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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-278

No. COA20-707

Filed 15 June 2021

Mecklenburg County, No. 16 CVS 15658

BRANCH BANKING AND TRUST COMPANY, Plaintiff,

v.

SUNTRUST BANK, TRUSTEE SERVICES OF CAROLINA, LLC, CORSICA, LLC, JOSEPH H. DRURY, MICHELLE S. DRURY, and GPAR FF, LLC, Defendants.

Appeal by plaintiff from orders entered 22 February 2019, 26 August 2019, and 6 April 2020 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2021.

*Alexander Ricks PLLC, by Ryan P. Hoffman, and Loeb & Loeb LLP, by Wook Hwang, pro hac vice, for plaintiff.*

*Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendant GPAR FF, LLC.*

ARROWOOD, Judge.

¶ 1 Branch Banking and Trust Company ("plaintiff") appeals from the trial court's orders granting GPAR FF, LLC's ("defendant GPAR") motion for summary judgment and motion to intervene and denying plaintiff's motion for judgment on the pleadings and motion to dismiss defendant GPAR's counterclaims. Plaintiff contends that the

trial court erred in granting the motion arguing (1) the deed of trust at issue is void as a matter of law; (2) defendant GPAR's motion to intervene was not timely and did not meet the requirements for intervention; (3) defendant GPAR lacks standing to seek reformation; and (4) there was insufficient evidence to support reformation. Plaintiff further contends that void instruments purporting to convey interests in real property cannot be reformed. For the following reasons, we hold the trial court did not err in granting defendant GPAR's motion for summary judgment and affirm the trial court's orders.

## I. Background

¶ 2 This appeal arises from a priority dispute between the beneficiaries to two deeds of trust. The real property subject to this dispute is located in Mecklenburg County, North Carolina and has a property address of 1816 Craigmore Drive, Charlotte, North Carolina ("the Property"). Defendants Joseph H. Drury and Michelle S. Drury ("the Drurys") became record title owners of the Property by deed recorded in Mecklenburg County. In 2009, plaintiff agreed to loan the Drurys $2,000,000.00 in exchange for a first position lien on the Property. As part of the loan agreement, the Drurys executed a deed of trust to plaintiff conveying a lien against the Property ("BB&T deed of trust"). The BB&T deed of trust was inadvertently recorded in the Union County Registry on 18 August 2009 and was not correctly recorded in the Mecklenburg County Registry until 18 August 2016.

¶ 3 After execution of the BB&T deed of trust but prior to recordation in the Mecklenburg County Registry, the Drurys executed a deed of trust securing a loan of $500,000.00 and identifying GPAR FF, LLC as the sole beneficiary ("GPAR deed of trust"). The deed of trust specifically identified GPAR as "GPAR FF, LLC a North Carolina limited liability company," located at 6300 Carmel Road, Suite 110 B, Charlotte, North Carolina 28226. The GPAR deed of trust was recorded in the Mecklenburg County Registry on 9 September 2015. A promissory note executed in connection with the GPAR deed of trust identified "GPAR FF, LLC, a North Carolina limited liability company" as the sole "Payee" and required the Drurys to direct payments to the 6300 Carmel Road address.

¶ 4 GPAR FF, LLC was originally incorporated and organized as a North Carolina limited liability company, represented by registered agent Timothy B. Gavigan ("Gavigan"), on 23 June 2014. On 8 July 2014, Gavigan filed articles of dissolution for GPAR FF, LLC as incorporated in North Carolina, effective 25 June 2014. Also on 25 June 2014, Gavigan executed a certificate of formation to incorporate GPAR FF, LLC in the State of Delaware.

¶ 5 On 30 August 2016, plaintiff filed a complaint and issued a civil summons against "GPAR FF, LLC." Plaintiff filed an amended complaint and issued a civil summons to defendant GPAR FF, LLC, a North Carolina limited liability company, on 19 October 2016. The amended complaint identified GPAR FF, LLC as a limited

liability company organized and existing in the State of North Carolina, and stated that upon information and belief, GPAR FF, LLC had been dissolved on or about 25 June 2014.

¶ 6 GPAR FF, LLC filed an answer to the amended complaint on 16 December 2016, admitting that an entity named GPAR FF, LLC was organized under the laws of the State of North Carolina and had been dissolved on or about 25 June 2014. GPAR denied that GPAR FF, LLC had been dissolved, instead asserting that GPAR FF, LLC is a limited liability company organized under the laws of the State of Delaware with an office in Mecklenburg County, North Carolina.

¶ 7 In their response to plaintiff's first set of interrogatories, defendant GPAR identified several individuals with knowledge of the subject matter of the complaint. This included Afshin Ghazi ("Ghazi"), a manager of GPAR, Thomas I. Lyon ("Lyon"), an attorney that represented Tri-Cities Restaurant Group, LLC ("Tri-Cities") in connection with drafting the documents used to restructure the loan, and Gavigan, the registered agent and attorney retained by defendant GPAR in the original loan restructuring. Defendant GPAR produced affidavits from all three individuals. Plaintiff made no objection to the admission or admissibility of these affidavits.

¶ 8 Ghazi's affidavit provided that in 2014 he and Rob Pedlow were involved in a transaction surrendering their ownership interests in Tri-Cities in exchange for a promissory note. As part of the transaction, GPAR FF, LLC was "set up" for the

purpose of receiving the promissory note from Tri-Cities and was intended to be a Delaware company. Ghazi stated that the 2015 transaction was meant for Joseph Drury, the majority owner of Tri-Cities, to personally assume the debt owed to defendant GPAR. Ghazi concluded by averring that "there were never any discussions of changing the beneficiary of the note and security agreements from GPAR FF, LLC a Delaware limited liability company to GPAR FF, LLC a North Carolina limited liability company."

¶ 9 Lyon averred that his firm was retained by Tri-Cities around July 2015 in connection with a loan restructuring, with a requirement of the loan being "that Tri-Cities had to remove or discharge a debt owed by it to GPAR FF[,] LLC, a Delaware limited liability company." On 3 September 2015, an attorney working in Lyon's office emailed drafts of two deeds of trust used to secure the debt being transferred from Tri-Cities to Drury. Both deeds of trust referenced GPAR FF, LLC, a North Carolina limited liability company, which "was a mistake because GPAR FF[, LLC] was a Delaware limited liability company." Lyon attached several exhibits to his affidavit. Exhibit C, "Assignment and Assumption of Promissory Note" and Exhibit E, the related Pledge Agreement, both identified GPAR FF, LLC as a Delaware limited liability company. Exhibit D, the "Amended and Restated Promissory Note" and Exhibit F, the deed of trust, identified GPAR FF, LLC as a North Carolina limited liability company.

¶ 10 Gavigan's affidavit reiterated much of the information provided by Ghazi and Lyon regarding the context of the transaction. Gavigan stated that the reference to GPAR FF, LLC as a company organized under the laws of North Carolina "was a scrivener's error as GPAR FF, LLC was organized under the laws of Delaware[,]" and that "[n]o one connected with the matter discovered the error in the reference to GPAR FF's state of organization." Gavigan averred that on 10 November 2016, he recorded an Affidavit of Correction of Typographical or Other Minor Error with the Mecklenburg County Register of Deeds.

¶ 11 On 13 February 2018, defendant GPAR filed a motion for summary judgment against plaintiff. On 16 April 2018, plaintiff filed a motion for summary judgment against defendant GPAR. On 2 May 2018, the Mecklenburg County Superior Court heard both motions for summary judgment, the Honorable Lisa C. Bell presiding. Following the hearing, Judge Bell rendered a decision granting plaintiff's motion for summary judgment as to plaintiff's eighth claim for relief.

¶ 12 On 2 August 2018, before entry of the first summary judgment order, defendant GPAR filed a motion to dismiss for failure to include necessary parties. On 10 August 2018, GPAR FF, LLC, a Delaware limited liability company, filed a motion to intervene in this action. On 28 September 2018, defendant GPAR filed a motion to consolidate this action with a separate civil action filed by GPAR.

¶ 13 On 22 February 2019, Judge Bell entered the order granting plaintiff's motion

for summary judgment and denying defendant GPAR's motion for summary judgment. The order provided that it was "not currently binding upon GPAR FF, LLC a Delaware limited liability company . . . as GPAR Delaware was deemed by the Court to be a necessary party and added to the litigation by Order of the Court rendered on October 2, 2018 with a written Order yet to be filed[.]" Also on 22 February 2019, Judge Bell entered an order granting defendant GPAR's motion to intervene and motion to consolidate and denying GPAR-NC's motion to join a necessary party.

¶ 14 On 13 March 2019, defendant GPAR filed an answer to the amended complaint, as well as a crossclaim and counterclaim against plaintiff. On 13 May 2019, plaintiff filed a response and motion to dismiss defendant GPAR's counterclaim. On 22 July 2019, plaintiff filed a motion for judgment on the pleadings as to defendant GPAR. On 26 August 2019, the trial court entered an order denying plaintiff's motion to dismiss and motion for judgment on the pleadings.

¶ 15 On 20 February 2020, plaintiff filed a motion for summary judgment against defendant GPAR. On 24 February 2020, defendant GPAR filed a motion for summary judgment against plaintiff. On 6 April 2020, Judge Bell entered an order granting defendant GPAR's motion for summary judgment and *sua sponte* setting aside her earlier summary judgment order.

¶ 16 Plaintiff filed and served notice of appeal on 6 May 2020.

## II. Discussion

¶ 17 Plaintiff appeals from four orders by the trial court, including the first summary judgment order, the order granting defendant GPAR's motion to intervene, the order denying plaintiff's motion for judgment on the pleadings and motion to dismiss defendant GPAR's counterclaims, and the second summary judgment order. Plaintiff contends that the trial court erred in granting the orders because the GPAR deed of trust is void as a matter of law and is incapable of being reformed, repaired, or revived as a matter of law. Plaintiff further contends that defendant GPAR's motion to intervene was not timely and that defendant GPAR lacks standing to seek reformation. Defendant argues that the trial court's orders were proper because the reference to GPAR as a North Carolina company was a scrivener's error and that GPAR FF, LLC, as incorporated in Delaware, was the intended beneficiary of the deed of trust.

### A. Deed of Trust Reformation

¶ 18 "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Nationstar Mortg., LLC v. Dean*, 261 N.C. App. 375, 381, 820 S.E.2d 854, 859 (2018) (quoting *Metro. Property & Cas. Ins. Co. v. Dillard,* 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997)). A mutual mistake exists where each

party was mistaken as to the meaning of a material fact or term such that the resulting written instrument does not embody the parties' actual agreement. *Metro. Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997). Reformation of a written instrument due to mutual mistake of the parties requires clear, strong, and convincing evidence. *Bank of Am., N.A. v. Schmitt*, 263 N.C. App. 19, 24, 823 S.E.2d 396, 399 (2018) (citing *Textile Ins. Co. v. Lambeth*, 250 N.C. 1, 11, 108 S.E.2d 36, 42 (1959)). Parol evidence may be considered as competent to correct a mistake but "cannot validate a void description" where it would "amount to a substitution by parol of an essential element of the deed which the statute of frauds requires to be in writing." *Watford v. Pierce*, 188 N.C. 430, 433, 124 S.E. 838, 840 (1924).

¶ 19 Deeds of trust are written instruments that are subject to reformation claims. *Noel Williams Masonry v. Vision Contractors of Charlotte*, 103 N.C. App. 597, 603, 406 S.E.2d 605, 608 (1991). "In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties . . . ." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981) (citations omitted). "If the evidence is strong, cogent, and convincing that the deed, as recorded, did not reflect the agreement between the parties due to a mutual mistake caused by a drafting error, a deed can be reformed." *Drake v. Hance*, 195 N.C. App. 588, 592, 673 S.E.2d 411, 414 (2009) (citing *Parker v.*

*Pittman*, 18 N.C. App. 500, 505, 197 S.E.2d 570, 573 (1973)).

¶ 20 "[T]here is a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." *Hice*, 301 N.C. at 651, 273 S.E.2d at 270 (internal quotation marks, citation, and emphasis omitted). "[E]quity for the reformation of a deed or written instrument extends to the inadvertence or mistake of the draftsman who writes the deed or instrument." *Crews v. Crews*, 210 N.C. 217, 221, 186 S.E. 156, 158 (1936) (citation and internal quotation marks omitted).

¶ 21 "The equity to correct an instrument when by the mistake of the draftsman it is not drawn according to the prior agreement of the parties has been recognized from the earliest times[.]" *Bank of Union v. Redwine*, 171 N.C. 559, 565, 88 S.E. 878, 881 (1916). In the absence of fraud, "the true test is whether the party seeking correction acted as one of ordinary prudence under the circumstances." *Id.* at 564-65, 88 S.E. at 881. In addition to ordinary prudence, the *Bank of Union* Court noted the following principles guiding the inquiry:

> The law does not require a prudent man to deal with every one as a rascal. There must be a reasonable reliance upon the integrity of men, or the transaction of business, trade, and commerce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and [n]ational wealth and prosperity. The rules of law are founded on natural reason

> and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled.

*Id.* at 565, 88 S.E. at 881 (quoting *Walsh v. Hall*, 66 N.C. 233 (1872)).

¶ 22 In *Bank of Union*, the Court affirmed the reformation of a deed of trust to insert the name of the intended beneficiary of a deed in place of the one mistakenly typed thereto. 171 N.C. 559, 88 S.E. 878. The recorded deed identified "W. S. Blakeney" as the beneficiary but was intended to be assigned to the plaintiff, Bank of Union. *Id.* at 562, 88 S.E. at 880. The Court determined that "[w]hen the high character of the parties is considered, the reasonable conclusion is that the mistake occurred because Mr. Blakeney was president of the Bank of Union and had charge of its affairs, and one or the other of the parties spoke of him when referring to the bank." *Id.* at 567, 88 S.E. at 882.

¶ 23 In the present case, there is strong, cogent, and convincing evidence that the parties intended GPAR FF, LLC, as incorporated in Delaware, to be the beneficiary of the deeds of trust and promissory note. Although a GPAR FF, LLC entity did exist at one time incorporated under the laws of North Carolina, that entity was dissolved within two days of incorporation and on the same day of incorporation in Delaware of the existing GPAR FF, LLC entity. Several documents used in preparation of the recorded deeds of trust identify GPAR FF, LLC as incorporated in Delaware, and the only difference between the draft documents and the recorded documents is the

reference to state of incorporation. No evidence suggested any fraud on the part of either party and no evidence suggested that the parties intended for the dissolved GPAR FF, LLC incorporated in North Carolina to be the beneficiary of the deed.

¶ 24 Additionally, defendant GPAR produced several affidavits that support the conclusion that the reference to GPAR FF, LLC as incorporated in North Carolina was a scrivener's error. Considering the evidence presented and the context of the transaction, the reasonable conclusion is that the reference to GPAR FF, LLC as incorporated in North Carolina was the mistake of the draftsman and did not reflect the parties' actual agreement.

¶ 25 We note that although plaintiff made no objection before the trial court to the admission of the aforementioned draft documents and affidavits, plaintiff's appellate counsel asserted they had sufficiently objected in their responsive pleadings and in their appellate briefs. The North Carolina Rules of Appellate Procedure provide that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Because plaintiff failed to preserve the issue of whether the draft documents and affidavits were admissible, we reject plaintiff's assertion that an objection was presented to the trial court.

¶ 26 Plaintiff cites several authorities to support its argument that the deed of trust

is void as a matter of law. The cases that plaintiff relies on, including *Piedmont & Western Inv. Corp. v. Carnes-Miller Gear Co.*, 96 N.C. App. 105, 384 S.E.2d 687 (1989) and *James R. Carcano v. JBSS, LLC*, 200 N.C. App. 162, 684 S.E.2d 41 (2009), hold that deeds purporting to transfer ownership to a non-existent entity are void as a matter of law because the deeds could not operate to convey title. We find these authorities to be distinguishable from the case at hand, as GPAR FF, LLC *was* a validly existing legal entity at the time of the conveyance, albeit incorporated in Delaware rather than North Carolina. Adopting plaintiff's interpretation would undercut the well-established equity of reformation in cases where strong, cogent, and convincing evidence reveals a mutual mistake due to a draftsman's error. Otherwise, any drafting error as to the identity of a beneficiary of a conveyance would render the conveyance void and deny the intended beneficiary. In fact, in response to a hypothetical question during oral argument plaintiff conceded that under its theory of the case, if a deed of trust mistakenly named the beneficiary as John S. Arrowood, Sr., the deceased father of the intended beneficiary John S. Arrowood, Jr., then the deed could not be reformed because the deed of trust naming a deceased person would have been void. We decline to adopt plaintiff's reasoning and hold that the deed of trust was subject to reformation and that the trial court did not err in reforming the deed of trust to correct the reference to GPAR's state of incorporation.

B. Motions for Summary Judgment

¶ 27 Plaintiff argues that "this Court should determine that the trial court erred in refusing to adhere to the foregoing precedent relating to void instruments in connection with its denial of [plaintiff]'s motions to dismiss and motion for judgment on the pleadings, and in connection with the trial court's entry of the Second SJ Order[.]" We disagree.

¶ 28 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.' " *Nationwide Mut. Ins. Co. v. Integon Nat. Ins. Co.*, 232 N.C. App. 44, 48, 753 S.E.2d 388, 391 (2014) (quoting *In re Will of Jones,* 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

¶ 29 Plaintiff does not specifically allege error related to the trial court's second summary judgment order with respect to any genuine issue of material fact but instead focuses on the purported refusal to adhere to precedent. The only issue of fact in dispute between the parties is whether the intended beneficiary of the deed of trust was the existing GPAR FF, LLC incorporated in Delaware, or the dissolved GPAR FF, LLC incorporated in North Carolina. As previously discussed, the evidence presented to the trial court was strong, cogent, and convincing that the reference to GPAR FF, LLC as a North Carolina entity was a mutual mistake of the parties caused by draftsman's error. Plaintiff presents no evidence to the contrary.

Accordingly, we hold that there was no genuine issue of material fact and that defendant GPAR was entitled to summary judgment and reformation as a matter of law.

C. Motion to Intervene

¶ 30 Plaintiff next contends that the trial court erred in granting defendant GPAR's motion to intervene on the grounds that the motion was not timely and that defendant GPAR did not meet the requirements for intervention. We disagree.

¶ 31 Pursuant to N.C. Gen. Stat. § 1A-1, Rule 24, a proper party can intervene if the individual timely files a petition.

> The determination of the timeliness of the motion under this rule is left to the sound discretion of the trial court. Such rulings are given great deference and will only be overturned upon a showing that the ruling " 'was so arbitrary that it could not have been the result of a reasoned decision.' "

*Malloy v. Cooper*, 195 N.C. App. 747, 750, 673 S.E.2d 783, 786 (2009) (citation omitted). On the issue of timeliness, we consider five factors: "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) *the reason for the delay in moving for intervention,* (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Id.* (citation omitted) (emphasis in original). "A motion to intervene is rarely denied as untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered

if 'extraordinary and unusual circumstances' exist." *Taylor v. Abernethy*, 149 N.C. App. 263, 267-68, 560 S.E.2d 233, 236 (2002) (citation omitted); *see also Home Builders Ass'n of Fayetteville N. Carolina Inc. v. City of Fayetteville*, 170 N.C. App. 625, 631, 613 S.E.2d 521, 525 (2005) ("While post-judgment intervention is not impossible, the law disfavors it.").[1]

¶ 32 With regard to the first factor, GPAR-DE sought to intervene after the hearing on plaintiff's motion for summary judgment and after Judge Bell had rendered a decision, but before judgment had been entered. Because judgment had not yet been entered, we consider GPAR-DE's intervention to be pre-judgment.

¶ 33 As to the second factor, the possibility of unfairness or prejudice is great with respect to defendant GPAR-DE and negligible with respect to plaintiff. If GPAR-DE were not permitted to intervene in this case, the intended beneficiary of the conveyance would lose their opportunity to enforce their rights. Plaintiff, on the other hand, was not prejudiced by the trial court's decision to allow the motion to intervene,

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[1] We note a dichotomy in standards of review applied to whether a motion to intervene is timely. On one hand, "[w]hether a motion to intervene is timely is a matter within the sound discretion of the trial court and will be overturned only upon a showing of abuse of discretion." *Taylor*, 149 N.C. App. at 268, 560 S.E.2d at 236. On the other hand, post-judgment intervention is only allowed if there are extraordinary and unusual circumstances. *Home Builders Ass'n of Fayetteville N. Carolina Inc.*, 170 N.C. App. at 631, 613 S.E.2d at 525. Applying these standards, we review a trial court's decision on a pre-judgment motion to intervene for abuse of discretion, but only allow post-judgment motions in "extraordinary and unusual circumstances" without regard to the trial court's discretion. Although this apparent divide does not change the outcome of the present case, we emphasize the importance of considering a trial court's discretion in determining whether a motion to intervene is timely.

as the priority rights they obtained by recording their deed of trust in Mecklenburg County in 2016 remain undisturbed.

¶ 34 Defendant GPAR does not present any specific reason for the delay in moving for intervention, but does note that plaintiff failed to join GPAR-DE in the lawsuit, "even after pleadings and discovery filed by GPAR-NC put the Appellant on notice that it has sued the wrong party because GPAR-DE was the intended beneficiary in the Deed of Trust." Defendant GPAR suggests that plaintiff may have "intentionally tried to take advantage of GPAR-DE's absence by seeking summary judgment to hold the Deed of Trust void in its absence." Plaintiff, on the other hand, argues that both GPAR entities were represented by the same counsel, and for 599 days while the case was pending before the trial court, GPAR-DE had made no separate attempt to insert itself into the case until the first adverse ruling was rendered. We find this factor to weigh in favor of plaintiff; despite plaintiff's failure to initially join GPAR-DE in the lawsuit, GPAR-DE was sufficiently on notice of the proceedings and does not present a persuasive reason for their delay in moving for intervention.

¶ 35 On the fourth factor, defendant GPAR would be prejudiced if the motion to intervene were denied. As the intended beneficiary of the deed of trust, defendant GPAR was a necessary party to the litigation, and would be prejudiced by exclusion from the proceedings.

¶ 36 On the final factor, there were some unusual circumstances, largely created by

a multitude of attorney errors at various stages of the transactions and proceedings. For example, plaintiff's deed of trust would have had priority over defendant GPAR's deed of trust if not for the failure to properly record in Mecklenburg County until 2016; defendant GPAR's deed of trust could have been reformed prior to plaintiff's recording, but no claim for reformation was made and the "Affidavit of Correction of Typographical or Other Minor Error" filed by Gavigan did not appear to have any actual legal effect; defendant GPAR acknowledged in responsive pleadings that GPAR-NC did not exist, but failed to clarify which GPAR FF, LLC was involved in the case until after the hearing on plaintiff's motion for summary judgment. We consider these circumstances sufficiently extraordinary and unusual for purposes of the standard.

¶ 37 Taking these factors together, we hold the trial court properly found the motion to intervene timely. Any disfavor assigned to defendant GPAR's delay in intervening is outweighed by the risk of prejudice. More importantly, whether the motion was timely is left to the sound discretion of the trial court, and we give deference to the trial court's balancing of the forgoing factors. Plaintiff has failed to show that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision."

D. Standing and Statute of Frauds

¶ 38 Plaintiff further contends defendant GPAR lacks standing to bring any claims

relating to the GPAR deed of trust because "GPAR Delaware is not a party to, or in privity with, the named grantee of the GPAR Deed of Trust." On these grounds, plaintiff argues the agreement asserted by defendant GPAR violates the North Carolina Statute of Frauds. We disagree.

¶ 39 N.C. Gen. Stat. § 22-2 requires that all contracts to convey land "shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *In re Thompson*, 253 N.C. App. 46, 49-50, 799 S.E.2d 658, 662 (2017). The Supreme Court of North Carolina has held that "[a] valid contract to convey land, therefore, must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976). With respect to the description of property, the Court has explained that "a description is patently ambiguous if it leaves the subject of the contract in a state of absolute uncertainty and refers to nothing extrinsic by which it might be possibly identified with certainty." *Taefi v. Stevens*, 53 N.C. App. 579, 583, 281 S.E.2d 435, 437 (1981) (citing *Lane v. Coe*, 262 N.C. 8, 136 S.E.2d 269 (1964), *modified*, 305 N.C. 291, 287 S.E.2d 898 (1982)). A patently ambiguous description does not comply with the statute of frauds. *Id.* A latent ambiguity exists where a description is insufficient

to identify the property but refers to something extrinsic by which identification might possibly be made; latent ambiguities comply with the statute of frauds. *Id.* at 583, 281 S.E.2d at 437-38.

¶ 40 These principles have generally been applied to questions regarding a description of property, rather than identification of parties or beneficiaries. We see good reason to apply the same principles to the case at hand, as identification of the parties is also an essential element of a contract under the statute of frauds. Here, for the identification of defendant GPAR to be patently ambiguous, the deed of trust would necessarily "leave[ ] the subject of the contract in a state of absolute uncertainty and refer[ ] to nothing extrinsic by which it might be possibly identified with certainty." *Id.* at 583, 281 S.E.2d at 437. As previously discussed, the deed of trust does not leave the subject of the contract in a state of absolute uncertainty because the only difference between the existing GPAR entity and the GPAR entity named in the deed of trust was the state of incorporation. Extrinsic evidence, including earlier draft documents and correspondence, clearly shows that the parties intended to name the existing GPAR entity as beneficiary to the deed of trust.

¶ 41 Plaintiff argues that defendant GPAR lacks standing to seek reformation because our Supreme Court has held "[i]n all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity." *Hege v. Sellers*, 241 N.C. 240, 246, 84 S.E.2d 892, 897 (1954)

(internal quotation marks omitted). Plaintiff's argument hinges on the view that defendant GPAR was not an original party to the transaction, or alternatively that GPAR-DE is not in privity with GPAR-NC. As previously discussed, the trial court appropriately recognized that there was only one GPAR entity involved in the transaction: the GPAR FF, LLC incorporated in Delaware. Plaintiff's repeated assertions that GPAR-NC was the original party to the transaction are without merit. Therefore, defendant GPAR had standing to seek reformation.

¶ 42 Accordingly, we hold the identification of GPAR was a latent defect, defendant GPAR had standing to seek reformation, and the trial court's order reforming the GPAR deed of trust was proper.

## III. Conclusion

¶ 43 For the forgoing reasons, we hold the trial court did not err in granting defendant GPAR's motions to intervene and for summary judgment, and affirm the trial court's orders.

AFFIRMED.

Judges COLLINS and GORE concur.

Report per Rule 30(e).