IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-229

No. COA20-372

Filed 18 May 2021

Rowan County, No. 19 CVS 139

STEPHEN W. WAUGH and TRACY B. WAUGH, Plaintiffs,

v.

STATES RESOURCES CORP. and L. RAGAN DUDLEY AS SUBSTITUTE TRUSTEE, Defendants.

Appeal by Defendant from order entered 8 January 2020 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 27 January 2020.

Hamilton Stephens Steele + Martin, PLLC, by Kenneth B. Dantinne and Sarah J. Sawyer, for the Plaintiffs-Appellees.

Parker Poe Adams & Bernstein LLP, by Kiah T. Ford, IV, for the Defendants-Appellants.

GRIFFIN, Judge.

¶ 1 Defendant States Resources Corp. ("SRC") appeals from the trial court's order denying SRC's motion for summary judgment against each of Plaintiffs Stephen W. Waugh and Tracy B. Waugh's (together, "Plaintiffs") claims and for each of SRC's counterclaims. SRC contends the trial court erred by denying its motion for summary

judgment because the disposition of at least some of Plaintiffs' claims is controlled by prior foreclosure and bankruptcy orders between the parties, and relitigation of these claims is barred by the doctrines of collateral estoppel and *res judicata*. Because SRC's appeal is interlocutory and does not affect a substantial right, we dismiss SRC's appeal.

I. Factual and Procedural History

¶ 2 This appeal arises from the trial court's most recent order in a long history of dealings between the parties with respect to three loans which Plaintiffs acquired to fund their business endeavors.

A. The Three Notes

¶ 3 First, on 15 August 2002, Plaintiffs purchased a parcel of land in Rowan County, North Carolina, financed by then-owner the Lois C. Miller Revocable Trust. Plaintiffs executed a promissory note for the purchase money debt of $1,000,000 (the "Miller Note"), and a deed of trust securing the Miller Note (the "Miller DOT").

¶ 4 Second, on 12 March 2004, Plaintiffs purchased an adjacent parcel of land in Rowan County, financed by SouthTrust Bank ("SouthTrust"). Plaintiffs executed a promissory note for the purchase money debt of $300,000, and a deed of trust securing the note. SouthTrust later became Wachovia Bank, National Association ("Wachovia"), and the note and deed of trust were transferred to Wachovia. Between June 2005 and March 2006, Plaintiffs borrowed an additional $300,000 from

Wachovia to further their business endeavors, and executed two more promissory notes and respective deeds of trust to secure the debt. Collectively, as of March 2006, Plaintiffs owed Wachovia a principal debt of $705,600, secured by multiple promissory notes (the "Wachovia Notes") and deeds of trust (the "Wachovia DOTs").

¶ 5 Lastly, on 11 July 2005, Mr. Waugh and two others obtained a $75,645 loan from Wachovia under the name of their jointly owned corporation, Freebird Aviation, Inc. ("Freebird"), in order to purchase an airplane for use in the business of airplane rentals. Freebird executed a promissory note for the loan (the "Freebird Note"), secured by the purchased airplane. Additionally, Mr. Waugh and his business partners each individually executed an unconditional guaranty of their debt under the Freebird Note.

B. Consolidation of the Notes

¶ 6 SRC acquired the Wachovia Notes, the Wachovia DOTs, and the Freebird Note from Wachovia in September 2008. In July 2015, SRC purchased the Miller Note and the Miller DOT and became the record holder of each document.

¶ 7 In September 2015, Plaintiffs executed an Amended, Restated, and Consolidated Promissory Note (the "2015 Note"), which consolidated, extended, and modified the debts Plaintiff owed to SRC under the Miller Note, Wachovia Note, and Freebird Note. Plaintiffs also executed a Second Loan Modification Agreement and modifications to the Miller DOT and the Wachovia DOTs so that each complied with

the 2015 Note.

¶ 8 The 2015 Note stated that it "[was] subject to the Second Loan Modification Agreement[.]" The Second Loan Modification Agreement specified, *inter alia*, that: (1) "the Notes [were] in default based on [Plaintiffs'] failure to make payments as and when due"; (2) "[Plaintiffs] acknowledge[d] . . . the unpaid balances due under the Notes"; and (3) "[a]s a material inducement to [SRC] to enter into th[e] agreement" modifying Plaintiffs' loan obligations, Plaintiffs waived and released all claims and causes of action against SRC which arose from Plaintiffs' loan obligations prior to the execution of the agreement through a "Release of Claims and Covenant Not to Sue."

C. Foreclosure and Bankruptcy Proceedings

¶ 9 Plaintiffs did not timely make their first payments under the 2015 Note in October 2015 and November 2015. Plaintiffs then failed to make any payments in December 2015, January 2016, and February 2016, and also failed to pay real estate taxes on the properties securing the 2015 Note.

¶ 10 On or about 15 March 2016, SRC brought actions for foreclosure on the two Rowan County properties under the Miller DOT and the Wachovia DOTs, which secured the 2015 Note. The Assistant Clerk of Superior Court of Rowan County conducted a foreclosure hearing on the matter on 30 June 2016. At the close of the hearing, the Clerk entered an order of sale (the "Foreclosure Order") finding, *inter alia*, that (1) the "Note [was] a valid debt"; (2) the "[2015] Note [was] secured by the

Deed[s] of Trust"; (3) "[Plaintiffs were] in default . . . [for] failure to make payments as and when due as required by the Note"; and, (4) under the Deed[s] of Trust, the trustee was "authorized, upon default, to foreclose and sell the property described therein[.]" The Foreclosure Order "authorized [the trustee] to proceed with the foreclosure[.]" Plaintiffs did not appeal from the Foreclosure Order.

¶ 11 On 13 September 2016, Plaintiff filed a Chapter 13 bankruptcy petition, automatically staying the foreclosure proceedings. During the bankruptcy proceedings, Plaintiffs again defaulted on their payments under the 2015 Note. SRC then moved for relief from the automatic stay so that it could proceed with foreclosure. On 14 September 2017, Plaintiffs and SRC entered into a consent order to resolve SRC's motion for relief from the automatic stay (the "Bankruptcy Consent Order"). The Bankruptcy Consent Order stated, *inter alia*, (1) "[Plaintiffs were] indebted to SRC pursuant to [the 2015 Note]"; (2) the 2015 Note was "secured by properly executed and recorded Deeds of Trust"; and (3) Plaintiffs "failed to make [full and timely] payments" from May 2017 to September 2017. In the Bankruptcy Consent Order, Plaintiffs and SRC agreed that, "[s]hould [Plaintiffs] fail to make any payment required pursuant to this order, the stay shall be automatically lifted[.]"

¶ 12 Plaintiffs continued to pursue their Chapter 13 bankruptcy case, but failed to make payments under their bankruptcy plan in and around October 2018. On 7 December 2018, the bankruptcy court dismissed Plaintiffs' bankruptcy case because

Plaintiffs were in "substantial default" for failure to make payments in compliance with their bankruptcy plan.

D. The Present Case

¶ 13 During negotiations for the 2015 Note and the subsequent foreclosure and bankruptcy proceedings, Plaintiffs discovered evidence of SRC's behavior throughout the parties' relationship which led Plaintiffs to believe that SRC had acted fraudulently. Negotiations for the 2015 Note initially began around April 2015 when Plaintiffs requested modification of their loan obligations. Nonetheless, in May 2015, SRC instituted foreclosure on the Wachovia Notes and obtained an order of sale directing foreclosure to occur. To avoid foreclosure sale under the Wachovia Notes, Plaintiffs and SRC agreed that Plaintiffs would make a payment on their outstanding balance and provide SRC with all information necessary for SRC to obtain the Miller Note and Miller DOT.[1] SRC expressed to Plaintiffs that the foreclosure action would be cancelled and SRC would agree to restructure Plaintiffs' loan obligations under the Wachovia Notes following receipt of Plaintiffs' agreed-upon payment to avoid foreclosure.

¶ 14 Plaintiffs completed the necessary payment on 8 September 2015, and SRC

[1] The Miller Note and Miller DOT still encumbered property adjacent to property encumbered by the Wachovia Notes. Possession of the Miller Note and the Wachovia Notes would give SRC an interest in each parcel of adjoining property.

provided Plaintiffs with a proposed restructured loan agreement—which would become the 2015 Note—on 28 September 2015. However, the foreclosure had not been cancelled at this time, and SRC informed Plaintiffs that the foreclosure would not be cancelled until the Plaintiffs had executed and made their first payment under the 2015 Note. Plaintiffs complied and SRC cancelled the foreclosure.

¶ 15 Prior to initiating a second foreclosure proceeding in March 2016, SRC sent Plaintiffs a notice of default in February 2016. The notice of default did not inform Plaintiffs of the amount which needed to be paid to cure their default. Rather, on 17 February 2016, SRC accelerated Plaintiffs' loan obligations under the 2015 Note, making the entire balance fully due and payable. Plaintiffs then initiated the bankruptcy case to prevent foreclosure on their properties. During the bankruptcy proceedings, SRC provided the court with loan records describing SRC's allocation of Plaintiffs' loan payments that Plaintiffs had not seen before. Upon reviewing these records, Plaintiffs discovered evidence which led them to believe that SRC had misapplied principal loan payments to their loan's interest. Plaintiffs hired a forensic accountant to look into SRC's application of Plaintiffs' loan payments following the dismissal of the bankruptcy case.

¶ 16 Plaintiffs filed their complaint initiating this action on 22 January 2019. During discovery, SRC provided Plaintiffs with documentary records showing SRC's history servicing Plaintiffs' loans. Plaintiffs' review of this documentation bolstered

their belief that SRC had improperly applied a default interest rate to the principal balance of the Wachovia Notes; had repeatedly applied Plaintiffs' payments to loan interest when those payments were contractually allocated to principal only; and had consolidated the balance of the Freebird Note into the Wachovia Notes without authorization.

¶ 17 Plaintiffs filed an amended complaint on 16 April 2019, adding allegations and claims based on information learned in discovery. The amended complaint alleged the following claims:

> (1) that Plaintiffs were "entitled to an accounting concerning all calculations, computations and payments comprising the loan history of Plaintiffs; indebtedness to SRC";
>
> (2) that SRC communicated "false and misleading information" to Plaintiffs, SRC "failed to exercise reasonable care or competence in obtaining or communicating this false and misleading information[,]" SRC "intended for [Plaintiffs] to rely on that information[,]" and Plaintiffs "justifiably relied to their detriment" on that information;
>
> (3) that SRC "imposed and collected charges from Plaintiffs in excess of those agreed upon or otherwise permitted by law" with "corrupt and usurious intent";
>
> (4) that SRC "waived its right to prompt payment, and thereby waived its right to collect late charges and/or accelerate" the loans;
>
> (5) that SRC "breached the terms of its contractual obligations to Plaintiffs by imposing or collecting sums that were not due or owing, assessing erroneous and/or

> excessive charges and fees, and refusing to properly credit payments in accordance with the agreed upon terms";
>
> (6) that SRC's "conduct and pattern of concealment and misrepresentation . . . breached its implied duty of good faith and fair dealing";
>
> (7) that SRC's "acts and omissions" amounted to "numerous unfair and deceptive acts or [trade] practices";
>
> (8) that Plaintiffs receive a "judicial determination of the rights[,] obligations and interests of the parties with regard to Plaintiffs' indebtedness to SRC, including the validity of the [2015 Note] and the proper payoff amount";
>
> (9) that the 2015 Note and the deed of trust modification executed at the same time be reformed "to reflect the true intent of the parties" because Plaintiffs "executed [the documents] under a mistaken belief that these documents contained the true agreement among the parties";
>
> (10) that Plaintiffs receive a "judicial determination that the [deed of trust modifications] are void"; and
>
> (11) that the trial court issue a temporary restraining order "enjoining [SRC] from proceeding any further in the underlying Foreclosure Actions[.]"[2]

SRC answered the amended complaint and filed a counterclaim on 17 May 2019. Plaintiffs filed an answer to SRC's counterclaim on 20 June 2019.

¶ 18 SRC filed a motion for summary judgment in favor of SRC against all of Plaintiffs' claims and on SRC's counterclaim on 5 July 2019. Following a hearing on

[2] Plaintiffs voluntarily dismissed claims (1) (accounting) and (3) (usury), pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure on 16 December 2019.

the matter, the trial court entered an order denying SRC's motion for summary judgment on 8 January 2020. SRC appeals.

II. Analysis

¶ 19 SRC appeals from the trial court's denial of its motion for summary judgment. SRC contends that there can be no issues of material fact with respect to Plaintiffs' claims because the claims concern matters which have already been judicially decided in SRC's favor by the prior Foreclosure Order and Bankruptcy Consent Order between the parties. SRC argues the trial court erred in denying its motion because relitigation of these claims is barred by collateral estoppel, stemming from the Foreclosure Order, and by *res judicata*, stemming from the Bankruptcy Consent Order.

¶ 20 Plaintiffs have filed a motion to dismiss SRC's appeal, arguing primarily that the present appeal is interlocutory and therefore not properly before this Court for review at this time. We agree, and hold this Court lacks jurisdiction to review SRC's arguments at this stage of the proceedings.

¶ 21 SRC appeals from the denial of its motion for summary judgment and its appeal is therefore interlocutory. *McCallum v. N.C. Co-op. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230 (2001) ("The denial of summary judgment is not a final judgment, but rather is interlocutory in nature."). "[I]nterlocutory decrees are immediately appealable only when they affect some

substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433 (1980) (citation omitted).

¶ 22 SRC contends that its claims are immediately appealable because the denial of a motion for summary judgment based upon the doctrines of *res judicata* and/or collateral estoppel affects a substantial right. SRC correctly asserts that "the right to avoid the possibility of two trials on the same issues can be . . . a substantial right[,]" *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (citation and internal quotation marks omitted), and that the doctrines of *res judicata* and collateral estoppel are particularly "directed at preventing the possibility that a successful defendant . . . will twice have to defend against the same claim by the same plaintiff," *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Indeed, "denial of a motion for summary judgment based on the defense[s] of *res judicata* [or collateral estoppel] *may* affect a substantial right" because such a denial "*could* lead to a second trial in frustration of the underlying principles of the doctrine[s]." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161 (emphasis added) (citations omitted). Thus, the denial of a motion for summary judgment affects a substantial right when the motion "'makes a colorable assertion that the claim is barred under the doctrine[s] of collateral estoppel[and/or *res judicata*].'" *Poulos v. Poulos*, 270 N.C. App. 289, 295, 841 S.E.2d 282, 288 (2020) (quoting *Turner v. Hammocks Beach Corp.*,

363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009)).

¶ 23 This Court has further explained, though, that "[i]ncantation of the two doctrines does not . . . automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534 (2007). Raising the defenses of *res judicata* and collateral estoppel grants this Court jurisdiction for interlocutory review only where "the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts." *Id.* (citations omitted). Therefore, "we must determine whether, at this preliminary stage, [SRC has] made a colorable argument that the doctrine[s apply] in this context in order to allow us to exercise jurisdiction over this appeal." *Poulos*, 270 N.C. App. at 295, 841 S.E.2d at 288.

¶ 24 Whether a defendant has presented a colorable assertion of *res judicata* and/or collateral estoppel, and thereby has shown that a substantial right is at risk, depends on the defendant's showing some evidence of each element of the applicable doctrine.

> [U]nder *res judicata* as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where [the] defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, *all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded*. Under collateral estoppel as traditionally applied, a final judgment on the merits

> prevents relitigation of *issues actually litigated and necessary to the outcome* of the prior action in a later suit involving a different cause of action between the parties or their privies.

Thomas M. McInnis & Assocs., Inc., v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 556–57 (1986) (emphasis added) (citations omitted). If the court adjudicating a prior proceeding lacked jurisdiction to determine a claim or an issue, then that claim or issue could not have been actually litigated and necessary to the prior judgment on the merits. *See Meehan v. Cable*, 127 N.C. App. 336, 340, 489 S.E.2d 440, 443 (1997).

¶ 25 SRC bases its claims of *res judicata* and collateral estoppel on prior court orders which do not reflect a decision on the merits by a jury or judge of the sort contemplated under these doctrines. For the reasons explained below, we hold that SRC has failed to make a colorable assertion that Plaintiffs' claims are barred by either *res judicata* or collateral estoppel. SRC has therefore failed to demonstrate the existence of a substantial right which warrants our review at this time.

A. Collateral Estoppel as applied to the Foreclosure Order

¶ 26 The Foreclosure Order in this case cannot bar Plaintiffs' claims through collateral estoppel because the claims are based in equity, rather than in law, and were therefore not issues which the clerk of court had jurisdiction to decide. "At a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16, '[t]he Clerk of Superior Court is limited to making the four findings of fact specified in the statute[.]'" *Mosler*

ex rel. Simon v. Druid Hills Land Co., 199 N.C. App. 293, 295–96, 681 S.E.2d 456, 458 (2009) (citation omitted). N.C. Gen. Stat. § 45-21.16 grants the clerk of court jurisdiction to determine only whether, in relevant part, (1) there is a valid debt; (2) the borrower is in default; (3) the trustee has the right to foreclose; and (4) proper notice has been given to all interested parties. N.C. Gen. Stat. § 45-21.16(d) (2015); *see In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 71–72, 284 S.E.2d 553, 555 (1981).

¶ 27 "It is well established that a clerk of court is without jurisdiction to consider equitable defenses in a foreclosure hearing pursuant to section 45-21.16 of the General Statutes." *Meehan*, 127 N.C. App. at 340, 489 S.E.2d at 443–444. "[E]quitable defenses to foreclosure may not be raised in a hearing or appeal pursuant to [N.C. Gen. Stat. §] 45-21.16 but must be raised in an action to enjoin the foreclosure pursuant to [N.C. Gen. Stat. §] 45-21.34." *Matter of Foreclosure of Deed of Tr. Executed by Godwin*, 121 N.C. App. 703, 705, 468 S.E.2d 811, 812 (1996) (citation omitted).

¶ 28 Plaintiffs filed their present action under N.C. Gen. Stat. § 45-21.34, seeking equitable remedies on claims of fraud, misrepresentation, improper calculation of the amount owed, waiver of prompt payment, unfair and deceptive trade practices, and reformation. This Court has held that these kinds of claims, particularly those disputing the amount owed and alleging waiver of timely payment, are beyond the

jurisdiction of the clerk of court in a section 45-21.16 hearing and must instead be brought in a subsequent action under section 45-21.34. *See Matter of Foreclosure of Deed of Tr. by Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993) ("Equitable defenses to foreclosure, such as waiver of the right to prompt payment through acceptance of late payments, may not be raised in a hearing pursuant to [N.C. Gen. Stat. §] 45–21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under [N.C. Gen. Stat. §] 45–21.34." (citation omitted)); *Matter of Burgess*, 47 N.C. App. 599, 603–04, 267 S.E.2d 915, 918 (1980) ("[T]he fact that respondents . . . dispute the balance owed on the note and deed of trust is irrelevant to the required findings under [N.C. Gen. Stat. §] 45-21.16(d). . . . . [T]he determination of the amount owed on a debt is beyond the scope of the hearing under [N.C. Gen. Stat. §] 45-21.16[.]").

¶ 29 Whether a valid debt exists is an issue to be determined by the clerk of court in a section 45-21.16 foreclosure hearing. N.C. Gen. Stat. § 45-21.16(d) ("If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder . . . then the clerk shall authorize [foreclosure]."). The clerk of court's jurisdiction is limited to determining whether the documents before it evidence a legally valid debt on their face, whether the party seeking foreclosure is the holder of a secured instrument regarding that debt, and whether the debtor has defaulted, *i.e.* failed to meet its obligations stated on the face of the documents. Equitable challenges to the

validity of a debt which stem from the parties' conduct outside of the loan documents themselves are beyond the clerk's jurisdiction and can only be addressed in an action under section 45-21.34. *See In re David A. Simpson, P.C.*, 211 N.C. App. 483, 488–89, 711 S.E.2d 165, 170 (2011) (holding trial court correctly concluded respondents' contention that "the debt [was] not valid because [the loaner] rescinded the transaction by which he obtained the loan" was an "equitable defense and not properly before the trial court" in a section 45-21.16 hearing).

¶ 30 SRC contends that Plaintiffs' claims are not rightfully presented as equitable, but are instead merely collateral legal attacks on the binding findings made by the clerk of court in the Foreclosure Order. In support of this argument, SRC cites to this Court's decisions in *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 775 S.E.2d 1 (2015), and *Gray v. Federal National Mortgage Association*, 264 N.C. App. 642, 830 S.E.2d 652 (2019). We find the present case distinguishable from *Funderburk* and *Gray*.

¶ 31 In *Funderburk*, the noteholder foreclosed upon eight rental properties owned by the plaintiffs. *Funderburk*, 241 N.C. App. at 417, 775 S.E.2d at 3. After unsuccessfully appealing the clerk of court's foreclosure orders, the plaintiffs filed a separate action challenging the foreclosure on six of those properties on equitable grounds, "assert[ing] causes of action for breach of contract, promissory estoppel, negligent misrepresentation, tortious interference with contracts and business

expectancy, and quantum meruit." *Id.* In support of these claims, the plaintiffs alleged that the noteholder had refused to accept online payments properly tendered by the plaintiffs prior to foreclosure, and that the noteholder had caused the plaintiffs to lose tenants and rental payments by contacting the plaintiffs' tenants and informing them of the impending foreclosure. *Id.* Throughout the proceedings, the plaintiffs argued that the clerk of court improperly concluded that they were in default on their loan obligations due to the noteholder's conduct. *Id.* at 418–19, 775 S.E.2d at 3–4.

¶ 32 On appeal, this Court held that the plaintiffs' claims were all barred by the clerk of court's prior determination that the plaintiffs were in default or otherwise arose directly from the foreclosure of the properties. *Id.* at 423–24, 775 S.E.2d at 7. First, the *Funderburk* Court noted that the plaintiffs' claims for damages were solely for losses incurred in the foreclosure process. *Id.* at 423, 775 S.E.2d at 7. As a matter of law, the Court held that the plaintiffs could "not recover damages resulting from the foreclosures of the properties." *Id.* Second, the Court held that the plaintiffs' claims failed because (1) the clerk of court's determination of default was binding on collateral appellate review, (2) the plaintiffs were in default prior to the noteholder's refusal to accept subsequent electronic payments, and (3) the terms of the promissory notes and deeds of trust securing the plaintiffs' loans permitted the noteholder to refuse payments, initiate foreclosure, and contact the plaintiffs' tenants. *Id.* at 424,

775 S.E.2d at 7.

¶ 33 SRC contends in its brief on appeal that the present case "is analogous to *Funderburk* in that most of the [P]laintiffs' claims are premised on an argument that the [2015] Note is not valid and not secured by the Deeds of Trust." It is precisely this reason that this case is distinguishable from *Funderburk*. The "central issue . . . before [the *Funderburk* Court] on appeal [was] whether the default determinations in the foreclosure orders [were] fatal to [the] plaintiffs' claims"; the Court was never asked to assess the validity of the underlying promissory note. *Id.* at 423, 775 S.E.2d at 6. In the present case, Plaintiffs are not challenging the clerk of court's determination that Plaintiffs were in default based upon the terms of the 2015 Note. Plaintiffs' claims do not assert that they properly performed their contractual duties under the 2015 Note and were therefore not in default. Rather, Plaintiffs challenge the calculation of the amount of their debt arising from the 2015 Note and allege the amount claimed by SRC resulted from SRC's dishonest conduct. Further, Plaintiffs' claims arise, at least in part, from SRC's alleged conduct prior to and throughout negotiations leading to the formation of the 2015 Note—long before the foreclosure process began.

¶ 34 *Gray* is likewise distinguishable. In *Gray*, the noteholder accelerated the outstanding balance on the plaintiffs' mortgage and ultimately foreclosed on the plaintiffs' home, as well as a neighboring parcel of land. *Gray*, 264 N.C. App. at 643–

34, 830 S.E.2d at 654–55. The plaintiffs sued, alleging that the description of property in the deed of trust incorrectly included the neighboring parcel, that they had received no notice of the parcel's inclusion, and that these mistakes nullified the bank's foreclosure. *Id.* The plaintiffs asserted equitable claims for relief, including: "(1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the North Carolina Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices." *Id.* at 644, 830 S.E.2d at 655. This Court held the plaintiffs' arguments were barred by collateral estoppel because they "merely constitute[d] a collateral attack on [the bank's] right to foreclose upon the property under the Deed of Trust." *Id.* at 650, 830 S.E.2d at 659. The *Gray* Court concluded:

> [The p]laintiffs' claims seeking a declaratory judgment that the foreclosure is "a nullity" and asserting mutual mistake and unjust enrichment are all premised upon an alleged *mistake* in the description of the property in the Deed of Trust. As such, these arguments merely constitute a collateral attack on [the bank's] right to foreclose upon the property under the Deed of Trust. These issues were all previously determined by the clerk in its [foreclosure] order. Therefore, we hold that [the p]laintiffs are collaterally estopped from raising these claims in this lawsuit. [The p]laintiffs' claims for breach of fiduciary duty and unfair and deceptive trade practices are likewise barred under principles of collateral estoppel because *the conduct upon which these causes of action are based is the foreclosure itself*.

Id. at 650–51, 830 S.E.2d at 659 (emphasis added).

¶ 35 In this case, Plaintiffs' claims arise in equity from allegedly fraudulent or negligent business practices by SRC prior to foreclosure. Plaintiffs do not contend that there was a mistake as to which property was encumbered by the 2015 Note, or a mistake regarding any of the 2015 Note's remaining terms. Plaintiffs' claims are based on SRC's conduct during the origination of the 2015 Note, as well as SRC's allocation of loan payments both prior to and under the 2015 Note. To that end, none of Plaintiffs' claims are based upon the "foreclosure itself."

¶ 36 It is undisputed that the clerk of court found that the 2015 Note constituted a valid debt based upon the information before the clerk during the proceedings. However, Plaintiffs' claims turn on issues which were never presented to the clerk of court during foreclosure proceedings and which would have been improper to present at that time. The clerk of court did not actually determine whether SRC's allegedly fraudulent conduct invalidated the 2015 Note or whether SRC improperly calculated the balance owed under the 2015 Note. In sum, the record is devoid of any indication that these issues were actually litigated during the section 45-21.16 foreclosure proceeding.

B. *Res Judicata* and Collateral Estoppel as applied to the Bankruptcy Consent Order

¶ 37 The Bankruptcy Consent Order in this case cannot bar Plaintiffs' claims because the specific issue that SRC seeks to bar Plaintiffs from relitigating was not

actually litigated by the bankruptcy court.

¶ 38 Our decision turns on recognition of the facets of the Bankruptcy Consent Order: it is (1) an order resolving a party's motion to lift an automatic stay in a bankruptcy case, which was (2) entered by consent of the parties. Federal common law controls this Court's review of the preclusive effect of an order entered in a bankruptcy proceeding. *See Barrow v. D.A.N. Joint Venture Properties of N.C., LLC*, 232 N.C. App. 528, 531, 755 S.E.2d 641, 645 (2014).

¶ 39 The United States Supreme Court has made it clear that judgments or orders entered by consent of the parties ordinarily have no preclusive effect on the individual *issues* within a decided claim:

> [S]ettlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear . . . that the parties intend their agreement to have such an effect. "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion." This differentiation is grounded in basic res judicata doctrine. It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule . . . [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action."

Arizona v. California, 530 U.S. 392, 414, *supplemented*, 531 U.S. 1 (2000) (citations omitted).

¶ 40 Though a consent order may preclude relitigation of an entire claim under the doctrine of *res judicata*, it cannot preclude relitigation of the individual issues which would have been litigated to resolve that claim "unless it is clear . . . that the parties intend their agreement to have such an effect." *Id.* Here, the Bankruptcy Consent Order does not bar Plaintiffs from "relitigating" the validity of the 2015 Note because the issue was not actually litigated in order to resolve SRC's motion to lift the automatic stay, and it is not clear that the parties intended their agreement to have such an effect.

C. Additional Arguments

¶ 41 Plaintiffs assert three additional arguments in their motion to dismiss SRC's appeal.[3] Plaintiffs contend that SRC failed to timely file the record on appeal in accordance with Rules 12 and 25 of the North Carolina Rules of Appellate Procedure, that SRC failed to include in the record a recitation of the necessary portions of the underlying litigation as required by Rule 9 of the Rules of Appellate Procedure, and

[3] Plaintiffs also included a motion for sanctions against SRC in their motion to dismiss SRC's appeal. Whether SRC's interlocutory appeal invoked a substantial right presented this Court with a significant question requiring thorough review. We hold that SRC's appeal was not so frivolous and un-grounded in law as to warrant sanctions. *See* N.C. R. App. P. 34(a).

that SRC failed to preserve its arguments regarding collateral estoppel and *res judicata* under Rule 10 of the Rules of Appellate Procedure. N.C. R. App. P. 9(a); N.C. R. App. P. 10(a)(1); N.C. R. App. P. 12(a); N.C. R. App. P. 25(a). Because this Court does not have jurisdiction to hear SRC's interlocutory appeal, we do not address Plaintiff's arguments concerning the record on appeal.

¶ 42 SRC also presents an additional argument on appeal, contending that its motion for summary judgment should have been granted because at least some of Plaintiffs' claims are barred by their waiver of certain prior claims in the 2015 Note. SRC admits, however, that this argument was not properly preserved for our review and has filed a petition for writ of certiorari alongside its appeal asking us to nonetheless review this argument.

¶ 43 Our decision to dismiss SRC's properly preserved arguments at this time rests on the equitable nature of Plaintiffs' claims in this case. Specifically, Plaintiffs claim that the circumstances surrounding the creation of the 2015 Note as well as the balance due under the 2015 Note are the result of fraudulent and misrepresentative conduct by SRC. SRC's additional claim essentially argues that Plaintiffs are barred from challenging the propriety of the 2015 Note based upon the terms of the 2015 Note itself. In our discretion, we deny SRC's petition for writ of certiorari. *See State v. Ledbetter*, 371 N.C. 192, 196–97, 814 S.E.2d 39, 42–43 (2018).

III. Conclusion

¶ 44 We hold that SRC's appeal to this Court is interlocutory and that SRC has failed to present a colorable assertion of its claims for *res judicata* and collateral estoppel supporting its contention that a substantial right is at risk if this Court does not review its appeal at this time. Therefore, SRC's appeal must be dismissed.

DISMISSED.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).