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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-509

No. COA20-606

Filed 21 September 2021

Mecklenburg County, No. 17 CVS 8935

SLOK, LLC, Plaintiff,

v.

COURTSIDE CONDOMINIUM OWNERS ASSOCIATION, INC., Defendant.

Appeal by Plaintiff from order entered 13 February 2020 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2021.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and J. Alexander Heroy, for plaintiff-appellant.

Sellers, Ayers, Dortch & Lyons, P.A., by Michelle Massingale Dressler, for defendant-appellee.

MURPHY, Judge.

¶ 1 When a condominium association seeks a judicial sale as a remedy, which is a type of foreclosure authorized under N.C.G.S. § 47C-3-116 and N.C.G.S. § 1-339.1, a trial court has subject matter jurisdiction over a judicial sale under N.C.G.S. § 47C-3-116 and N.C.G.S. § 1-339.1. Here, in its pleading, the condominium association requested both a "judicial foreclosure" by an execution sale, a remedy that is disallowed under N.C.G.S. § 47C-3-116 and N.C.G.S. § 1-339.1, and alternatively a

judicial sale as a secondary remedy, providing the trial court subject matter jurisdiction over the judicial sale.

¶ 2 Further, when an appellate court voids a judicial foreclosure and remands to the trial court for further proceedings, the trial court errs in declaring on remand that the original judicial foreclosure was valid and enforceable. Here, the trial court erroneously declared on remand that the voided original judicial foreclosure was "valid and enforceable" due to valid and enforceable fines the condominium association levied against Plaintiff.

¶ 3 Additionally, a party is not entitled to attorney fees for defending a claim on appeal that the opposing party has abandoned. Here, while the trial court did not err in determining Plaintiff's Chapter 75 claim was frivolous and malicious, and in awarding attorney fees to the condominium association under Chapter 75, we cannot deduce the amount of attorney fees awarded to the condominium association for any time spent defending the Chapter 75 claim in the prior appeal after Plaintiff clearly abandoned the claim on appeal. Such attorney fees awarded for defending against an abandoned claim would be improper and not authorized by statute. We vacate the Chapter 75 attorney fees award in part and remand for determination of the proper Chapter 75 attorney fees amount, which excludes the Chapter 75 attorney fees accrued by the condominium association defending the merits of the matter after Plaintiff abandoned the Chapter 75 claim in the prior appeal.

¶ 4 Finally, an attorney fees award pursuant to N.C.G.S. §§ 47C-3-116 and 47C-4-117, which requires a prevailing party as to a motion for a judicial foreclosure, is erroneous when there is no prevailing party to the motion for judicial foreclosure. Here, the trial court erroneously awarded attorney fees and costs to the condominium association pursuant to N.C.G.S. §§ 47C-3-116 and 47C-4-117 as our opinion in the prior appeal voided the original judicial foreclosure, leaving no prevailing party to the original judicial foreclosure.

BACKGROUND

¶ 5 Plaintiff Slok, LLC brings its second appeal in this case. While facts from this case are set out in the original appeal, *Slok, LLC v. Courtside Condo. Owners Ass'n*, No. COA18-736, 265 N.C. App. 111, 826 S.E.2d 580, 2019 WL 1749031 (unpublished) ("*Slok I*"), *disc. rev. denied*, 372 N.C. 706, 830 S.E.2d 834 (2019), we include a recitation of "the facts and procedural history relevant to the issues currently before us." *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 348, 804 S.E.2d 599, 601 (2017).

¶ 6 Plaintiff purchased a condominium's single commercial unit ("the Property") in July 2014; the Property is located within Courtside Condominium ("the Condominium"), which is comprised of 106 residential units and the Property. *See Slok I*, 2019 WL 1749031 at *1. The Condominium is maintained and administered by Defendant Courtside Condominium Owners Association, Inc. ("the Association"). *See id.* The Property's prior owner and the Association entered into an amendment

to the Condominium's original Declaration ("the Declaration") allowing the Property to have its own trash room, with the Property's owner being assessed maintenance, repair, and operation costs. *See id.* at *1-2. When Plaintiff became delinquent in those costs, the Association commenced a foreclosure proceeding, which was dismissed due to Plaintiff's subsequent repayment of the outstanding assessments. *See id.* at *2. The Association also assessed fines against Plaintiff for violations of the Declaration's terms. *See id.*

¶ 7 Plaintiff prosecuted this action against the Association by filing an amended complaint on 7 August 2017, including the following claims: declaratory judgment that, *inter alia*, the amendment to the Declaration was void and Plaintiff could recover its fees paid to the Association; breach of contract; unjust enrichment; unfair trade practices pursuant to N.C.G.S. § 75-1.1; breach of the covenant of good faith and fair dealing; and rescission. In this complaint, Plaintiff alleged, *inter alia*, the Association was denying and impairing "Plaintiff's rights regarding participation on the [Association's] Board," was "conducting secret meetings and not alerting Plaintiff to the specific time and place of said meetings," and therefore had violated "Chapter 75 of the North Carolina General Statutes."

¶ 8 The Association filed an answer on 6 September 2017 and maintained it complied with the Declaration, Bylaws, and North Carolina General Statutes, and asserted the following counterclaims: judicial foreclosure on its claim of lien for fines

imposed for the Declaration violations; injunctive relief requiring Plaintiff to cure all violations; breach of contract for Plaintiff's failure to pay fines; attorney fees accrued in defending Plaintiff's frivolous and malicious Chapter 75 claim; and declaratory judgment the Association did not violate the Declaration, Bylaws, or North Carolina laws in these matters.

¶ 9 The trial court granted summary judgment on 16 January 2018 in favor of the Association on all claims ("Summary Judgment Order"), excluding the Association's claims for attorney fees, which were to be resolved at a later time. The Summary Judgment Order "authorized [the Association] to proceed with judicial foreclosure of the full amount of the fines levied against Plaintiff" if "Plaintiff [did] not make[] full payment to [the Association]" of the fines and "remove all personal property from the Commercial Trash Room within thirty days of the date of execution of [the Summary Judgment Order.]" Plaintiff timely appealed the Summary Judgment Order. When Plaintiff failed to pay the fines, a judicial foreclosure occurred via *Notice of Sale of Real Estate* on 9 March 2018 and a bid at sale on 3 April 2018. Plaintiff redeemed the Property on 13 April 2018, and the *Notice of Redemption* was filed 17 April 2018.

¶ 10 In *Slok I*, we affirmed the trial court's dismissal of Plaintiff's claims, but vacated the following two paragraphs in the Summary Judgment Order as a void conditional order:

> 11. The fine imposed against Plaintiff for storing Plaintiff's

> personal property in the Commercial Trash Room is reduced from $42,500 to $27,400 so long as Plaintiff does the following within thirty days of the execution of this Order: (1) makes full payment to [the Association] in the amount of $27,400; and (2) removes all personal property from the Commercial Trash Room
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> 12. In the event Plaintiff does not make full payment to [the Association] in the amount of $27,400; and . . . remove all personal property from the Commercial Trash Room [within thirty days of the execution of this Order], then [the Association] is authorized to proceed with judicial foreclosure of the full amount of the fines levied against Plaintiff.

Slok I, 2019 WL 1749031 at *7-8. Importantly, we stated:

> [P]aragraphs 11 and 12 of the [S]ummary [J]udgment [O]rder, which reduce the fines . . . and authorize a 'judicial foreclosure,' *are void* in that they are conditioned upon Plaintiff's failure to pay the Association and remove all personal property from the Commercial Trash Room within thirty days of the order's entry.

Id. at *8 (emphasis added).

¶ 11 While we affirmed the "portion of the trial court's [S]ummary [J]udgment [O]rder concluding that the fines imposed by the Association are valid and enforceable," we vacated the reduction of the fine and the authorization for judicial foreclosure, should Plaintiff not make full payment and remove personal property, and remanded to the trial court. *Id.* at *7-8.

¶ 12 Further, we characterized the Association's first counterclaim for Plaintiff's outstanding fines as follows:

> The Association asserted counterclaims against Plaintiff for the outstanding fines imposed for Plaintiff's storage of personal property in the Commercial Trash Room, as secured by the 31 August 2017 Claim of Lien. The Association's third counterclaim asserted breach of contract for Plaintiff's failure to pay the fines. Though titled "Judicial Foreclosure," the Association's first counterclaim primarily sought the ordering of an execution sale, pursuant to Section 1-302 and Article 29B of our General Statutes, upon the Association's Claim of Lien "in the amount of the fines actually accrued through the date Final Judgment is entered." In the alternative, the Association requested an order that the Commercial Unit be sold via judicial sale, pursuant to Article 29A of our General Statutes.

Id. at *6.

¶ 13 After our Supreme Court denied Plaintiff's 22 May 2019 petition for discretionary review on 20 August 2019, the Association's motion for attorney fees was heard 2 December 2019. *See Slok, LLC v. Courtside Condo. Owners Ass'n*, 372 N.C. 706, 830 S.E.2d 834 (2019). On 13 February 2020, the trial court entered the *Order on Remand and Granting Attorney Fees* ("the Attorney Fees Order"), which upheld the original judicial foreclosure as "valid and enforceable," and granted the Association's attorney fee request. Specifically, the trial court concluded the Association "was entitled to foreclosure on the Property based on the total amount of fines due and payable[,]" and decreed the Association's "foreclosure on the fines was valid and enforceable."

¶ 14 In response, Plaintiff moved for Rule 60(b) relief from the Attorney Fees Order

on 9 March 2020.[1] *See* N.C.G.S. § 1A-1, Rule 60(b) (2019). Plaintiff also appealed on 13 March 2020. On appeal, Plaintiff argues the trial court lacked subject matter jurisdiction to uphold the original judicial foreclosure, and alternatively that the trial court erred in declaring the original judicial foreclosure to be valid and enforceable because the sale was void in light of *Slok I*. Plaintiff also argues the trial court erred in awarding attorney fees under Chapter 75, specifically N.C.G.S. § 75-16.1, as well as costs and attorney fees under N.C.G.S. §§ 47C-3-116 and 47C-4-117, and further argues multiple findings of fact were not supported by competent evidence and the attorney fees award amount was unreasonable.[2]

ANALYSIS

A. Subject Matter Jurisdiction

¶ 15 "A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, 251 N.C. App. 528, 531, 796 S.E.2d 361, 365 (2017). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

When a court decides a matter without the court's having

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[1] As of the time of briefing, Plaintiff's Rule 60(b) motion is still pending. The content of this motion is rendered moot by our decision.

[2] Our resolution of this appeal does not require us to reach the issues regarding whether the findings of fact were supported by competent evidence or whether the attorney fees award amount was unreasonable.

> jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. . . . [When a party] seek[s] a type of foreclosure which is not allowed for by our foreclosure statutes[,] [t]he actions taken before the [trial] court . . . were done without subject matter jurisdiction . . . and are vacated.

Banks, 251 N.C. App. at 531, 536, 796 S.E.2d at 365, 368.

¶ 16 According to N.C.G.S. § 47C-3-116,

> [a] claim of lien securing a debt consisting solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association *may only be enforced by judicial foreclosure*, as provided in Article 29A of Chapter 1 of the General Statutes.

N.C.G.S. § 47C-3-116(h) (2019) (emphasis added); *see Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985) (noting judicial foreclosure "requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails"). Further, N.C.G.S. § 1-339.1 establishes "[a] judicial sale . . . is not . . . [a]n execution sale." N.C.G.S. § 1-339.1(a)(3) (2019). As *Slok I* deemed the Association's counterclaim as primarily seeking an execution sale, and alternatively seeking a judicial sale, we continue in our analysis under that conclusion. *See Slok I*, 2019 WL 1749031 at *6; *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) ("As a general rule, when an appellate court passes on questions and remands the case for

further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.").

¶ 17 We have noted:

> North Carolina statutes provide for two [exclusive] means by which a foreclosure proceeding may be brought against real property: (1) foreclosure by judicial sale pursuant to [N.C.G.S.] § 1-339.1 *et seq.*, or, (2) if expressly provided within the deed of trust or mortgage, by power of sale under [N.C.G.S.] § 45-21.1 *et seq.*

Banks, 251 N.C. App. at 534, 796 S.E.2d at 367. Where a party does "not seek a foreclosure pursuant to either" of those two methods and "fail[s] to invoke the trial court's subject matter jurisdiction over the relief sought by seeking a type of foreclosure which is not allowed for by our foreclosure statutes[,]" we vacate that portion of the trial court's order. *Id.* at 535, 536, 796 S.E.2d at 367, 368.

¶ 18 The Association sought a type of foreclosure, by seeking "judicial foreclosure" primarily through an execution sale, a remedy which is not available under N.C.G.S. § 47C-3-116 as it only allows foreclosure for fines owed via a judicial foreclosure. *See* N.C.G.S. § 47C-3-116(h) (2019) ("A claim of lien securing a debt consisting solely of fines imposed by the association . . . may only be enforced by judicial foreclosure, as

provided in Article 29A of Chapter 1 of the General Statutes."). As previously noted, an execution sale is not a judicial sale under N.C.G.S. § 1-339.1. N.C.G.S. § 1-339.1(a)(3) (2019). While Count One of the Association's counterclaim was entitled "Judicial Foreclosure - Fines," it specifically requested "the Property be sold by *execution* sale" and listed alternative requests in its prayers for relief–(1) an execution sale in accordance with N.C.G.S. § 1-302, N.C.G.S. § 1-309, and Article 29B, N.C.G.S. § 1-339.41 *et seq*; or (2) a judicial sale pursuant to Article 29A, N.C.G.S. § 1-339.1 *et seq*. (Emphasis added); *see Slok I*, 2019 WL 1749031 at *6. Only the alternative request by the Association was an available method for selling the Property. *See* N.C.G.S. § 47C-3-116(h) (2019); N.C.G.S. § 1-339.1(a)(3) (2019).

¶ 19 The Association characterizes *Banks* as distinguishable from the present case, and thus inapplicable, as the party in *Banks* did not request foreclosure under N.C.G.S. § 1-339.1 or Chapter 45 *at all*, while the Association "clearly requested foreclosure under the foreclosure statutes" here.[3]

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[3] Of note, the Association does not address the argument that N.C.G.S. § 47C-3-116(h) and N.C.G.S. § 1-339.1(a)(3), read together, *prohibit* execution sales arising from liens "securing a debt consisting solely of fines imposed by the [A]ssociation, . . . [which] may only be enforced by judicial foreclosure[.]" N.C.G.S. § 47C-3-116(h) (2019); *see* N.C.G.S. § 1-339.1(a)(3) (2019) ("A judicial sale is a sale of property made pursuant to an order of a judge or clerk . . . , but is not . . . [a]n execution sale[.]"). Contrary to the Association's attempt to distinguish *Banks*, the principle from *Banks* that a party can run afoul of the court's subject matter jurisdiction "by seeking a type of foreclosure which is not allowed for by our foreclosure statutes" brings the Association's counterclaim perilously close to failing to invoke the trial court's subject matter jurisdiction. *Banks*, 251 N.C. App. at 536, 796 S.E.2d at 368.

¶ 20 However, our focus in *Banks* was twofold in declaring the trial court lacked subject matter jurisdiction: (1) a party not only sought a foreclosure method not recognized in North Carolina in the absence of seeking an appropriate method, *but also* (2) a party "did *not* seek a foreclosure pursuant to . . . [N.C.G.S.] § 1-339.1." *Banks*, 251 N.C. App. at 535, 796 S.E.2d at 367 (emphasis added). Here, only one of the two issues from *Banks* existed. While the Association sought a foreclosure method not authorized by statute, it sought a judicial sale as a secondary remedy under N.C.G.S. § 1-339.1, and such a judicial sale is authorized under N.C.G.S. § 1-339.1 and N.C.G.S. § 47C-3-116. This proper secondary claim provided the trial court subject matter jurisdiction. The trial court was free to disregard the improper execution sale remedy sought by the Association and provide an appropriate remedy for foreclosure–a judicial sale. Plaintiff's arguments that the trial court lacked subject matter jurisdiction fail.[4]

While the Association sought a prohibited execution sale, it also sought the appropriate method, even if that method was a secondary request.

[4] We do not rule on the issues Plaintiff raises on appeal that were included for the first time in its pending Rule 60(b) motion. According to Plaintiff, "assuming *arguendo* such argument does not implicate subject matter jurisdiction, then [Plaintiff] respectfully asks that this Court invoke Appellate Rule 2 to address such argument to prevent manifest injustice." (Marks omitted). We decline to use Rule 2. On remand, Plaintiff may contend the Association otherwise "lacked standing to assert any foreclosure counterclaim relating to the challenged fines . . . [for] fail[ure] to show that any lien for fines survived [Plaintiff's] satisfaction of the 2016 claim of lien," although we note Plaintiff does not clearly show how the fines assessed for various violations, which were in addition to the assessments, constituted assessments, nor how such an argument relates to standing. *See Slok I*, 2019 WL 1749031 at *2.

B. Vacated Portion of the Summary Judgment Order

¶ 21 We next analyze the Attorney Fees Order regarding the trial court's application of our opinion in *Slok I* to the judicial foreclosure on the Property. We have held:

> This Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*. On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court. It is well-established that in discerning a mandate's intent, the plain language of the mandate controls.

State v. Hardy, 250 N.C. App. 225, 232, 792 S.E.2d 564, 568-69 (2016).

¶ 22 Plaintiff argues we should vacate the portion of the Attorney Fees Order that upheld "the outcome of the challenged sale"–namely, the original judicial foreclosure authorized in the Summary Judgment Order, which was executed subsequent to the Summary Judgment Order and prior to issuance of our opinion in *Slok I*–and "instruct the trial court on remand to order the Association to provide restitution to [Plaintiff] in the amount [Plaintiff] paid to redeem the [the Property] from the void sale."

1. Voided Judicial Sale

¶ 23 In turning to the merits of this issue, we note *Slok I* affirmed the "portion of the trial court's [S]ummary [J]udgment [O]rder concluding that the fines imposed by

the Association are valid and enforceable." *Slok I*, 2019 WL 1749031 at *7. However, we declared "paragraphs 11 and 12 of the [S]ummary [J]udgment [O]rder . . . *are void* in that they are conditioned upon Plaintiff's failure to pay the Association and remove all personal property from the Commercial Trash Room within thirty days of the order's entry." *Id.* at *8 (emphasis added). Even if we were to read that language as potentially only voiding the conditional judgment language, and not expressly voiding the judicial foreclosure itself, no other portion of the Summary Judgment Order granted authority to the Association for a judicial foreclosure. While paragraph 10 of the Summary Judgment Order declares "[t]he fines imposed by [the Association] against Plaintiff are valid and enforceable[,]" the authorization for a judicial foreclosure only appears in paragraph 12–"[i]n the event Plaintiff does not make[] full payment to [the Association] . . . and [] remove all personal property . . . [the Association] is authorized to proceed with judicial foreclosure of the full amount of the fines levied against Plaintiff."

¶ 24 Our opinion in *Slok I* voided the judicial foreclosure. *See id.* We next examine whether the trial court had the authority to declare that the original judicial foreclosure was "valid and enforceable" and that the Association had the authority to foreclose where we had voided the only provisions permitting judicial foreclosure to occur.

¶ 25 "As we have long held, a void judgment has no legal effect[.]" *Boseman v.*

Jarrell, 364 N.C. 537, 547, 704 S.E.2d 494, 501 (2010). "'A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.'" *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)).

¶ 26 We voided the original judicial foreclosure, and any subsequent proceedings based on that original judicial foreclosure are also void. "The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid." *Boseman*, 364 N.C. at 547, 704 S.E.2d at 501. "A void judgment is a [legal] nullity, and no rights can be based thereon; it can be disregarded, or set aside on motion, or the court may of its own motion set it aside, or it may be attacked collaterally." *Reid v. Bristol*, 241 N.C. 699, 702, 86 S.E.2d 417, 419 (1955).

¶ 27 According to the trial court's new order on remand, "[the Association] *was* entitled to foreclose," and the trial court decreed that "[the Association's] foreclosure on the fines *was* valid and enforceable." (Emphases added). This declaration by the trial court was in error as we voided the original judicial foreclosure, and it had no effect. No proceedings or rights could be based upon it. Contrary to the trial court's declaration that the voided judicial foreclosure was appropriate and valid, the remedy available to the trial court was to order a new judicial foreclosure pursuant to N.C.G.S. § 47C-3-116.

¶ 28 As a result of the conditional judgment, we voided the judicial foreclosure on the Property in *Slok I*. *See Slok I*, 2019 WL 1749031 at *8. In the trial court's Attorney Fees Order, it approvingly referred to the judicial foreclosure in the past tense, which could only be the foreclosure that *Slok I* voided. Further, the Attorney Fees Order did not give authorization for a new judicial foreclosure. Without the court's authorization, no foreclosure due to unpaid fines can occur. *See U.S. Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 727, 800 S.E.2d 412, 416 (2017) (emphasis added) ("A judicial sale is a sale of property made *pursuant to an order of the court*[.]"); *Price v. Calder*, 240 N.C. App. 190, 193, 770 S.E.2d 752, 754 ("[A] judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the [S]uperior or [D]istrict [C]ourt[.]"), *disc. rev. denied*, 368 N.C. 284, 775 S.E.2d 870 (2015); N.C.G.S. § 1-339.1 (2019); N.C.G.S. § 47C-3-116 (2019). The Association could not obtain a foreclosure on the Property without a valid order, which it has yet to obtain. The voided first judicial foreclosure did not suffice, regardless of the trial court's declarations of its validity in the Attorney Fees Order.

¶ 29 Accordingly, we reverse the trial court's declaration in the Attorney Fees Order that the original judicial foreclosure was "valid and enforceable," and we remand for further proceedings regarding the appropriate disposition of the Association's fines regarding the Property, which may include the ordering of a new judicial foreclosure on the Property.

2. Restitution

¶ 30 On remand, the trial court must unwind the result of the voided judicial foreclosure–declare the original judicial foreclosure void in accordance with *Slok I* and this opinion; determine what amount, if any, is still owed to the Association for the Property; and, if appropriate, order a new judicial foreclosure on the Property. Further, the Association owes restitution to Plaintiff for the redemption amount paid as a result of the voided original judicial foreclosure, and the trial court must effectuate whatever restitution is appropriate in the unwinding of the voided judicial foreclosure. *See generally In re George*, 377 N.C. 129, 2021-NCSC-35, ¶ 32 (ordering remand to the trial court "for consideration of the [appropriateness of restitution] issue"); *see also* N.C.G.S. § 1-297 (2019) ("When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.").

C. Attorney Fees and Costs

1. Chapter 75 Attorney Fees

¶ 31 The trial court awarded attorney fees to the Association under N.C.G.S. § 75-16.1. According to N.C.G.S. § 75-16.1:

> In any suit instituted by a person who alleges that the defendant violated [N.C.G.S. §] 75-1.1, the presiding judge may, in his discretion, allow a *reasonable* attorney fee to the duly licensed attorney *representing the prevailing party*, such attorney fee to be taxed as a part of the court

> costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The *party charged with the violation has willfully engaged* in the act or practice, and there was an *unwarranted refusal* by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The *party instituting the action knew*, or *should have known*, the action was *frivolous and malicious*.

N.C.G.S. § 75-16.1 (2019) (emphases added).

¶ 32 If appropriate, "[t]he decision whether or not to award attorney fees under [N.C.G.S. §] 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court and we review such awards for abuse of discretion." *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), *aff'd per curiam*, 361 N.C. 347, 643 S.E.2d 586 (2007). "An award of attorney's fees pursuant to [N.C.G.S.] § 75-16.1 . . . may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Birmingham v. H&H Home Consultants and Designs, Inc.*, 189 N.C. App. 435, 442, 658 S.E.2d 513, 518 (2008). However, when a party is not entitled by statute to an award of attorney fees, or a portion thereof, the award is an error of law reviewed de novo. *See generally Sarno v. Sarno*, 255 N.C. App. 543, 548, 804 S.E.2d 819, 824 (2017); *E. Brooks Wilkins Family Med., P.A. v. WakeMed*, 244 N.C. App. 567, 579-80, 784 S.E.2d 178, 186-87 (2016), *disc. rev. denied*, 369 N.C. 524, 797 S.E.2d 18 (2017).

¶ 33 Here, the Summary Judgment Order dismissed all of Plaintiff's claims in its *First Amended Complaint*, including its Chapter 75 claim, with prejudice. The issue of attorney fees was not addressed in the Summary Judgment Order, other than to state "this Order is without prejudice to [the Association's] motion for attorney fees under Section 7.18(b) of the Declaration, [N.C.G.S. § 47C-4-116], [N.C.G.S. § 47C-4-117], and [N.C.G.S. § 75-16.1], which motion shall be brought on at a later date." After the Summary Judgment Order, Plaintiff did not present any argument regarding its Chapter 75 claim in its appeal in *Slok I*, and, in this appeal, recognized it abandoned the issue on appeal in *Slok I*. However, the Association included argument regarding the Chapter 75 issue in its appellee brief for *Slok I*, beyond abandonment, despite Plaintiff's *clear* abandonment of the issue.[5] *See* N.C. R. App. P. 28(a) (2021) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see generally McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 196, 745 S.E.2d 343, 348 (2013).

¶ 34 The trial court addressed Chapter 75 attorney fees in its Attorney Fees Order, which included the following:

> 37. Without any basis in law or fact, Plaintiff also brought a claim under the Unfair and Deceptive Trade Practices

[5] Plaintiff's brief in *Slok I* did not contain argument regarding "Unfair and Deceptive Acts or Practices," or "Chapter 75," and only mentioned the phrases in a recitation of the causes of action contained in the Complaint, First Amended Complaint, Answer, and Counterclaims.

> Act. Plaintiff did not present any evidence in opposition to the [Association's] motion for summary judgment.
>
> . . . .
>
> 40. [The Association] brought a counterclaim for attorney's fees under [N.C.G.S. § 75-16.1], which permits an award of attorney's fees to the opposing party if the party who instituted the action knew or should have known that the actions were frivolous or malicious.
>
> 41. Plaintiff knew or should have known that her claims under Chapter 75 were frivolous and malicious.

In the Attorney Fees Order, the trial court concluded "[the Association] is . . . entitled to recover its attorney fees under N.C.G.S. [§] 75-16.1, as Plaintiff knew or should have known the claims under Chapter 75 were frivolous or malicious."[6] Accordingly, the trial court awarded the Association *all* attorney fees, incurred at the trial court and appellate court, which were sought under Chapter 75, as well as N.C.G.S. §§ 47C-3-116 and 47C-4-117.

¶ 35 The trial court did not err in finding the Association may be entitled to attorney

[6] Any error in the trial court's use of "frivolous or malicious" was not prejudicial, as it also used "frivolous and malicious" to describe Plaintiff's Chapter 75 claim. We find the trial court's use of both "frivolous or malicious" and "frivolous and malicious" shows any error would not have affected the outcome of this action–the trial court's finding and conclusion Plaintiff's Chapter 75 claim was frivolous and malicious under N.C.G.S. § 75-16.1. "[T]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that *will likely affect the outcome of an action*." *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (emphasis added) (finding no prejudicial error in an erroneous finding of fact).

fees under Chapter 75. The following facts, determined in analyzing whether summary judgment was appropriate, were conclusively established by *Slok I*: "Plaintiff submitted no materials to rebut" the Association on Plaintiff receiving notice of all board meetings; Plaintiff's sole member "admitted in her deposition that she had been permitted to sit on the Board since she provided the Association with the requisite Corporate Resolution"; and the Record did not support Plaintiff's claim that the Association denied access to common areas. *Slok I*, 2019 WL 1749031 at *6; *see also Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) ("According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal."). Based on these facts, the trial court did not err in determining that Plaintiff's Chapter 75 action was frivolous and malicious, entitling the Association to Chapter 75 attorney fees.

¶ 36 However, we are unable to determine whether the trial court erred in the *amount* of Chapter 75 attorney fees it could and did award. In the Attorney Fees Order, the trial court did not itemize how many hours the Association's attorney spent regarding the Chapter 75 claim on appeal after Plaintiff abandoned the Chapter 75 issue. Rather, the Attorney Fees Order included the number of hours "spent on this matter," including on appeal, and a total attorney fee of $94,166.58.

¶ 37 Once the Chapter 75 issue was abandoned on appeal by Plaintiff's brief on the original appeal, the Association was not entitled to attorney fees under Chapter 75 in the *Slok I* appellate proceedings.[7] *See* N.C.G.S. § 75-16.1 (2019) (providing the prevailing party in a Chapter 75 claim may receive a "reasonable attorney fee"); *see also Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 279, 775 S.E.2d 316, 326 (2015) (emphasis added) ("[U]pon a finding that appellees were entitled to attorney's fees in obtaining their judgment under [N.C.G.S.] § 75-16.1, any effort by appellees *to protect that judgment* should likewise entitle them to attorney's fees."). Upon abandonment of the Chapter 75 issue, the reasoning of *Faucette* no longer applied, as the Association did not have to protect the judgment on the Chapter 75 claim once that part of the appeal was abandoned. While the Association was not entitled to attorney fees for responding to the merits of the abandoned Chapter 75 issue in the *Slok I* appellate proceedings, it was entitled to attorney fees for time spent on the Chapter 75 issue during *Slok I* for the following: compiling the Record on Appeal; research and writing regarding the Chapter 75 issue before Plaintiff's brief; research regarding the impact of abandonment; and the response to Plaintiff's abandonment

[7] We do not imply that the Association's attorney's inclusion of argument against Plaintiff's Chapter 75 claim in the appellate brief in *Slok I*, despite Plaintiff's abandonment of the claim, was poor lawyering; rather, our holding is limited to the Association's lack of entitlement to attorney fees for time spent on the Chapter 75 argument on appeal in *Slok I* after Plaintiff abandoned the claim.

of the issue. On remand, the trial court must itemize these areas to ensure the Association does not receive attorney fees for any time spent responding to the merits of the abandoned Chapter 75 issue, as it spent multiple pages in its *Slok I* appellee brief engaging in such arguments.

¶ 38 The Attorney Fees Order did not itemize how many hours the Association's attorney spent litigating the then abandoned Chapter 75 issue in the *Slok I* appeal. However, the Attorney Fees Order clearly contemplates the Association's attorney's "Appellate Brief" and work "defend[ing] the Association's position in the Court of Appeals," as well as the increase in the attorney fee amount "after the appeals[.]" From the Record, we cannot deduce the amount of attorney fees awarded to the Association for time spent on appeal defending the abandoned Chapter 75 claim, but the Record does reflect the Association received some portion of the Chapter 75 attorney fees award for time spent defending against the Chapter 75 claim after it was abandoned. Such an attorney fee award for defending against an abandoned claim would be improper and not authorized by statute.

¶ 39 Accordingly, because we cannot determine to what extent the trial court allowed attorney fees not authorized by Chapter 75, we vacate the trial court's award of attorney fees under N.C.G.S. § 75-16.1 and remand for further proceedings, consistent with this opinion, regarding the amount of Chapter 75 attorney fees to which the Association is entitled. *See Cobb v. Cobb*, 79 N.C. App. 592, 597-98, 339

S.E.2d 825, 829 (1986) (citing *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)) (holding where the record contains insufficient findings to determine the appropriate amount of attorney fees, we vacate the award of attorney fees and remand for further findings). On remand, we instruct the trial court to itemize the time spent by the Association's attorney in two separate categories: (1) time spent on the Chapter 75 claim; and (2) time spent on all other claims. Such itemization of the time spent on the Chapter 75 claim must show no attorney fees are awarded to the Association for time spent defending the merits of the claim during the *Slok I* appeal after Plaintiff had already clearly abandoned the issue.

2. N.C.G.S. §§ 47C-3-116 and 47C-4-117 Attorney Fees and Costs

¶ 40 The Attorney Fees Order also awarded attorney fees and costs pursuant to N.C.G.S. §§ 47C-3-116 and 47C-4-117, which provide for attorney fees to the prevailing party in an action brought under these sections. Specifically, N.C.G.S. § 47C-3-116 provides the following regarding attorney fees, as well as costs:

> [(f)(12)] . . . . Any judgment, decree, or order in any action brought under this section *shall include costs and reasonable attorneys' fees for the prevailing party*.
>
> . . . .
>
> (g) . . . . Any judgment, decree, or order in any judicial foreclosure or civil action relating to the collection of assessments *shall include an award of costs and reasonable attorneys' fees for the prevailing party*, which shall not be subject to the limitation provided in

> subdivision (f)(12) of this section.
>
> (h) A claim of lien securing a debt consisting solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association may only be enforced by judicial foreclosure, as provided in Article 29A of Chapter 1 of the General Statutes. In addition, an association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any unit owner unless the fee is expressly allowed in the declaration, and any claim of lien securing a debt consisting solely of these fees may only be enforced by judicial foreclosure, as provided in Article 29A of Chapter 1 of the General Statutes.

N.C.G.S. § 47C-3-116(f)(12), (g), (h) (2019) (emphases added).

¶ 41 N.C.G.S. § 47C-4-117 provides the following regarding attorney fees:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party.

N.C.G.S. § 47C-4-117 (2019).

¶ 42 In light of our holding in *Slok I* that the judicial foreclosure was void, which made all rights and proceedings based on the judicial foreclosure void, there is not a prevailing party at this point in litigation as pertains to the judicial foreclosure contemplated in N.C.G.S. § 47C-3-116, and the issue of attorney fees under N.C.G.S.

§§ 47C-3-116 and 47C-4-117 is not yet ripe.[8] *See Slok I*, 2019 WL 1749031 at *8; *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 515, 836 S.E.2d 682, 692 (2019) (quoting N.C.G.S. § 47C-3-116(g) (2019)) ("[N.C.G.S. § 47C-3-116(g)] provides that any judgment in any 'civil action relating to the collection of assessments shall' include an award of costs and reasonable attorneys' fees 'for the prevailing party.' This statute's use of the word 'shall' provides no element of discretion of whether reasonable fees will be awarded."). In light of the voided judicial foreclosure as a result of *Slok I*, the Association was not a prevailing party regarding the fines levied against Plaintiff and the resulting judicial foreclosure. *See Slok I*, 2019 WL 1749031 at *8. The Attorney Fees Order did not order a new judicial foreclosure, which would have again granted the Association the status of "prevailing party." *See* N.C.G.S. § 47C-3-116 (2019). Unless the Association obtains a judicial foreclosure for fines

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[8] Although unpublished, we are instructed by our recent opinion in *Martin v. Landfall Council of Ass'ns*. *See Martin v. Landfall Council of Ass'ns*, No. COA19-883, 271 N.C. App. 179, 840 S.E.2d 542, 2020 WL 1921740, *12 (2020) (unpublished) (emphasis added) (marks omitted) ("Our reversal of the judgment on the pleadings granting [the defendant's] counterclaims for recovery of the past-due amount and other damages and for judicial foreclosure is pivotal here. Given this reversal, although [the defendant] prevailed on the theories of liability raised in [its] request for a declaratory judgment and in its request for injunctive relief, [the defendant] *is not a prevailing party* with respect to any judgment, decree or order in any judicial foreclosure or civil action relating to the collection of assessment. We therefore must reverse and remand the award of attorneys' fees. However, if [the defendant] prevails on any part of its claim for damages on remand, then an award of attorneys' fees under [N.C.G.S. §] 47F-3-116(g) would be proper."). N.C.G.S. § 47F-3-116, which was at issue in *Martin*, pertains to planned communities and closely mirrors the language of N.C.G.S. § 47C-3-116, exchanging "lot" for "unit." *See* N.C.G.S. § 47F-3-116 (2019). Similar to the defendant in *Martin*, the Association is not yet a prevailing party here.

levied against Plaintiff, it is not a prevailing party and is not entitled to attorney fees under N.C.G.S. §§ 47C-3-116 and 47C-4-117, or costs under N.C.G.S. § 47C-3-116.

¶ 43 We reverse the trial court's award of attorney fees under N.C.G.S. §§ 47C-3-116 and 47C-4-117, as well as costs under N.C.G.S. § 47C-3-116, and remand for further proceedings not inconsistent with this opinion.

CONCLUSION

¶ 44 Although the Association requested "judicial foreclosure" primarily through an execution sale that is not an available remedy under N.C.G.S. § 47C-3-116 and N.C.G.S. § 1-339.1, it also sought a judicial sale as a secondary remedy, which is a type of foreclosure authorized under N.C.G.S. § 47C-3-116 and N.C.G.S. § 1-339.1. The trial court had subject matter jurisdiction over this action.

¶ 45 In *Slok I*, we voided the portion of the Summary Judgment Order that granted a judicial foreclosure on the Property. The Attorney Fees Order erroneously declared that the original judicial foreclosure was "valid and enforceable," as a result of the valid and enforceable fines regarding the Property. We reverse the Attorney Fees Order in part as to this erroneous declaration, and we remand for further proceedings regarding the appropriate disposition of the Association's fines regarding the Property, not excluding the ordering of a new judicial foreclosure on the Property.

¶ 46 The trial court did not err in determining Plaintiff brought a frivolous and malicious Chapter 75 claim, entitling the Association to attorney fees. However, the

Association is not entitled to attorney fees for defending the merits of the Chapter 75 claim on appeal in *Slok I* after Plaintiff clearly had abandoned the claim. We cannot deduce the amount of attorney fees awarded to the Association for time spent during the *Slok I* appeal defending the Chapter 75 claim after Plaintiff abandoned the claim, but the Record does reflect the Association may have received some portion of the Chapter 75 attorney fees award for time spent defending against the Chapter 75 claim after it was abandoned. Such an attorney fee award for defending against an abandoned claim was improper. We vacate the Attorney Fees Award in part as to the trial court's award of attorney fees under N.C.G.S. § 75-16.1 and remand for further proceedings regarding the amount of Chapter 75 attorney fees to which the Association is entitled. An order on remand regarding attorney fees must itemize the time spent by the Association's attorney in two separate categories: (1) time spent on the Chapter 75 claim; and (2) time spent on all other claims. Specifically, the order must itemize the time spent by the Association's attorney on the Chapter 75 claim to show no attorney fees are awarded to the Association for time spent defending the merits of the claim after Plaintiff had already clearly abandoned it on appeal in *Slok I*.

¶ 47 The Attorney Fees Order also erroneously awarded attorney fees to the Association pursuant to N.C.G.S. §§ 47C-3-116 and 47C-4-117, as well as costs pursuant to N.C.G.S. § 47C-3-116, which require a prevailing party as to the judicial

foreclosure at issue. After *Slok I* voided the original judicial foreclosure, the Association was no longer a prevailing party as to the judicial foreclosure at issue. Accordingly, the attorney fees awarded to the Association pursuant to N.C.G.S. §§ 47C-3-116 and 47C-4-117, as well as the costs awarded pursuant to N.C.G.S. § 47C-3-116, are reversed and remanded for further proceedings.

REVERSED AND REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and CARPENTER concur.

Report per Rule 30(e).