

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1034

Filed: 5 May 2020

Durham County, No. 16 SP 307

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RALPH FOSTER AND SHYVONNE L. STEED-FOSTER, HUSBAND AND WIFE, DATED FEBRUARY 26, 2010, AND RECORDED IN BOOK 6428 AT PAGE 134 IN THE DURHAM COUNTY PUBLIC REGISTRY, DURHAM, N.C.

Appeal by respondents from order entered 8 July 2019 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 14 April 2020.

Ralph Foster and Shyvonne L. Steed-Foster, pro se.

Womble Bond Dickinson, LLP, by B. Chad Ewing, for Appellee Wells Fargo Bank, N.A.

ARROWOOD, Judge.

Ralph Foster and Shyvonne Steed-Foster (“respondents”) appeal from Order Permitting Foreclosure entered by the trial court on 8 July 2019. Wells Fargo Bank (“appellee”) has filed a Motion to Dismiss Appeal as Moot, which we grant for the following reasons.

I. Background

IN RE FOSTER

Opinion of the Court

On 8 July 2019, the trial court entered an Order Permitting Foreclosure pursuant to a power of sale provision in appellee's deed of trust on respondent's real property. Respondents filed and served a notice of appeal from this order on 12 July 2019, but never executed a bond to stay the foreclosure sale during the pendency of their appeal.

Rather than pay the appeal bond to stay foreclosure proceedings, respondents filed several motions with the trial court and this Court seeking to prevent or delay the foreclosure sale. All such motions were denied. However, this Court entered an order temporarily staying the foreclosure sale while we considered the merits of respondents' Emergency Motion for Temporary Stay Pending Hearing on Bond Calculation. This Court ultimately denied that motion, and the foreclosure sale was conducted on 25 November 2019. Respondents' property subject to the foreclosure action was conveyed to the eventual highest bidder by Trustee's Deed executed on 13 February 2020. Said deed was recorded in the Durham County Register of Deeds on 19 February 2020.

II. Discussion

"[A]n appeal presenting a question which has become moot will be dismissed. . . . [A] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. When the questions originally at issue in a case are no longer at issue

when the case is on appeal, the appeal is moot and should be dismissed.” *In re Hackley*, 212 N.C. App. 596, 598-99, 713 S.E.2d 119, 121 (2011) (internal quotation marks and citations omitted).

An appeal from an order allowing a power of sale foreclosure is rendered moot when the rights of the parties to foreclosure become “fixed” under N.C. Gen. Stat. § 45-21.29A (2019). The rights of the parties become fixed “[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified” N.C. Gen. Stat. § 45-21.29A. Accordingly, we will dismiss such an appeal as moot when the record indicates that “the subject real property was sold and the Trustee’s Deed was recorded[, t]here is no indication in the record that respondent paid a bond to stay the foreclosure sale, *see* N.C. Gen. Stat. § 1-292[(2019),] nor was there an upset bid during the 10 day period, *see* N.C. Gen. Stat. § 45-21.29A, or any indication in the record that respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period.” *Hackley*, 212 N.C. App. at 605, 713 S.E.2d at 125 (citation omitted).

In the instant case, we take judicial notice of the Trustee’s Deed indicating that the subject property was sold at a foreclosure sale. *See id.* at 601-602, 713 S.E.2d at 123 (taking judicial notice of Trustee’s Deed filed in appendix to party brief). The record lacks any indication that the foreclosure sale was stayed, enjoined, or temporarily restrained in any manner that would prevent the foreclosure sale from

taking place. Furthermore, the record makes clear that the time in which to file an upset bid has expired.

Respondents argue that their filing of a notice of *lis pendens* after their notice of appeal to this Court has effectively prevented the parties' rights in the property from becoming fixed. We disagree. Respondents have not cited, nor can we find, any cases discussing the applicability of a notice of *lis pendens* to property subject to a final judgment on appeal before this Court. Respondents had the opportunity to prevent the parties' rights in the property from becoming fixed by executing a bond for stay pending appeal pursuant to N.C. Gen. Stat. § 1-292. They failed to do so. The payment of a bond for stay pending appeal of a final judgment "direct[ing] the sale or delivery of possession of real property" is designed to ensure "that, during his possession of such property, [the appellant] will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment" N.C. Gen. Stat. § 1-292. Respondents may not circumvent this safeguard by their unilateral filing of a notice of *lis pendens*.

Furthermore, the only effect of filing and cross-indexing of a notice of *lis pendens* is to provide constructive notice to the potential purchasers of property subject to ongoing litigation that their interest in the property may be impacted by a

final judgment in the action. See N.C. Gen. Stat. § 1-118 (2019); *Kelley v. CitiFinancial Servs., Inc.*, 205 N.C. App. 426, 431, 696 S.E.2d 775, 780 (2010) (“Although the cross-indexing of the *lis pendens* does not, like an injunction, prevent transfers of or encumbrances on land, it makes clear that a subsequent purchaser or encumbrancer takes action knowledgeable of certain risks.”). Respondents have cited no cases in which the filing of a notice of *lis pendens* prevented the sale of property subject to litigation, let alone after the entry of a final judgment allowing a foreclosure sale to proceed and a respondent-appellant’s subsequent failure to pay a bond for stay pending appeal of the judgment.

III. Conclusion

The record makes clear that the rights of the parties to the foreclosure action became fixed under N.C. Gen. Stat. § 45-21.29A. We therefore dismiss as moot respondents’ appeal from the trial court’s order allowing foreclosure.

DISMISSED.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).