

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-35

No. COA20-176

Filed 16 February 2021

Durham County, No. 18 CVS 1208

WILMINGTON SAVINGS FUND SOCIETY, FSB, doing business as Christiana Trust, not in its individual capacity, but solely as trustee for BCAT 2014-10TT, Plaintiff,

v.

THERESA HALL and SUBSTITUTE TRUSTEE SERVICES, INC., Defendants.

Appeal by defendant Theresa Hall from order entered 26 September 2019 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 13 January 2021.

Hutchens Law Firm LLP, by Claire Collins Dickerhoff and Hilton T. Hutchens, Jr., for plaintiff-appellee.

Fox Rothschild LLP, by Matthew W. Krueger-Andes and Troy D. Shelton, for defendant-appellant Theresa Hall.

ZACHARY, Judge.

¶ 1

Defendant Theresa Hall appeals from the trial court's order granting summary judgment in favor of Plaintiff Wilmington Savings Fund Society, FSB ("WSFS") and

denying Hall's motion for summary judgment. After careful review, we affirm the trial court's order.

Background

¶ 2 On 23 February 2000, Firststar Bank, N.A. loaned \$111,000.00 to Linda Shaw to refinance an existing loan on certain real property located on Beckett Street in Durham, North Carolina ("the Property"). Linda Shaw executed a promissory note ("the Note") in the amount of the loan, payable to Firststar Bank, N.A., the Note was secured by a deed of trust ("the Deed of Trust") on the Property.

¶ 3 Linda Shaw died testate in May 2001, roughly one year after she obtained the loan from Firststar Bank, N.A. In her will, she devised her interest in the Property to Hall, who subsequently took possession of the Property and began making mortgage payments. On 30 December 2008, Hall entered into a loan modification agreement ("the Loan Modification Agreement") with Sovereign Bank. Pursuant to the terms of the Loan Modification Agreement, Hall assumed all obligations of the Note and Deed of Trust, thereby becoming a borrower on the Note.

¶ 4 In 2009, Hall suffered an injury that rendered her unable to work for six months, and she contacted Sovereign Bank in January 2010 to request a loan modification. A Sovereign Bank employee informed her that she could not be considered for a modification until she was at least three months behind on her mortgage payments, so she withheld three months of mortgage payments. However,

Hall was unable to return to her job full-time, and she made no additional mortgage payments after January 2010.

¶ 5 On 3 October 2018, WSFS filed a complaint initiating this action, asserting claims against Hall for (1) a declaratory judgment that WSFS was entitled to enforce the Note and Deed of Trust; (2) breach of contract, based on Hall's missed payments on the Note; or (3) alternatively, for unjust enrichment or an equitable lien; and (4) judicial foreclosure, requesting that the Property be sold to satisfy the debt due to WSFS on the Note.¹ Plaintiff attached a copy of the Note to the complaint as Exhibit C.

¶ 6 There were five allonges attached to the Note reflecting indorsements of the Note. The first allonge indorsed the Note from Firststar Finance, Inc. to Sovereign Bank. A footnote to this allonge reads:

Said Note and Mortgage may have been originated by Star Bank, N.A. and/or assigned to Star Banc Finance, Inc. Effective 2/12/99, Star Bank, N.A. changed its name to Firststar Bank, N.A. and Star Banc Finance, Inc. changed its name to Firststar Finance, Inc. These are the same legal entity, and addresses and responsible individuals remain unchanged.

¶ 7 Subsequent allonges evidence transfers of the Note from Sovereign Bank to "State Street Bank and Trust Company as Trustee for Sovereign Bank Home Equity

¹ The complaint also asserted these claims against nominal defendant Substitute Trustee Services, Inc., which is not a party to this appeal.

Loan Trust 2000-1” (undated); from “Sovereign Bank as Attorney in fact for US Bank as successor in interest to State Street Bank and Trust Company as Trustee for the Sovereign Bank Home Equity Loan Trust 2000-1” to Sovereign Bank (30 September 2008); from “Santander Bank, N.A., formerly known as Sovereign Bank,” to MTGLQ Investors, L.P. (undated); and from MTGLQ Investors, L.P. to WSFS (undated).

¶ 8 Also attached, as Exhibit J, was an “Assignment of Note and Deed of Trust” transferring all of Firststar Bank, N.A.’s “rights, title and interest in” the Note to Sovereign Bank. Firststar Bank, N.A. executed the assignment on 25 July 2007, prior to execution of the Loan Modification Agreement.

¶ 9 On 7 December 2018, Hall filed her answer, admitting that she had not made any mortgage payments since January 2010 but denying that WSFS was the holder of the Note. Hall filed a motion for summary judgment on 13 August 2019; WSFS filed a competing summary judgment motion on 28 August 2019. In its memorandum of law in support of its motion, WSFS argued that the footnote on the first allonge “puts any parties . . . on notice that Firststar Bank, N.A. and Firststar Finance, Inc. are the same legal entity.” According to WSFS, the assignment was “further evidence of this transfer[.]”

¶ 10 On 26 September 2019, the trial court entered an order denying Hall's motion and granting WSFS's motion.² In doing so, the trial court determined that WSFS was "the holder of the Note in that [WSFS] is in possession of the original Note and the Note has been properly endorsed." Hall gave timely notice of appeal on 24 October 2019.

Discussion

¶ 11 On appeal, Hall argues that the trial court erred in entering summary judgment for WSFS and denying Hall's motion for summary judgment because WSFS could not show that it was the holder of the Note, or alternatively, because a genuine issue of material fact existed regarding whether WSFS was the holder of the Note. In response, WSFS contends that there was no genuine issue of material fact regarding its status as holder of the Note, and furthermore, that Hall was estopped from challenging WSFS's position as such.

I. Standard of Review

¶ 12 We review the entry or denial of summary judgment de novo. *Lifestore Bank v. Mingo Tribal Pres. Tr.*, 235 N.C. App. 573, 576, 763 S.E.2d 6, 9 (2014), *disc. review denied*, 368 N.C. 255, 771 S.E.2d 306 (2015).

Summary judgment is proper when, viewed in the light

² The trial court did not consider WSFS's alternate claim for unjust enrichment and equitable lien because it concluded that WSFS was entitled to judgment as a matter of law on its primary claims for relief.

most favorable to the nonmovant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Dobson v. Substitute Tr. Servs., Inc., 212 N.C. App. 45, 47, 711 S.E.2d 728, 730 (citation and internal quotation marks omitted), *aff'd per curiam*, 365 N.C. 304, 716 S.E.2d 849 (2011). The moving party may meet its burden of proving that no issue of material fact exists if it proves “that an essential element of the opposing party’s claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim.” *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980) (citation and internal quotation marks omitted).

II. Summary Judgment

¶ 13 In order to enforce a promissory note, a party must present legally sufficient evidence to establish that it is the holder of the note. *Id.* North Carolina General Statutes § 25-1-201(b)(21)(a) defines the “holder” of an instrument as, *inter alia*, “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]” N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2019). While “[m]ere possession of a note payable to order does not suffice to prove ownership or holder status[.]” *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57, “[i]t is the fact of possession which is significant in

determining whether a person is a holder, and the absence of possession defeats that status[.]” *In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). An instrument may be negotiated to an identified person who becomes the holder of the instrument; that process “requires transfer of possession of the instrument and its indorsement by the holder.” N.C. Gen. Stat. § 25-3-201(b). When an instrument has been negotiated multiple times, the last transferee is a proper holder only if the instrument shows a proper “indorsement by each previous holder.” *In re Foreclosure of Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013).

¶ 14 Hall contends that the “chain of indorsements” from the original holder, Firststar Bank, N.A., to WSFS is “broken” because although the first allonge transfers the Note from Firststar Finance, Inc. to Sovereign Bank, there is no allonge transferring the Note from Firststar Bank, N.A. to Firststar Finance, Inc. Hall argues, then, that because “Firststar Finance, Inc. was not the holder of the Note, it had nothing to convey[and that a]ll subsequent indorsements were consequently of no moment either, as each subsequent transferor likewise had nothing to convey.”

¶ 15 In response, WSFS argues that Firststar Bank, N.A. and Firststar Finance, Inc. are in fact the same legal entity, and that the footnote to the first allonge establishes as much. The footnote reads as follows:

Said Note and Mortgage may have been originated by Star Bank, N.A. and/or assigned to Star Banc Finance, Inc. Effective 2/12/99, Star Bank, N.A. changed its name to

Firststar Bank, N.A. and Star Banc Finance, Inc. changed its name to Firststar Finance, Inc. These are the same legal entity, and addresses and responsible individuals remain unchanged.

¶ 16 While the language of the pertinent footnote may not be a model of clarity, we agree with WSFS. “[T]he fact of possession . . . is significant in determining whether a person is a holder,” and the parties do not dispute that WSFS has possession of the original Note and Deed of Trust. *In re Foreclosure of Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125. The footnote to the first allonge indicates that Firststar Bank, N.A. and Firststar Finance, Inc. both had authority to indorse the Note because all entities referred to in the footnote are the same legal entity. We therefore disagree with Hall that the chain of indorsements is broken; there is no genuine issue of material fact regarding whether WSFS was the holder of the Note.

¶ 17 WSFS further asserts that Hall ratified WSFS’s holder status by entering into the Loan Modification Agreement with Sovereign Bank on 30 December 2008; continuing to make payments under the terms of the Note, Deed of Trust, and Loan Modification Agreement to Sovereign Bank and its successors and assigns; and receiving the clear benefits from the terms of the loan modification, including a reduced monthly payment and the possession and enjoyment of the Property. We agree that, by her actions, Hall is estopped from now contending that the indorsement to Sovereign Bank was not valid.

¶ 18 The Loan Modification Agreement “by and between[] Theresa Hall and Sovereign Bank” provides, in pertinent part:

This Loan Modification Agreement (“Agreement”) . . . amends and supplements (1) the Deed of Trust (the “Security Instrument”) from Linda Shaw, deceased, to Firststar Bank, NA. . . subsequently assigned to Sovereign Bank, . . . Sovereign being the current beneficiary of the Security Instrument and holder of the Note secured thereby, and (2) the Note bearing the same date as, and secured by, the property described in the Security Instrument [T]he parties hereto agree as follows[:]

1. This Agreement is entered into pursuant to the Consent Judgment entered in Durham County

2. Borrower [Hall] is hereby added to the Note, the Security Instrument, and the loan account of Lender [WSFS] as an additional maker, grantor and obligor, respectively.

. . . .

5. The Lender will waive all late fees and attorney fees occurred [sic] under the Note through the date of this Agreement. . . .

6. . . . The Past Due Amount will be added to the end of the payment term of the Note as a balloon payment. The Past Due Amount shall not bear interest and shall not be considered due or delinquent, but shall be due and payable in one lump sum at the earlier of (1) any prepayment of the Note, (2) the original maturity date of the Note, . . . or (3) any default by Borrower on the Note after the date of this Agreement. . . .

7. Borrower hereby assumes all obligations of the Note and Security Instrument and agrees to be

bound by the original terms of the Note and Security Instrument except as expressly modified herein.

(Capitalization omitted.) Hall executed the Loan Modification Agreement on 30 December 2008.

¶ 19 “Where, in the course of making a contract, the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds on that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it.” *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 102, 258 S.E.2d 379, 385 (1979) (holding that the doctrine of ratification estopped one party from denying the title to property of the other party where a contract between the parties acknowledged title in one party), *disc. review denied*, 299 N.C. 120, 261 S.E.2d 923 (1980); *see also In re Cullifer*, 246 N.C. App. 514, 785 S.E.2d 187, 2016 WL 1320917, at *11 (2016) (unpublished) (applying doctrine of ratification articulated in *Furst* to a note amendment between parties).

¶ 20 Hall voluntarily entered into the Loan Modification Agreement with Sovereign Bank and accepted its terms and benefits, including possession of the Property for roughly ten years between the execution of the Loan Modification Agreement and the commencement of foreclosure proceedings. We conclude that, having signed the Loan Modification Agreement with Sovereign Bank and received the benefits of that

agreement, Hall is now estopped from denying that Sovereign Bank—and subsequently WSFS—was the holder of the Note and entitled to enforce it.

Conclusion

¶ 21 There being no genuine issue of material fact regarding WSFS's holder status, the trial court properly granted summary judgment for WSFS. Accordingly, we affirm the trial court's order.

WILMINGTON SAV. FUND SOC'Y, FSB v. HALL

2021-NCCOA-35

Opinion of the Court

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).