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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1056

Filed: 19 May 2020

Forsyth County, No. 16 SP 1525

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY JUDSON S. DAVIS AND LOIS A. DAVIS DATED FEBRUARY 24, 1999 AND RECORDED IN BOOK 2054 AT PAGE 2037 IN THE FORSYTH COUNTY PUBLIC REGISTRY, NORTH CAROLINA

Appeal by Respondents from order entered 22 July 2019 by Judge William Wood in Forsyth County Superior Court. Heard in the Court of Appeals 15 April 2020.

Shapiro & Ingle, LLP, by Jason K. Purser, for Petitioner-Appellee.

Ferikes & Bleynt, PLLC, by H. Gregory Johnson and Jane A. Dearwester, for Respondents-Appellants.

INMAN, Judge.

Because the trial court is in the best position to evaluate evidence, its findings of fact will not be disturbed on appeal unless no competent evidence supports them, and the evidence is reviewed with all inferences considered in favor of the appellee. But when a trial court's order allowing foreclosure depends upon a finding of fact not supported by competent evidence and directly conflicts with undisputed evidence, we reverse.

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Respondents Judson S. Davis and Lois A. Davis appeal from the trial court's order authorizing Waterfall Victoria Trust, Series E ("Waterfall") to foreclose on real property under power of sale found in a deed of trust. Respondents contend that: (1) the trustees' absence at the foreclosure hearing before the trial court requires reversal of the order; (2) the trial court erred in finding and concluding that Waterfall possessed the right to foreclose under power of sale when the record discloses Waterfall had transferred all beneficial right, title, and interest in the deed of trust to a third party; and (3) an error in the identification of Lois A. Davis as grantee in the underlying deed that conveyed the property to Respondents precludes foreclosure. After careful review, we agree with Respondents' second argument and reverse the trial court's order.

I. Factual and Procedural Background

The record below discloses the following:

In February of 1999, Respondents executed an Adjustable Rate Note (the "Note") in favor of Collateral One Mortgage Corp. requiring repayment of an original principal balance of \$191,600. As collateral for the Note, Respondents signed a deed of trust (the "Deed of Trust") encumbering their real property located at 747 Sylvan Road in Winston-Salem, North Carolina (the "Property"). Respondents originally took possession of the Property by a deed executed in 1972; that deed, however,

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identified the grantees as “Judson S. Davis and wife, Lauren A. Davis,” rather than by Respondent Lois A. Davis’s true name.

The Note and Deed of Trust changed hands several times over the ensuing decades. In 2006, Respondents stopped making payments on the Note and, in 2010, the then-trustee sought to foreclose on the Property under the Deed of Trust. action was eventually dismissed, and a new foreclosure action was instituted in 2011. An order permitting foreclosure was entered later that year in favor of Wells Fargo as trustee for Waterfall; however, Respondents filed for Chapter 13 bankruptcy before the foreclosure sale process could be completed. Respondents also filed an adversary proceeding with the bankruptcy court, challenging Wells Fargo’s possession of the Note and the 2011 foreclosure proceeding under the Servicemembers Civil Relief Act. In the course of the adversary proceeding, Waterfall filed a transfer of claim with the bankruptcy court, attesting that Wells Fargo had transferred the Note and Deed of Trust to Waterfall. The bankruptcy court later granted partial summary judgment in favor of Wells Fargo, concluding it had established its prior possession of, and interest in, the Note. Following the bankruptcy court’s ruling, Wells Fargo physically transferred the original Note to Waterfall’s loan servicer, Statebridge Company, LLC (“Statebridge”). Statebridge then lost the Note.

Waterfall obtained relief from the automatic stay in Respondents’ bankruptcy case and, in 2016, counsel for the substitute trustees filed a notice of foreclosure under

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the Note and Deed of Trust. After a hearing, the Forsyth County Clerk of Superior Court entered an order dated 30 March 2017 allowing Waterfall to foreclose. Respondents timely appealed the Clerk's decision to superior court consistent with N.C. Gen. Stat. § 1-301.2(e) (2017) and N.C. Gen. Stat. § 45-21.16(d1) (2017).

While the appeal to superior court was pending, Statebridge informed Respondents they would be considered for loss mitigation review. But, in August 2018, Statebridge notified Respondents that they were ineligible. That same month, Waterfall executed and recorded an assignment (the "Assignment") of "all its right, title and all beneficial interest in" the Deed of Trust to another entity, WF Victoria Grantor Trust ("WFFV").

Respondents' appeal *de novo* was heard by the superior court on 21 July 2019. Neither the substitute trustees nor their counsel appeared at the hearing; instead, the trial court took evidence and heard argument from counsel for Respondents and Waterfall. Although the hearing was not recorded, the narrative and stipulations provided in the record on appeal, as well as the parties' briefs, disclose that Respondents' counsel introduced the Assignment into evidence and argued that Waterfall could not foreclose because it no longer possessed the Deed of Trust, and therefore no longer had power of sale.

In support of its right to foreclose, Waterfall introduced an affidavit executed by an attorney with Statebridge, who attested that "Statebridge . . . is unaware of any

entity other than Waterfall presently claiming an interest in the right to payment in connection with the Note and Deed of Trust.” On 22 July 2019, the trial court entered an order permitting foreclosure. Respondents timely appealed.

II. Analysis

A. *Standard of Review*

In our review of the trial court’s non-judicial foreclosure order, “where the trial court sat without a jury, ‘findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.’” *In re Foreclosure of Frucella*, ___ N.C. App. ___, ___, 821 S.E.2d 249, 251 (2018) (quoting *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013)). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *In re Foreclosure of Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (citations and quotation marks omitted). The trial court’s conclusions of law are reviewed *de novo*. *Frucella*, ___ N.C. App. at ___, 821 S.E.2d at 251-52.

B. *Evidence Before the Trial Court Did Not Establish that Waterfall Had Power of Sale*

Foreclosure by power of sale is “a procedure to avoid lengthy and costly judicial foreclosures” that “permit[s] parties to expeditiously resolve mortgage defaults via a non-judicial power of sale if authorized in the parties’ mortgage or deed of trust.” *Id.*,

821 S.E.2d at 252. It is a contractual right enforceable through a non-judicial proceeding. *In re Foreclosure of Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016). Non-judicial foreclosures are conducted according to “the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale.” *Id.* at 226, 794 S.E.2d at 505 (citing N.C. Gen. Stat. § 45-21.16) (additional citations omitted). However, “foreclosure under a power of sale in a mortgage is not favored in the law, and its exercise by the mortgagee will be watched with jealousy.” *In re Foreclosure of Michael Weinman Assocs.*, 333 N.C. 221, 228, 424 S.E.2d 385, 389 (1993) (citation and quotation marks omitted). Non-judicial foreclosure is available if the trial court finds facts showing:

- (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45–101(1b) . . . and (vi) that the sale is not barred by G.S. 45–21.12A[.]

N.C. Gen. Stat. § 45-21.16(d); *see also In re Foreclosure of Garvey*, 241 N.C. App. 260, 265, 772 S.E.2d 748, 751 (2015) (noting the superior court must make findings of fact relating to the six criteria in N.C. Gen. Stat. § 45-21.16(d)). The trial court may find the evidence establishes the third element, a contractual right to foreclose, “if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case.” *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980).

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Respondents challenge the trial court’s finding that Waterfall had the right to foreclose as unsupported by the evidence. They point out that, per the Assignment, Waterfall conveyed “all its right, title and all beneficial interest in” the Deed of Trust—which included the power of sale—to WFV. Respondents maintain that, absent any evidence showing a conveyance back to Waterfall, the trial court could not find that Waterfall possessed a “right to foreclose under the instrument” as required by N.C. Gen. Stat. § 45-21.16(d). We agree.

Of the documents introduced into evidence at the hearing, two demonstrate the chain of ownership for the Note and Deed of Trust. The first, an affidavit from an attorney at Statebridge, recounts the execution of the Note and Deed of Trust and their various transfers through 2013. Although the affidavit discusses Statebridge’s actions through August 2018, it omits discussion of any transfers by or to Waterfall between September 2012 and the affidavit’s execution in June 2019. The second document—the Assignment—was executed by Waterfall on 8 August 2018 and was recorded with the Forsyth County Register of Deeds seven days later. The Assignment—executed while Respondents’ appeal to the superior court was pending—is the most recent evidence of the Deed of Trust’s ownership admitted at the superior court hearing.

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Waterfall does not argue that the Assignment was not credible¹ or inadmissible,² and in fact stipulated to its admission in evidence before the superior court. Nor does Waterfall point to any text in the Deed of Trust giving it power of sale when it is assigned to another party. Instead, Waterfall asks this Court to presume that: (1) because Statebridge was unaware of any other interest in the Note and Deed of Trust, WFV must have transferred the power of sale in the Deed of Trust back to Waterfall at a later date; (2) WFV is a “commonly owned or affiliated entity” such that Waterfall still possessed rights under the Deed of Trust even if it was not assigned back to Waterfall; and (3) Waterfall proved it was the holder of the Note and, absent any evidence of another party’s intent to foreclose, it therefore demonstrated it possessed the power of sale provided in the Deed of Trust.

¹ Waterfall notes in its brief that the Assignment was entered “without any corroborating testimony or explanatory evidence.” Such corroborating evidence is not required under the “relaxed” rules of evidence employed in non-judicial foreclosure hearings. *See Lucks*, 369 N.C. at 228, 794 S.E.2d at 506 (noting a photocopy of a recorded document, if proffered, could have constituted competent evidence under the relaxed evidentiary rules of non-judicial foreclosure proceedings).

² We acknowledge that “[t]he competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine.” *Lucks*, 369 N.C. at 228, 794 S.E.2d at 506 (citation and quotation marks omitted) (second alteration in original). Nothing in the record, however, indicates the trial court considered the Assignment to be incompetent, inadmissible, or insufficient. Although we do not have a trial transcript, the narrative of proceedings included in the record contains a stipulation from the parties that the Assignment was part of the “documentary evidence that was submitted to the [trial c]ourt” at the hearing. Waterfall’s brief acknowledges that the Assignment was “tendered . . . into evidence[.]” and does not claim the Assignment was objected to, ruled inadmissible, or otherwise excluded from the evidence received by the trial court. They likewise do not claim the Assignment contains any indicia of untrustworthiness or inauthenticity that would support exclusion. *Cf. id.* at 228, 794 S.E.2d at 506 (holding the trial court in a power of sale foreclosure proceeding did not abuse its discretion in excluding a fourteen-page photocopy of a recorded document when the document was executed in 2013 but evinced a 2010 recording stamp from the wrong county indicating a length of 11 pages).

Waterfall's arguments are unconvincing. Statebridge's attestation, as Waterfall's servicer, that it was "unaware of any entity other than Waterfall presently claiming an interest in the right to payment in connection with the Note and Deed of Trust," does not evince a transfer of the Deed of Trust from WFV back to Waterfall.³ In fact, other than Statebridge's denial of Respondents' request for loss mitigation, the narrative provided in Statebridge's affidavit does not address any events after 2017, the year before the Assignment. Similarly, Waterfall's assertion that WFV "seems to be a commonly owned or affiliated entity" is no more than a suggestion, unsupported by any evidence of record. Assuming *arguendo* that the Assignment does indicate a connection between Waterfall and WFV, there is simply no evidence of that relationship's character supporting Waterfall's contention that it maintained the right of power of sale in the face of an assignment of "all its right, title and all beneficial interest in" the Deed of Trust to WFV. Further, possession of "(i) [a] valid debt of which the party seeking to foreclose is the holder" and "(iii) [a] right to foreclose under the instrument" are two separate elements under the statute that must be shown to allow a non-judicial foreclosure to go forward. N.C. Gen. Stat. § 45-21.16(d). A party must prove "that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case." *Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918. A party's proof that it holds a note does not constitute

³ Statebridge's affidavit defined "Waterfall" as "Waterfall Victoria Grantor Trust, Series E" and does not mention or recognize WFV's existence anywhere in the document.

proof that it has power of sale. *Cf. Michael Weinman Assocs.*, 333 N.C. at 229-230, 424 S.E.2d at 389-390 (holding holder of a note failed to prove it possessed power of sale and right to foreclose on a particular tract). In sum, Waterfall's arguments amount to speculation, and speculation is insufficient to support factual findings. *See Chesson v. Pilot Life Ins. Co.*, 268 N.C. 98, 104, 150 S.E.2d 40, 45 (1966) (vacating a jury's finding of causation because "[t]here [was] no *competent* evidence" on the question and it was instead "left to conjecture") (emphasis in original); *cf. State v. Weaver*, 231 N.C. App. 473, 478, 752 S.E.2d 240, 244 (2013) (holding a finding of fact in a trial court's suppression order was unsupported by the evidence when it amounted to "mere speculation" absent "any testimony or evidence to support th[e] finding").

Waterfall also asserts that Respondents' argument poses "a logical absurdity," as it suggests neither Waterfall nor WFV can satisfy the elements of N.C. Gen. Stat. § 45-21.16(d) and pursue a non-judicial foreclosure against Respondents. However, no such logical contradiction exists in our holding. We do not reverse the trial court's order based on any determination that Waterfall (or WFV) is unable to pursue foreclosure as a matter of law. Instead, we reverse simply because Waterfall failed to meet its evidentiary burden establishing it possessed the right to foreclose under power of sale in the face of evidence showing a divestment of that right. If evidence exists showing Waterfall still possesses such a right, Waterfall may bring another

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foreclosure action and present that evidence. *See In re Worsham*, ___ N.C. App. ___, ___, 833 S.E.2d 239, 248 (2019) (holding that the prohibition against multiple non-judicial foreclosure actions on the same default applies only when the trial court has denied foreclosure). Our holding merely recognizes that Waterfall did not introduce any evidence sufficient to support the necessary finding that it possessed power of sale when this matter was heard by the superior court.

III. Conclusion

We hold that the record evidence does not support the trial court's finding that Waterfall possessed the right to foreclose under power of sale found in the Deed of Trust. As a result, we reverse the trial court's order without addressing Respondents' remaining arguments.

REVERSED.

Judges DIETZ and DILLON concur.

Report per Rule 30(e).