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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-411

No. COA20-558

Filed 3 August 2021

Iredell County, No. 17 CVS 361

ETHEL P. GOFORTH PRIMARY TRUST, by and through R. LYNN GOFORTH, SUE GOFORTH HEDRICK, and DEBORAH GOFORTH-TAYLOR, as Trustees, Plaintiffs,

v.

LR DEVELOPMENT-CHARLOTTE, LLC, MARK F. JONES, NUBIA E. JONES, WARREN S. BOGER, CHRISTOPHER E. CLARK, KERI I. CLARK, CHRISTY R. MILLSAPS, MELANIE J. ELLIS, SCOTT TUCKER, JENNIFER TUCKER, CASSANDRA Y. PATTERSON, ELMBER B. BARBER, MELINDA N. BARBER, THOMAS N. SMITH, ASHLEY E. LAIL, JAMES HOLLY, TIMOTHY S. LEFEVER as Trustee of the 178 WEDGE WAY VIEW TRUST, CONSTANCE N. TERLL as Trustee of the Constance N. Terll Revocable Living Trust, LEWIS J. TONDO, LILIA R. COX, ALLAN J. ZANOTTI REVOCABLE LIVING TRUST, JAMES SETH KEY, CHARLES ROBERT FOGLE, VALARIE A. FOGLE, and WALTER H. JONES, JR. as Trustee of That Certain Deed of Trust Executed by Fox Den Development Company, LLC Dated May 19, 2004, and Recorded in Book 1621 at Page 1101, Iredell County Registry, Defendants.

Appeal by Plaintiff-Appellant from orders entered 16 April 2020 and 27 September 2017 by Judges Martin B. McGee and Jesse B. Caldwell, respectively, in Iredell County Superior Court. Heard in the Court of Appeals 13 April 2021.

Everett Gaskins Hancock LLP, by James M. Hash, for Plaintiff-Appellant.

Offit Kurman, P.A., by Amy P. Hunt & Robert B. McNeill, for Defendants-Appellees.

INMAN, Judge.

¶ 1 This is the second appeal arising from a series of unorthodox real estate financing transactions. Two married couples agreed to loan millions of dollars for the development of real property without any formal documentation. After the loans were partially funded and one of the creditors died, his family honored his commitment, in incremental advances, loaning more than a million dollars based on a promissory note and deed of trust secured by 50 residential lots. But the note and deed of trust omitted any language to indicate that the loan was funded by future advances. After the deed of trust was recorded, the debtor sold the lots to a developer who in turn sold each of the lots to individual homeowners. Neither the developer nor any of the homeowners appears to have addressed the recorded encumbrance at the time those purchases closed.

¶ 2 We must consider whether a deed of trust for real property secured the loan of money advanced after the date the deed and underlying promissory note were executed, and in some instances after the stated maturity date of the loan. Based on our interpretation of statutes governing future advances, the plain language of these documents, and our precedent, we conclude that the deed does not secure the debt for funds loaned after the stated maturity date.

¶ 3 Plaintiff-Appellant Ethel P. Goforth Primary Trust ("Goforth Trust") appeals from an order granting summary judgment to Defendants-Appellees, a developer and

group of residential homeowners (collectively, the "homeowners"),[1] in its judicial foreclosure action against the homeowners' real property. Goforth Trust argues that the trial court erred by concluding, as a matter of law, that all loan advances made after the execution date of the deed of trust were unsecured. After careful review, for the reasons explained below, we affirm in part and modify in part the trial court's order granting partial summary judgment, reverse the full summary judgment order, and remand this matter for further proceedings.

I. FACTS & PROCEDURAL BACKGROUND

¶ 4 The record tends to show the following:

¶ 5 Dwight and Ethel Goforth (the "Goforths") and E. Udean and Nancy Burke (the "Burkes") were primary funders and members of Fox Den Development Company, LLC and Fox Den Country Club, LLC (collectively, "Fox Den"), two business entities formed to develop a golf course and surrounding residential community (the "Development") in Iredell County. In the early 2000s, Fox Den decided to build a clubhouse for the golf course and to develop another phase ("Phase IV") of the Development. The two couples agreed to loan Fox Den approximately $2,000,000

[1] Walter H. Jones was named as a defendant in his capacity as trustee of the deed of trust upon which Goforth Trust seeks to judicially foreclose. However, he does not seek any relief and he has not participated in this case, so the term "homeowners" does not include him.

each, in alternating increments, for these purposes. Only the first million loaned by the Goforths is at issue in this case.

¶ 6 Mr. Goforth died unexpectedly in March 2004. At the time of his death, he had loaned $280,000 to Fox Den for the Development. Mr. Goforth's heirs requested formal documentation to reflect the debt.

¶ 7 In May 2004, Phyliss Edmiston ("Ms. Edmiston"), the treasurer of Fox Den Development Company, LLC, executed a promissory note ("2004 Goforth Note") on behalf of the company in favor of the Estate of Mr. Goforth in the amount of $1,002,000. Ms. Edmiston at the same time executed a deed of trust ("2004 Goforth Deed of Trust") to secure the 2004 Goforth Note with 50 lots in Phase IV of the Development. The 2004 Goforth Deed of Trust required the loan to be repaid on or before 1 October 2004. It was recorded with the Iredell County Register of Deeds on 9 February 2005,[2] four months after its maturity date and nearly nine months after its execution.

¶ 8 Mr. Goforth and his estate ultimately loaned $1,002,000 to Fox Den, relative to the dates of execution, maturity, and recordation of the deed of trust, as follows:

- 10 October 2003: $100,000

[2] On the same date, Ms. Edmiston executed and recorded almost identical documents for the Burkes. The Burkes did not join the Goforth family in the 2016 foreclosure action or this action.

- 26 November 2003: $30,000
- 16 December 2003: $150,000
- 19 May 2004: 2004 Goforth Note and 2004 Goforth Deed of Trust executed
- 29 September 2004: $100,000
- 1 October 2004: 2004 Goforth Deed of Trust maturity date
- 2 December 2004: $200,500
- 9 February 2005: 2004 Goforth Deed of Trust recorded
- 1 March 2005: $100,000
- 22 March 2005: $100,000
- 10 May 2005: $50,000
- 30 January 2006: $168,003.42
- 22 August 2006: $3,496.58

At the time the 2004 Goforth Note and Deed of Trust were signed, the Goforths had advanced $280,000. The Estate advanced a total of $380,000 prior to the maturity date and another $200,500 after the maturity date and before the recordation of the 2004 Goforth Deed of Trust. The Estate advanced the remaining $421,500 by August 2006.

¶ 9 In 2007 and 2008, Fox Den sold 50 Phase IV lots to LR Development-Charlotte ("LR Development"). LR Development paid for the lots in full and Fox Den provided a warranty deed which guaranteed that the lots were free and clear of all

encumbrances. As a matter of record, though, the lots were and are subject to the 2004 Goforth Deed of Trust. LR Development built homes on the lots and sold them to the homeowners with a general warranty deed representing that the properties were free and clear of all encumbrances.

¶ 10 In 2013, Goforth Trust instituted a nonjudicial foreclosure action in Iredell County Superior Court based on a power of sale provision in the 2004 Goforth Deed of Trust. The trial court concluded the instruments were invalid as a matter of law because Ms. Edmiston did not have the authority to sign them on behalf of Fox Den. Goforth Trust appealed and this Court affirmed the order of the trial court. *In re: Fox Den Dev., LLC*, 245 N.C. App. 328, 782 S.E.2d 122, 2016 WL 409786, at *8 (2016) (unpublished).

¶ 11 While its appeal in the nonjudicial foreclosure action was pending before this Court, Goforth Trust brought a second action against Fox Den to recover money owed. That action was stayed in 2016 after creditors brought involuntary bankruptcy proceedings against Fox Den in the United States Bankruptcy Court for the Western District of North Carolina. Goforth Trust pursued its claims against Fox Den in the bankruptcy proceeding.

¶ 12 In 2017, Goforth Trust brought the judicial foreclosure action from which this appeal arises, claiming a right to the homeowners' property to satisfy a debt of $1,691,751.63 based on the principal amount of $1,002,000, plus interest and

attorneys' fees. Counsel agreed to stay litigation pending a resolution of Goforth Trust's claims in the Fox Den bankruptcy proceeding.

¶ 13 In June 2018, the bankruptcy court approved a settlement between Goforth Trust and the Fox Den bankruptcy estate resulting in an $870,000 payment from the Fox Den bankruptcy estate to Goforth Trust. The bankruptcy matter was otherwise resolved and the judicial foreclosure action resumed. The parties agree Goforth Trust's recovery in this action is subject to the credit of $870,000.

¶ 14 In July 2019, the homeowners filed a motion for partial summary judgment based on the argument that the 2004 Goforth Deed of Trust did not secure future advances. The trial court granted the motion and determined that the instrument did not secure funds advanced after its execution date on 19 May 2004.

¶ 15 In February 2020, the homeowners moved for summary judgment as to all issues remaining in the case, arguing that all sums secured by the 2004 Goforth Deed of Trust had been repaid to Goforth Trust as a result of the $870,000 settlement from the Fox Den bankruptcy estate. The trial court granted the homeowners' motion for summary judgment on 16 April 2020. Goforth Trust timely appeals from the orders granting partial summary judgment and full summary judgment.

II. ANALYSIS

¶ 16 We review appeals from summary judgment orders *de novo*. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). The

moving party bears the burden of showing it is entitled to judgment as a matter of law and that there is no genuine dispute as to any material fact. *Jenkins v. Stewart*, 41 N.C. App. 262, 265, 254 S.E.2d 776, 778 (1979); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). We view the evidence in the light most favorable to the non-moving party, giving them the benefit of all reasonable inferences. *Jenkins v. Lake Montania Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E. 2d 259, 261 (1997).

¶ 17 Goforth Trust contends that the trial court's partial summary judgment order and the full summary judgment order should be reversed because (1) no future advances were made after the homeowners took title with record notice of the 2004 Goforth Deed of Trust and (2) even if the advances made after the recording of the deed can be correctly classified as future advances and are unsecured, the loan funds advanced before the recording date were secured. For the reasons explained below, we conclude that the deed of trust does not secure funds advanced after the maturity date of the loan. We affirm in part and modify in part the trial court's partial summary judgment order. We reverse the trial court's summary judgment order and remand this matter to the trial court to determine whether the secured debt has been repaid from the Fox Den bankruptcy estate and, if necessary, to resolve other issues of fact and law.

A. The 2004 Goforth Deed of Trust Does Not Secure Advances Made after the Instrument's Date of Maturity

¶ 18 The trial court concluded that the 2004 Goforth Deed of Trust did not secure any advances made after 19 May 2004, the date the deed was executed, and on that basis granted the homeowners' motion for partial summary judgment. The homeowners then filed a motion for complete summary judgment. The trial court granted that motion based on its conclusion that the debt secured by the 2004 Goforth Deed of Trust, in the amount limited by the partial summary judgment order, had been satisfied by payment made from the Fox Den bankruptcy estate to Goforth Trust as a result of the bankruptcy proceedings.

1. Record Notice to Homeowners

¶ 19 It is undisputed that the Goforth Estate loaned $1,000,200 to Fox Den and the debt has not been fully repaid. It is also undisputed that the homeowners had record notice of the 2004 Goforth Deed of Trust. The encumbrance on their land was and remains public record, discoverable by title search. Yet, even if the homeowners' title search revealed the encumbrance and related security instruments, they would only be on notice of the terms on the face of the instrument, including its maturity date, not the intent of the loaning party and not the schedule of monies advanced to Fox Den.

¶ 20 Goforth Trust contends that because each of the homeowners had record notice of the deed of trust when they purchased their lots, and the loan had been fully funded before the homeowners purchased their lots, the trial court erred in excluding future

advances from the scope of the 2004 Goforth Deed of Trust. Goforth Trust compares this case to *In re Willows II, LLC*, 485 B.R. 528 (Bankr. E.D.N.C. 2013). The deed of trust at issue in *Willows* included a future advances provision and identified the secured debt such that "no subsequent purchasers or lenders could genuinely claim that they had been deceived or misled as to the nature or amount of the secured obligation." 485 B.R. at 537. The 2004 Goforth Deed of Trust does not contain a future advances provision, but it does contain a maturity date that preceded the homeowners' purchases.

2. Statutory Provisions for Future Advances Deeds

¶ 21 Goforth Trust argues that N.C. Gen. Stat. Chapter 45, Article 7 does not apply to this action because there were no future advances relative to the homeowners, who all took title with record notice of the 2004 Goforth Deed of Trust years after all of the debt was incurred.[3] Goforth Trust has cited no authority construing the statute in this manner, and we have found no such authority.

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[3] In the alternative, Goforth Trust argues the 2009 version of the future advances statute, rather than the version in effect when the deed of trust was signed and when the homeowners purchased their property, governs this deed of trust. The amended statute establishes priority for future advances made after the date a deed of trust is *recorded* as opposed to the date it is *executed*. *See* "An Act to Amend the Future Advances Statutes by Distinguishing between a Future Advance and a Future Obligation and by Making Various Other Changes," S.L. 2009-197, §§ 2, 4, 2009 N.C. Sess. Laws 302, 302-04. Based on that amendment, Goforth Trust contends that if the debt at issue is not fully secured by the 2004 Goforth Deed of Trust, it secures all advances made as of the recording date, 9 February 2005. Because Goforth Trust concedes that the deed of trust does not comply with the statutory requirements of either version of the statute, this argument is without merit.

¶ 22 Goforth Trust further asserts that the statute "deals with the *priority* of instruments rather than their *validity*" and "establishes a priority hierarchy to resolve disputes over competing claims," but does not serve as a "mechanism to invalidate an instrument or to declare certain advances as unsecured." (emphasis added). No prior decision by this Court or the North Carolina Supreme Court holds that the statute concerns only priority, rather than security, of liens. However, after careful review of the statute, we agree with Goforth Trust in this respect.

¶ 23 Section 45-70 allows debts arising from loans funded by future advances to, in certain circumstances, take priority over debts arising from later loans, even if those intervening loans are made before all of the previously agreed to future advances have been made. The statute provides:

> [A]ny security instrument that conforms to the requirements of this Article shall, from the time and date of registration thereof, have the same priority to the extent of all future advances and future obligations secured by it, and all interest accruing thereon, as if all the advances had been made, all the obligations incurred, and all the interest accrued at the time the security instrument was registered.

N.C. Gen. Stat. § 45-70(a) (2019). Section 45-68 sets forth specific requirements so that a future advances deed of trust may secure this priority over a subsequent intervening creditor:

> A security instrument, otherwise valid, shall secure the following *so as to give priority* as provided in G.S. 45-70:

> . . . .
>
> (1a) Existing obligations that are specifically or generally identified, described, or referenced in the security instrument as being secured thereby, and all advances made at or prior to the registration of the security instrument.
> (1b) Future advances and future obligations that are specifically or generally identified, described, or referenced in the security instrument as being secured thereby that may from time to time be made or incurred, but only if the security instrument shows all of the following:
>
> > a. That the security instrument is given wholly or partly to secure future advances and/or future obligations.
> > b. The maximum principal amount that may be secured by the security instrument at any one time.
> > c. The period within which future advances may be made and future obligations may be incurred, which period shall not extend more than 30 years beyond the date of the security instrument or, if the security agreement is not dated, the date the security instrument is registered.

Id. at § 45-68 (2019) (emphasis added). A future advances deed of trust which complies with Section 45-68 secures the priority of future advances over an intervening lien. *Id.* at § 45-70.

¶ 24 Section 45-69 provides parameters for a valid instrument to secure future advances independent of priority:

> Unless the security instrument provides to the contrary, *if the maximum amount secured by the security instrument has not been advanced* or if any obligation secured thereby is paid or is reduced by partial payment, further advances may be made and additional obligations secured by the

> security instrument *may be incurred from time to time within the time limit fixed by the security instrument*.

Id. at § 45-69 (2019) (emphasis added).

¶ 25 Section 45-74, which was in effect at the execution of the 2004 Goforth Deed of Trust and remains the law, further provides: "The provisions of this Article *shall not be deemed exclusive*. Nothing in this Article shall invalidate or overrule any rule of *validity or priority* applicable to any security instrument failing to comply with the provisions of this Article." *Id.* at § 45-74 (2019) (emphasis added).

3. 2004 Goforth Deed of Trust

¶ 26 In light of these statutory provisions, we consider the terms of the 2004 Goforth Deed of Trust to determine what debt it secures. "It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Self-Help Ventures Fund v. Custom Finish, LLC*, 199 N.C. App. 743, 747, 682 S.E.2d 746, 749 (2009) (cleaned up). We read together contemporaneously executed instruments to determine the terms of the contract. *In re Foreclosure of Sutton Invs.*, 46 N.C. App. 654, 659, 266 S.E.2d 686, 689 (1980).

¶ 27 The 2004 Goforth Deed of Trust provides:

> WITNESSTH, That whereas the Grantor is indebted to the Beneficiary in the principal sum of ONE MILLION TWO THOUSAND AND 00/100 Dollars ($1,002,000.00), as evidenced by a Promissory of (sic) Note even date herewith,

> the terms of which are incorporated herein by reference. The *final due date for payments* of said Promissory Note, if not sooner paid is *October 1, 2004*.

(emphasis added). The 2004 Goforth Note, executed on the same date, provides:

> FOR VALUE RECEIVED the undersigned, jointly and severally, promise to pay to ESTATE OF DWIGHT J, GOFORTH, or order, the principal sum of ONE MILLION TWO THOUSAND AND NO/100)) DOLLARS ($1,002,000.00), with interest from October 3, 2003 . . . until paid or until default . . . .
>
> If not sooner paid, the *entire remaining indebtedness shall be due and payable on October 1, 2004*.

(emphasis added). Nothing in the language of the underlying promissory note or the deed identifies future advances; only an existing obligation of $1,002,000 is referenced. Both the underlying note and the deed of trust provide that the loan matures on 1 October 2004.

¶ 28 At the time the 2004 Goforth Deed of Trust was executed on 19 May 2004, however, only $280,000 of the loan had been funded. As of 1 October 2004, the loan's maturity date, $380,000 had been advanced. Nine months after the execution date and four months after the maturity date, when the deed was recorded on 9 February 2005, $580,500 had been advanced. The balance of the planned loan was funded by advances after the recording date.

¶ 29 Goforth Trust concedes that the 2004 Goforth Deed of Trust does not comply with the requirements of Section 45-68 to secure priority for future advances under

Section 45-70. Yet, Chapter 45, Article 7 does not invalidate instruments which do not comply with the future advances priority framework, and there is no issue of priority in this case.

¶ 30 Although it fails to meet the statutory criteria for *priority* pursuant to Section 45-68, the 2004 Goforth Deed of Trust is still governed by Chapter 45, Article 7 because the instrument's language and the parties' subsequent payment meet the criteria for *validity* set forth in Section 45-69. Again, that statute now provides, in pertinent part:

> Unless the security instrument provides to the contrary, *if the maximum amount secured by the security instrument has not been advanced* or if any obligation secured thereby is paid or is reduced by partial payment, further advances may be made and additional obligations secured by the security instrument *may be incurred from time to time within the time limit fixed by the security instrument*.

N.C. Gen. Stat. § 45-69 (2019) (emphasis added). The 2004 Goforth Deed of Trust provides a fixed time limit by its maturity date.

¶ 31 Goforth Trust interprets Section 45-74 to mean that any defect in the deed of trust which would deprive the lender of having lien priority does not invalidate the deed of trust itself or limit the financial obligation that it secures. As explained above, we agree that the 2004 Goforth Deed of Trust is a valid instrument. But we hold that the scope of what it secures is limited by the deed of trust's plain language.

4. Caselaw Applied to 2004 Goforth Deed of Trust

¶ 32 As reviewed above, the North Carolina legislature has enacted statutes to foster consistency and predictability in secured real property transactions. When parties deviate from the statutory framework, it should come as no surprise that a dispute cannot be resolved purely by reference to the statute. Instead, we must look to the common law.

¶ 33 Chapter 45, Article 7 does not address the scope of a deed of trust to secure future advances not specified by the instrument. Goforth Trust contends that the schedule of payments made by the Goforths to Fox Den over the course of nearly three years demonstrates that the 2004 Goforth Deed of Trust was intended to secure all advances despite the deficiencies on the face of the instrument. Here, we disagree.

¶ 34 Our precedent does not support holding that a deed of trust can secure advances made after the stated deadline for repayment of the loan. We find instructive this Court's decision in *In re Hall*, 210 N.C. App. 409, 708 S.E.2d 174 (2011). The deed of trust in that case "expressly limit[ed] the collateral pledged as security for only those advances made prior to [the maturity date]." *Id.* at 419, 708 S.E.2d at 180. The borrower executed a new promissory note to extend the loan term, but he failed to sign an amended deed of trust to reflect the extended maturity date. *Id.* at 411, 708 S.E.2d at 176. The borrower drew on the line of credit after the maturity date and ultimately defaulted. *Id.* This Court held the deed of trust did not secure advances made after the maturity date provided in the instrument even

though the parties had modified the note. *Id.* at 419, 708 S.E.2d at 180-81.

¶ 35 We acknowledge that the maturity date in the 2004 Goforth Deed of Trust is not as clear as the explicit term limit for future advances contained in the deed of trust in *Hall*. But common sense leads us to apply our Court's reasoning in *Hall* to this case. We hold the 2004 Goforth Deed of Trust does not secure advances made beyond the instrument's date of maturity because evidence that the parties agreed to later advances cannot cure the instrument's expired maturity date.

¶ 36 Viewing the evidence in the light most favorable to Goforth Trust, we conclude that the 2004 Goforth Deed of Trust's maturity date limited the scope of loan advances it could secure. We therefore affirm the trial court's partial summary judgment order with respect to advances made after the maturity date.

B. Outstanding Issues

¶ 37 As of the maturity date provided in the 2004 Goforth Deed of Trust, Mr. Goforth and his estate had loaned $380,000 to Fox Den. Considering this principal amount, combined with interest and attorneys' fees and viewed in a light most favorable to Goforth Trust, we cannot conclude as a matter of law that the alleged secured debt—principal and interest owed for the amount loaned as of the instrument's stated maturity date—was entirely satisfied by the Fox Den bankruptcy settlement payment. That is a factual matter to be determined by the trial court. If the trial court determines that the secured debt is the same as or less than the

amount of the bankruptcy settlement, then the homeowners are entitled to summary judgment in this case. However, if the trial court finds that the secured debt exceeds the amount paid in the bankruptcy settlement, then the record reflects other disputed factual issues which will need to be resolved before summary judgment would be appropriate for either party. *See In re: Fox Den Dev., LLC*, 2016 WL 409786, at *8. We therefore reverse the order granting summary judgment and remand this matter to the trial court for further proceedings.

III. CONCLUSION

¶ 38 We affirm the trial court's partial summary judgment but modify it, as explained above, to conclude that the deed of trust secures only debt incurred before the deed's stated maturity date. We reverse the trial court's full summary judgment order and remand for further proceedings not inconsistent with this opinion.

AFFIRMED AND MODIFIED IN PART; REVERSED AND REMANDED IN PART.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).