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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1225

Filed: 5 November 2019

Cabarrus County, No. 16 CVS 3057

AMERICAN FIRST FEDERAL, INC., successor in interest to NEWDOMINION BANK, Appellee-Plaintiff,

v.

ROCK HILL AFRICAN METHODIST EPISCOPAL ZION CHURCH; TRUSTEES OF ROCK HILL AFRICAN METHODIST EPISCOPAL ZION CHURCH; BOBBY R. SMITH, solely in his capacity as Trustee of Rock Hill African Methodist Episcopal Zion Church; ERNEST E. ROSS, solely in his capacity as Trustee of Rock Hill African Methodist Episcopal Zion Church; ALICE STEELE-ROBINSON, solely in her capacity as Trustee of Rock Hill African Methodist Episcopal Zion Church; and CHRISTOPHER S. WALKER, solely in his capacity as Trustee of Rock Hill African Methodist Episcopal Zion Church, Appellants-Defendants.

Appeal by defendants from order entered 18 May 2018 by Judge Kevin M. Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 5 June 2019.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Christopher C. Finan, for plaintiff-appellee.

Ferikes & Bleynat, PLLC, by H. Gregory Johnson and Jane A. Dearwester, for defendant-appellant.

BERGER, Judge.

Rock Hill African Methodist Episcopal Zion Church, *et al.* ("Defendants") appeal the trial court's order which granted American First Federal, Inc.'s ("Plaintiff") Rule 12(c) motion for judgment on the pleadings. Because the trial court did not err, we affirm.

Factual and Procedural Background

Defendants held title to real property located in Concord, North Carolina (the "Property"). The deed to the Property is recorded in Book 49, Page 481 of the Cabarrus County Public Registry and describes the Property as follows:

> ADJOINING THE LANDS OF VICTOR CALDWELL AND OTHERS; BEGINNING AT A PINE TREE NEAR SAID CHURCH, RUNNING THENCE N. 10 E. 32 POLES TO A STONE ON VICTOR CALDWELL'S LINE; THENCE WITH SAID LINE N. 64 ½ W. 44 POLES TO A STONE AT SALISBURY AND CHARLOTTE ROADS; THENCE WITH SAID LINES S. 22 ½ W. 30 POLES TO A STONE; THENCE S. 65 E. 49 POLES TO THE BEGINNING, SUPPOSED TO CONTAIN NINE ACRES; ONE ACRE OF SAID TRACT HAS PREVIOUSLY BEEN SOLD TO THE COUNTY SCHOOL, LEAVING 8 ACRES MORE OR LESS.
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> THE ONE ACRE TRACT SOLD TO THE COUNTY SCHOOL BOARD IS DESCRIBED AS FOLLOWS:
>
> ADJOINING THE LAND OF VICTOR CALDWELL AND SAID CHURCH TRACT OF LAND BEING AND LYING ON SOUTH EAST SIDE OF COUNTY ROAD FROM SALISBURY TO CHARLOTTE AND WHERE BOUNDED AS FOLLOWS:
>
> BEGINNING AT A STONE IN COUNTY ROAD AND RUNS S. 64 ½ E. 12 POLES AND 15 LINKS TO A STONE

> IN COUNTY ROAD; THENCE S. 22 ½ W. 12 POLES AND 15 LINKS TO A STONE; THENCE N. 64 ½ W. 12 POLES AND 15 LINKS TO A STONE IN COUNTY ROAD; THENCE N. 22 ½ E. 12 POLES AND 15 LINKS TO THE BEGINNING, CONTAINING ONE ACRE.
>
> Parcel [02-027-0024.00]

On February 8, 2008, Defendants borrowed $1,425,000.00 from NewDominion Bank ("NewDominion") pursuant to the terms and conditions of a promissory note (the "Note"). Defendants executed a deed of trust securing the Note to the Property (the "Deed of Trust"). The Deed of Trust contained a power of sale clause giving NewDominion the right to initiate power of sale, non-judicial foreclosure proceedings in the event of default.

In 2012, Defendants defaulted on their obligation under the Note. NewDominion initiated power of sale foreclosure proceedings and obtained an order authorizing sale of the Property from the Cabarrus County Clerk of Superior Court (the "Clerk"). However, NewDominion and Defendants entered into a forbearance agreement and modified the terms of the original Deed of Trust. In exchange for termination of foreclosure proceedings, Defendants agreed to waive certain defenses to the enforcement of the Deed of Trust in any future action. Defendants and NewDominion subsequently amended the forbearance agreement to include a provision that the terms of the agreement were to be binding on any successors and assigns. Shortly thereafter, NewDominion assigned the Note and Deed of Trust to Plaintiff.

Following the assignment of the Note and Deed of Trust to Plaintiff, Defendants defaulted a second time. Plaintiff sought to foreclose upon the Property and filed a new action with the Clerk (the "Second Foreclosure"). The Clerk denied Plaintiff's request to foreclose and stated that "the Court concludes that [Plaintiff] has failed to meet its burden in respect of establishing that the Deed of Trust is enforceable to allow for a foreclosure sale." Plaintiff timely appealed the Clerk's order to Cabarrus County Superior Court for *de novo* review. On December 12, 2016, the parties agreed to place the appeal from the Second Foreclosure on "inactive status" pending the resolution of this action.

On October 19, 2016, prior to placing the Second Foreclosure on "inactive status," Plaintiff initiated an action in Cabarrus County Superior Court seeking (1) to quiet title to the Property and (2) a declaratory judgment validating its ability to enforce the Deed of Trust. On March 5, 2018, Plaintiff filed a motion for judgment on the pleadings pursuant to Rule 12(c), which the trial court granted on March 26, 2018.

Defendants appeal, arguing that the trial court erred in granting judgment on the pleadings because (1) the present action constitutes an impermissible collateral attack, and (2) the legal description contained in the Deed of Trust is patently ambiguous. We disagree.

Standard of Review

"This court reviews *de novo* rulings on motions made pursuant to N.C. Gen. Stat. § 1A–1, Rule 12[(c)]." *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005) (citations and quotation marks omitted).

Analysis

Rule 12(c) of the North Carolina Rules of Civil Procedure "permits a party to move for judgment on the pleadings, after the filing of a responsive pleading, where the formal pleadings reveal that certain claims or defenses are baseless." *Garrett v. Winfree,* 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995). Rule 12(c) is intended "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy,* 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). A Rule 12(c) motion should only be granted when the complaint fails to allege "facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Robertson v. Boyd,* 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988). In reviewing a Rule 12(c) motion, the court must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Toomer*, 171 N.C. App. at 66, 614 S.E.2d at 334.

I. Collateral Attack

Defendants first argue that the trial court lacked jurisdiction in the present action because the Clerk's order in the Second Foreclosure was binding until it "is invalidated on appeal." Specifically, Defendants contend Plaintiff's declaratory

action amounts to an impermissible collateral attack on the appeal of the Second Foreclosure. We disagree.

A collateral attack is an "an attempt to avoid, defeat, or evade [a judicial proceeding], or deny [the judicial proceeding's] force and effect." *Hearon v. Hearon*, 44 N.C. App. 361, 362, 261 S.E.2d 9, 10 (1979) (citation omitted). "North Carolina does not allow collateral attacks on judgments." *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003). The plaintiff of a collateral attack "is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969).

"North Carolina law has long recognized a creditor's right to proceed with non-judicial foreclosure by power of sale or foreclosure by action (judicial foreclosure)." *United States Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 726, 800 S.E.2d 412, 415 (2017) (citation omitted). "Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 507 (2016). "A power of sale is a contractual arrangement in a mortgage or a deed of trust which confer[s] upon the trustee or mortgagee the 'power' to sell the real property mortgaged without any order of court in the event of a default." *In re Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation and quotation marks omitted).

> The contractual right of foreclosure by power of sale under a deed of trust is a non-judicial proceeding. In the comprehensive statutory framework governing nonjudicial foreclosure by power of sale set forth in Chapter 45 of our General Statutes, the General Assembly has prescribed *certain minimal judicial procedures*, including requiring notice and a hearing designed to protect the debtor's interest. The hearing official then authorizes the foreclosure to proceed or refuses to do so. In this informal setting, a creditor must establish, among other things, the existence of a debt, default, and its right to foreclose, and a debtor may raise evidentiary challenges. The Rules of Civil Procedure applicable to formal judicial actions do not apply. . . .
>
> The refusal to authorize the creditor to proceed . . . does not implicate res judicata or collateral estoppel in the traditional sense. While the creditor may not proceed with non-judicial foreclosure on the same default, it may proceed on the same default through foreclosure by judicial action. The creditor may also proceed non-judicially under power of sale based upon a different default.

In re Lucks, 369 N.C. at 222-23, 794 S.E.2d at 503 (emphasis added). Therefore, because the proceedings in the Second Foreclosure were not a judicial proceeding in the traditional sense, Plaintiff's action for a declaratory judgment to quiet title to the Property was not a collateral attack.

Further, in a non-judicial foreclosure proceeding, "[t]he act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act." N.C. Gen. Stat. § 45-21.16(d1) (2017). "An appeal requires a hearing de novo before the judge as to the issues decided by the Clerk of Superior Court pursuant to

[Section] 45-21.16(d)." *Phil Mech. Const. Co. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985).

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hosp., LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). A clerk's order will become a final judgment if the parties do not perfect an appeal within ten days. *Phil Mech. Const. Co.,* 72 N.C. App. at 322, 325 S.E.2d at 3 (finding the clerk of superior court's order binding because the plaintiffs did not appeal within ten days).

Here, the Clerk's order in the Second Foreclosure was not a final judgment. Plaintiff timely appealed the Clerk's order within ten days for *de novo* review, and the parties agreed to place the Second Foreclosure on "inactive status." Therefore, because there was no final judgment in the Second Foreclosure, Plaintiff's present action to quiet title is not a collateral attack, and Defendants' assignment of error is overruled.

II. Legal Description of Deed of Trust

Defendants also argue that the trial court erred in granting Plaintiff's judgment on the pleadings because the Deed of Trust's legal description is patently ambiguous, and therefore, void under the statute of frauds. We disagree.

> All contracts to sell or convey any lands . . . or any interest in or concerning them . . . shall be void unless said contract,

> or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2017). "[A] deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers." *N.C. Self Help Corp. v. Brinkley*, 215 N.C. 615, 619, 2 S.E.2d 889, 892 (1939). "If the description is sufficiently definite for the court, with the aid of extrinsic evidence, to apply the description to the exact property intended to be [conveyed], it is enough." *Lane v. Coe*, 262 N.C. 8, 12, 136 S.E.2d 269, 273 (1964).

A patently ambiguous description of real property is one that "leaves the land in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (citation and quotation marks omitted). Moreover, "parol evidence is not admissible to aid the description" and "[t]he deed or contract is void." *Id.* at 353, 222 S.E.2d at 400. A latent ambiguity is "an ambiguity which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe." *Emerson v. Carras*, 33 N.C. App. 91, 95, 234 S.E.2d 642, 646 (1977) (citation and quotation marks omitted). When a description is "insufficient in itself to identify the property but refers to something extrinsic by

which identification might possibly be made," it contains a latent ambiguity. *Lane*, 262 N.C. at 13, 136 S.E.2d at 273.

In contrast to patent ambiguity, latent ambiguity requires the "admission of extrinsic evidence to explain or refute the identification of the land in question." *Wolfe v. Villines*, 169 N.C. App. 483, 487, 610 S.E.2d 754, 758 (2005). The key difference between a patent and latent ambiguity is that "[a] patent ambiguity raises a question of construction; [while] a latent ambiguity raises a question of identity." *Id.* at 124, 388 S.E.2d at 552 (citation omitted).

"A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 349 (1976). "When the deed itself, including its references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land." *Id.* at 293, 221 S.E.2d at 349. "[A] deed of trust can identify the property with certainty and provide constructive notice of [a] lien where the deed of trust contains the correct physical address and the tax parcel ID number." *MTGLQ Inv'rs, L.P. v. Curnin*, ___ N.C. App. ___, ___, 823 S.E.2d 409, 411 (2018) (citation and quotation marks omitted).

On appeal, Defendants argue that the Deed of Trust does not comply with the statute of frauds requirements because the language in the legal description which

reads in part, "BEGINNING AT A PINE TREE NEAR SAID CHURCH," is patently ambiguous as the precise location of the Property cannot be located. We disagree.

Here, the legal description, read in its entirety, was not patently ambiguous because the description identified the Property through the use of the following identifiers: (1) the street address and (2) the tax parcel identification number. Our Supreme Court concluded in *Overton* that the property description, which did not include any extrinsic references, was patently ambiguous because:

> (1) [t]he exact area of the tract intended to be conveyed, (2) whether the tract intended to be conveyed is all or only part of a single . . . area, (3) assuming the . . . tract can be located with certainty, on which side of it lies the land here intended to be conveyed, and (4) the length of the common boundary between the . . . tract and the land here intended to be conveyed.

Overton, 289 N.C. at 294, 221 S.E.2d at 350.

Here, the legal description in the Deed of Trust clearly identifies the Property as being "located in Cabarrus [County] at 3620 Rock Hill Church Road, Concord, North Carolina 28027" and with a tax parcel identification number of "02-027-0024.00." The legal description is not patently ambiguous because it contained the street address and the tax parcel identification number which clearly identified the Property. To the extent there was an ambiguity in the legal description, it was a latent ambiguity because the address and tax parcel identification number "each refer to something extrinsic by which the land may be identified with certainty."

MTGLQ Inv'rs, L.P., ___ N.C. App. at ___, 823 S.E.2d at 411 (citation and quotation marks omitted). Thus, the legal description was not patently ambiguous because the exact location of the Property is identified within the Deed of Trust.

Finally, Defendants' contend that the Deed of Trust is void for lack of a defeasance clause. A defeasance clause is "[a] mortgage provision stating that the conveyance to the mortgagee will be ineffective if the mortgagor pays the debt on time." *Black's Law Dictionary* 449 (8th ed. 2004). However, because Defendants failed to raise this issue at trial, it was not properly preserved for appeal. *See* N.C. App. R. 10 ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Therefore, we decline to address this remaining argument.

Conclusion

For the foregoing reasons, we affirm the trial court's order granting Plaintiff's motion for judgment on the pleadings.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).