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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-198

Filed: 3 December 2019

Wake County, No. 18 CVS 9470

MATTHEW T. SHORT and DIANE K. SHORT, Plaintiffs,

v.

PNC BANK, N.A., HUTCHENS LAW FIRM, SUBSTITUTE TRUSTEE SERVICES, INC., and SUBSTITUTE TRUSTEE L.C. MILLER, Defendants.

Appeal by plaintiffs from order entered 14 November 2018 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 2 October 2019.

Matthew T. Short, pro se.

McGuireWoods LLP, by Anna M. Holloway, for defendant PNC Bank, N.A.

ARROWOOD, Judge.

Matthew Timothy Short and Diane Kay Short ("plaintiffs") purport to appeal from order granting PNC Bank's ("defendant") motion to dismiss. Only Mr. Short has signed the notice of appeal, purporting to represent both himself and his wife. Pursuant to N.C. Gen. Stat. § 84-4 (2017), Mr. Short, who is not a licensed attorney,

cannot appeal on behalf of his wife. Therefore, Mrs. Short has not properly appealed pursuant to the provisions of N.C.R. App. P. 3 (2019), and thus the purported appeal on her behalf is dismissed. With respect to Mr. Short's appeal, for the following reasons, we affirm.

I. Background

This case arises from plaintiffs' attempts to prevent defendant from foreclosing on their home ("the property"). On 24 October 2002, National City Mortgage Company extended a loan to plaintiffs in exchange for a promissory note and deed of trust on the property executed in its favor. Defendant later became the successor to National City Mortgage Company's interests in the note and deed of trust. On 10 April 2017, defendant instituted a foreclosure action in Wake County Superior Court against plaintiffs for default on the note and deed of trust. Plaintiffs argued, in essence, that the assignment of the interests in the promissory note and deed of trust to defendant invalidated the debt and prevented defendant from foreclosing on the property, and that defendant was estopped from asserting otherwise. On 11 July 2018, the Wake County Clerk of Superior Court held a hearing and entered an order authorizing defendant to proceed with non-judicial foreclosure on the property pursuant to the power of sale provision in the deed of trust. Plaintiffs did not appeal from this order.

Rather than appeal from the clerk's order, on 27 July 2018 plaintiffs brought the action in the present case in Wake County Superior Court seeking to enjoin foreclosure. The arguments in plaintiffs' complaint were substantially similar to those before the clerk at the prior hearing. Defendant moved to dismiss the complaint under N.C.R. Civ. P. 12(b)(6) (2019), for failure to state a claim upon which relief could be granted. Defendant maintained that plaintiffs were collaterally estopped from contesting the validity of the debt and defendant's right to foreclose because these issues were determined in the clerk's prior order authorizing foreclosure. On 13 November 2018, the trial court entered an order granting defendant's motion to dismiss the case with prejudice. Mr. Short, purporting to represent both himself and his wife, filed a notice of appeal from this order on 11 December 2018.

II. Discussion

Plaintiffs raise numerous challenges to the trial court's dismissal of their complaint and the clerk's order it sought to enjoin. For the reasons that follow, we need not reach the merits of these arguments because they are either barred by collateral estoppel, abandoned, or not properly before us on appeal.

A. Order Granting Motion to Dismiss

Plaintiffs argue that the trial court erred on various grounds by granting defendant's motion to dismiss the complaint for failure to state a claim pursuant to N.C.R. Civ. P. 12(b)(6). We disagree.

1. Standard of Review

"We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citations omitted).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint "fail[s] to state a claim upon which relief can be granted." [N.C. Gen. Stat.] § 1A-1, Rule 12(b)(6) (2013). [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. at 448, 781 S.E.2d at 7-8 (internal quotation marks and citations omitted). When a plaintiff is collaterally estopped from arguing an essential element of his claim, dismissal is proper under Rule 12(b)(6). *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 421, 775 S.E.2d 1, 6 (2015).

2. Collateral Estoppel

"The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Meehan v. Cable*, 127 N.C. App. 336, 340, 489 S.E.2d 440, 443 (1997) (citing *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986)). The doctrine of collateral estoppel

applies to issues arising in foreclosure proceedings in certain circumstances. *See Gray v. Fed. Nat'l Mortg. Ass'n*, __ N.C. App. __, __, 830 S.E.2d 652, 657 (2019) (recognizing applicability of collateral estoppel to issues determined in clerk's order authorizing non-judicial foreclosure). In the present case, the prerequisites to applying the doctrine of collateral estoppel are satisfied.

First, the clerk's order was a valid final judgment on the merits. A mortgagee or trustee seeking to conduct a power of sale foreclosure on real property does so by initiating a hearing before the Clerk of Superior Court in the county in which the property is located. N.C. Gen. Stat. § 45-21.16(a) (2017). The clerk's order authorizing foreclosure and any findings therein are "judicial act[s] and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days . . . ." N.C. Gen. Stat. § 45-21.16(d1). When a party fails to appeal from the order of the clerk, "the clerk's order is binding and [the parties] are estopped from arguing those same issues in [another] case." *Phil Mech. Constr. Co., Inc. v. Haywood*, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985). In the instant case, plaintiffs did not appeal from the clerk's order finding the requirements of N.C. Gen. Stat. § 45-21.16(d) satisfied and authorizing defendant to conduct a private sale foreclosure. Thus, the clerk's order was a final judgment on the merits.

Second, plaintiffs' complaint in the present case argued issues that were involved in the prior hearing before the clerk of court. "[T]here are only four issues

before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder, the existence of default, the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing . . . ." *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 71-72, 284 S.E.2d 553, 555 (1981) (citations omitted), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 149 (1982). In the instant case, plaintiffs raised several arguments in their complaint asserting that defendant had no right to foreclose and that the note and deed of trust no longer represented a valid, legally enforceable obligation. Therefore, the issues raised in the instant case are identical to those before the clerk at the foreclosure hearing.

Finally, the issues raised by plaintiffs regarding the validity of the debt and defendant's right to foreclose were actually litigated, and were necessary to and actually determined by the clerk's order authorizing foreclosure. The clerk's findings that the party seeking foreclosure is the holder of a valid debt and has the right to foreclose under the deed of trust are necessary prerequisites to the clerk's entry of an order authorizing foreclosure. *See* N.C. Gen. Stat. § 45-21.16(d)(i), (ii). Plaintiffs raised identical arguments on these matters in the hearing before the clerk. After considering plaintiffs' arguments, the clerk entered an order expressly finding that "[defendant] is the holder of the note sought to be foreclosed and it evidences that this is a valid debt[,] . . . said debt gives [defendant] the right to foreclose under a power of sale[, and plaintiffs] . . . have shown no valid legal reason why foreclosure should

not commence." Therefore, the issues raised by plaintiffs in the instant case were actually litigated, determined, and necessary to the clerk's order authorizing foreclosure.

The trial court correctly held that plaintiffs were collaterally estopped from challenging the validity of the debt and defendant's right to foreclose in the instant case. Accordingly, the complaint "disclose[d] facts that necessarily defeat[ed] the claim," *Arnesen* at 448, 781 S.E.2d at 8, and the trial court did not err by granting defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6).

B. Other Arguments on Appeal

Plaintiffs raise other arguments on appeal, all of which are either abandoned or not properly before us on appeal. For instance, plaintiffs argue that the clerk of court lacked subject-matter jurisdiction to enter an order authorizing the foreclosure. Appeal on this ground lies from the clerk's order, not the trial court's order in the present case. *See* N.C.R. App. P. 3(a), (d) (2019) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . [which] shall designate the judgment or order from which appeal is taken[.]"). We therefore lack jurisdiction to hear this issue. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal.") (citation

omitted); *Phil Mech. Const. Co.* at 322, 325 S.E.2d at 3 ("We note that decisions of the Clerk of Superior Court pursuant to [N.C. Gen. Stat. §] 45-21.1 et seq. are appealable to the judge of superior court within ten days. . . . Since plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk's order is binding and plaintiffs are estopped from arguing those same issues in this case.").

Finally, plaintiffs argue that the trial court abused its discretion by failing to grant their motion to amend their complaint before dismissing the case with prejudice. Plaintiffs do not direct us to any specific facts or law in support of this contention. Thus, we deem this issue abandoned. N.C.R. App. P. 28(a), (b)(6) (2019).

III. Conclusion

For the reasons discussed herein, we affirm.

AFFIRMED IN PART; DISMISSED IN PART.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).