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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1150

Filed: 7 August 2018

Guilford County, No. 16 SP 1235

IN THE MATTER OF THE FORECLOSURE OF Substitute Trustee Services, Petitioner,

v.

NEIL McARTHUR BYRD, Respondent.

Appeal by petitioner from order entered 22 May 2017 by Judge Angela B. Puckett in Guilford County Superior Court. Heard in the Court of Appeals 17 April 2018.

Hutchens Law Firm, by Claire L. Collins and Hilton T. Hutchens, Jr., for petitioner-appellant Wells Fargo Bank, N.A.

Respondent filed no brief.

BRYANT, Judge.

Where there was sufficient evidence to uphold the trial court's findings of fact and the findings support the trial court's conclusion of law, we affirm the trial court's order concluding that respondent's mortgage was not in default.

On 30 November 2016, per order entered by the Assistant Clerk of Superior Court for Guilford County, petitioner Wells Fargo Bank, NA (hereinafter "Wells Fargo") had evidenced it was the holder of a promissory note executed by Neil M. Byrd, Sr. (deceased) and that the note evidenced a valid debt; the note was in default and the instrument securing the note gave the note holder the right to foreclose under a power of sale; notice of the foreclosure hearing had been served on all record owners of the real estate and to all other persons against whom the note holder intended to assert liability (including Neil M. Byrd, Jr. (hereinafter "respondent") heir to Neil M. Byrd, Sr.'s estate); the debtors had shown no valid legal reason why foreclosure should not commence; the loan was a home loan, the pre-foreclosure notice was provided, and the relevant time periods had elapsed; and the sale was not barred by our General Statutes, section 45-21.12A. The Assistant Clerk of Court ruled that the substitute trustee for Wells Fargo could proceed to foreclose under the terms of the deed of trust. Respondent appealed the Assistant Clerk of Court's order to Guilford County Superior Court.

A hearing in Guilford County Superior Court was conducted during the 20 February 2017 session, the Honorable Angela B. Puckett, Judge presiding. Respondent testified that his residential address was 5007 Mallard Lake Drive in Greensboro and that his father had devised the property to respondent by will. When asked if there was a mortgage on the property at the time of his father's death,

respondent testified that based on conversations with his parents, the property had been paid for prior to the time of his mother's death, but he did not know what his father had done with the property in the interim. However, following his father's death in October 2014, Wells Fargo sent respondent a bill in January 2015. The mortgage payments on the property amounted to $557.00 per month. Respondent testified that he was disabled and received social security disability payments in the amount of $1,750.00 each month.

Respondent testified that he met with Wells Fargo representative Denise Edwards to make mortgage payments that had been missed between his father's death in October 2014 and Wells Fargo's notice of the outstanding mortgage to respondent in January 2015. "I paid November, December and January." Defendant testified that he set up an automatic monthly draft from his bank account to pay the mortgage, but he did not remember ever formally modifying the loan agreement to replace his father's name with respondent's on the mortgage documents. Respondent testified that the payments were to be deducted monthly in an amount close to $550.00; however, on 6 April 2015, Wells Fargo deducted $1,127.58 causing respondent's account to be overdrawn. Respondent testified that he suffered a car accident after the account was overdrawn and could not remember if Wells Fargo made any other deductions from his bank account for mortgage payments. On cross-examination when asked if he had made any monthly payments on the outstanding

loan amount since January 2015, respondent responded, "I'm waiting on [my attorney] to give me the money to do so."

On 22 May 2017, the superior court entered an order in which it concluded that respondent was a successor-in-interest to the property devised by his late father and Wells Fargo erroneously drafted mortgage payments from respondent's bank account and then refused to communicate with respondent as to the status of the mortgage or accept further payments. Noting that Wells Fargo was statutorily required (per N.C. Gen. Stat. § 45-21.16C) to make good faith efforts to resolve amounts due under mortgages of dwelling houses before foreclosure sale could be held, the trial court concluded that Wells Fargo breached its duty to respondent and ordered that the Assistant Clerk of Superior Court's order of foreclosure be set aside. Wells Fargo appeals.

On appeal, Wells Fargo argues that the trial court erred by (I) denying its request to proceed with foreclosure based on the determination that there was no default under the note and deed of trust, (II) extending the duties reserved for a mortgagor to respondent and finding that Wells Fargo breached those duties, and (III) weighing and applying evidence that exceeded the scope of its limited jurisdiction.

Standard of Review

> [Where] [t]he trial court's order authorizing the foreclosure to proceed was a final judgment of the superior court, . . . this Court has jurisdiction to hear the . . . appeal. N.C. Gen. Stat. § 7A–27(b) (2009). Our standard of review . . . where the trial court sat without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.

In re Foreclosure of Gilbert, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (citation omitted).

I

Wells Fargo first argues the trial court erred by denying its request to proceed with the foreclosure based on the determination that respondent did not default under the note and deed of trust. Wells Fargo's contention is that the trial court exceeded the scope of its jurisdiction by applying standards set forth in General Statutes, section 45-21.16 to an oral agreement between Wells Fargo and respondent. Wells Fargo further contends that it presented sufficient evidence of default. We disagree.

This Court has held that a creditor-mortgagee such as Wells Fargo has an election of remedies upon default, including foreclose on the property, pursuant to N.C. Gen. Stat. § 45–21.1 *et seq.* (Sales Under Power of Sale), or under N.C. Gen. Stat. § 1–339.1 *et seq.* (Judicial Sales). *Lifestore Bank v. Mingo Tribal Pres. Tr.*, 235 N.C. App. 573, 578, 763 S.E.2d 6, 10 (2014). Where a mortgage or deed of trust provides for foreclosure by power of sale, a mortgagee or trustee who seeks to exercise such

power pursuant to General Statutes, section 45-21.16, must establish the following in a foreclosure proceeding:

> (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled . . . , (v) . . . if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of . . . Chapter [45] have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A [("Power of sale barred during periods of military service")] . . . .

N.C. Gen. Stat. § 45-21.16(d) (2017). As further provided by section 45-21.16, an order entered by a clerk of court allowing for foreclosure by power of sale can be appealed to a judge of the district or superior court having jurisdiction. *Id.* § 45.21.16(d1).

> Both the clerk's and the superior court's authority in the special foreclosure proceeding is limited to determining whether the six criteria listed in N.C. Gen. Stat. § 45.21.16 are satisfied. *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). Correspondingly, interested parties who seek to prevent the foreclosure sale from going forward are limited in the special proceeding to challenging the existence of one or more of these six enumerated findings. *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295–96, 681 S.E.2d 456, 458 (2009).

Greene v. Tr. Servs. of Carolina, LLC, 244 N.C. App. 583, 588, 781 S.E.2d 664, 668, *writ denied, review denied*, ___ N.C. ___, 786 S.E.2d 268 (2016). "The superior court 'has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [N.C. Gen. Stat. §] 45–21.16.' " *In re Foreclosure of Young*,

227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013) (quoting *Matter of Helms*, 55 N.C. App. 68, 71–72, 284 S.E.2d 553, 555 (1981)).

> Although a Superior Court Judge has general equitable jurisdiction, a court is without jurisdiction unless the issue is brought before the court in a proper proceeding. The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34 [("Enjoining mortgage sales on equitable grounds")].

In re Watts, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429–30 (1978) (citations omitted); *see also* N.C. Gen. Stat. 1-301.2(g)(2) ("Foreclosure proceedings under Article 2A of Chapter 45 of the General Statutes shall not be transferred [to a court] even if an issue of fact, an equitable defense, or a request for equitable relief is raised. Equitable issues may be raised only as provided in G.S. 45-21.34. Appeals from orders entered in these proceedings are governed by Article 2A of Chapter 45 to the extent that the provisions of that Article conflict with this section.").

In the 22 May 2017 order, the trial court cited *In re Foreclosure of Bigelow*, 185 N.C. App. 142, 649 S.E.2d 10 (2007), as a basis for its conclusion the mortgage was not in default. In *Bigelow*, a superior court denied a petitioner's claim for foreclosure on the basis that the petitioner, a mortgage company, had disrupted the respondent's payment schedule by refusing to accept the respondent's checks and then sending respondent notices of default and foreclosure. *Id.* at 144, 649 S.E.2d at 12. "The apparent lack of communication between different departments or personnel of

petitioner bank supports the trial court's factual determination that the respondents were not in default. The absence of a default bars the entry of an order for foreclosure." *Id.* at 147, 649 S.E.2d at 14 (citing *In re Kitchens*, 113 N.C. App. 175, 178, 437 S.E.2d 511, 512 (1993)). This Court held that the superior court's findings of fact were supported by competent evidence and that as a matter of law, "a party to a contract may not take advantage of its nonperformance if its own actions prevented performance of the contract." *Id.* at 147, 649 S.E.2d at 13. Thus, where the petitioner refused to accept payments in accordance with the loan agreement, the petitioner could not claim that the respondents had defaulted on the loan. *Id.* at 147, 649 S.E.2d at 14. Accordingly, this Court affirmed the superior court's order denying the petitioner's request for foreclosure. *Id.*

As reflected in its 22 May 2017 order, the trial court made the following findings of fact:

> 7. After the death of his father and prior to any foreclosure proceedings, [respondent] used his own funds out of his own bank account to make payments on the mortgage. On April 6, 2015 [respondent] paid a sum of $1127 to Wells Fargo Mortgage, to be applied against the note in an attempt to bring the mortgage up to date. [Respondent] made an agreement with . . . an employee of [Wells Fargo], that the loan would be kept in full force and effect as long as [respondent] made the monthly payments of $550 beginning in May 2015. The payments were to be drafted from the bank account of [respondent]. Afterwards, . . . [Wells Fargo] erroneously, made 2 monthly withdrawals from [respondent's] bank

> account instead of 1 which resulted in an overdraft of [respondent's] bank account and a number of [respondent's] checks being dishonored with the additional burden of bad check charges. Thereafter, . . . [Wells Fargo] refused to communicate with [respondent] about the status of the loan account and refused to accept any further payment by [respondent] even though he repeatedly made offers to resume payments.
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> . . . .
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> 9. On November 30, 2016 an assistant clerk of Superior Court of Guilford County granted petitioner an order of foreclosure on the basis of failure to make timely payments on the mortgage.
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> 10. [Respondent] gave notice of appeal from the order of foreclosure . . . .
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> 11. [Respondent] is disabled and receives $1700.00 per month of disability income from the Social Security Administration. This provides him with ample funds with which to pay reasonable payments on the mortgage in question, such as the payments per month of $557.58 reflected on [Wells Fargo's] records.
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> 12. [Wells Fargo] alleges that the current amount past due on the mortgage is in excess of $17,000, and the total balance due on the mortgage in $74,336.53.
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> 13. The appraisal that [respondent] ordered on the property . . . indicates it has a present fair market value of $100,000.

On the basis of the above stated finding of fact, the trial court concluded that

> 1. Pursuant to N.C.G.S. 45-21.16(c)(7)d, [Wells Fargo] has established the existence of a valid debt of which

> the party seeking to foreclose is the holder, the right to foreclose under the instrument, and notice to those entitled to notice. However, [Wells Fargo] has failed to prove default, and [respondent] has proven the absence of default.
>
> . . . .
>
> 4. As a successor in interest [to respondent's deceased father's real property] and under his own agreement with Wells Fargo [respondent] was not in default in payments on the mortgage because the disruption to the payment schedule was proximately and directly caused by the refusal of . . . [Wells Fargo] to accept continued proffered payments by [respondent] and to have any further dealings with him before instituting foreclosure proceedings.

Wells Fargo argues that the trial court exceeded the scope of its jurisdiction by determining that Wells Fargo's conduct was the cause of respondent's default. Specifically, Wells Fargo challenges the trial court's finding of fact number 7 and conclusion of law number 4.

At trial, respondent testified that in January 2015, he received notice from Wells Fargo that mortgage payments for his residence had not been made following his father's death in October. In January, respondent submitted payment for the past due mortgage payments. Respondent testified that he issued a check for a mortgage payment in February 2015, and he set up an automatic draft to deduct mortgage payments from his bank account. Respondent testified that the draft (set to deduct around $550.00 per month) was scheduled to begin in May 2015; however, in April,

Wells Fargo attempted to deduct $1,162.00 from his account (with a balance of approximately $900.00). With his account overdrawn, respondent "bounced a bunch of checks." The trial court found that Wells Fargo thereafter refused to communicate with respondent and refused to accept respondent's further offers of loan payments.

The evidence before the trial court and the court's findings of fact and conclusions of law are materially indistinguishable from those in *Bigelow*, 185 N.C. App. 142, 649 S.E.2d 10. Therefore, the trial court's challenged finding of fact number 7 is supported by competent evidence and in turn, the trial court's conclusion of law number 4 that respondent's mortgage was not in default is supported by the findings of fact. Accordingly, we overrule Wells Fargo's argument.

II

Wells Fargo argues that the trial court erred by extending duties reserved for a mortgagor to respondent and then that Wells Fargo breached those duties. Wells Fargo contends that the trial court was not compelled to make findings of fact regarding loss mitigation as the protections extended under Chapter 45 ("Mortgages and Deeds of Trust") are for the mortgagor and mortgagee. Respondent is neither a mortgagor nor a mortgagee, and Wells Fargo has no contractual privity with respondent.

While we agree that respondent is not in contractual privity with Wells Fargo and is not entitled to the protections afforded a mortgagor under Chapter 45, this

Court affirms the trial court's ruling that the mortgage to respondent's father was not in default: that the failure to credit payments to the outstanding mortgage was more attributable to Wells Fargo's conduct than respondent's, *see* Issue I, *supra*. Accordingly, we need not address whether findings of fact regarding mitigation loss were appropriate.

III

Wells Fargo argues that the trial court erred by weighing and applying evidence that exceeds and is outside the scope of its limited jurisdiction. Wells Fargo contends that the trial court's findings of fact reflect equitable considerations rather than the six statutory elements required for foreclosure by power of sale as set forth in N.C. Gen. Stat. § 45-21.16(d).

However, as we have found the material facts of this matter materially indistinguishable from those set forth in *Bigelow*, 185 N.C. App. 142, 649 S.E.2d 10, we are compelled to follow the reasoning set forth therein. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). And in accordance with *Bigelow*, we hold "the trial court was correct in denying [Wells Fargo]'s request for foreclosure, and its order must be affirmed." *Bigelow*, 185 N.C. App. at 147, 649 S.E.2d at 14.

AFFIRMED.

Judges CALABRIA and HUNTER, JR., concur.

Report per Rule 30(e).