IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-69

No. COA 20-728

Filed 1 February 2022

Johnston County, No. 19 SP 499

IN THE MATTER OF THE FORECLOSUE OF A DEED OF TRUST EXECUTED BY NOORULLAH NOORI TO WILLIAM J. BARHAM, TRUSTEE FOR NABIL ALGAFNI 01-14-2017 AND RECORDED 01-19-2017 AT BOOK 4897, PAGE 938, JOHNSTON COUNTY REGISTRY

SEE APPOINTMENT OF SUBSTITUTE TRUSTEE AT BOOK 5414, PAGE 539, JOHNSTON COUNTY REGISTRY

Appeal by Debtor from order entered 27 March 2020 by Judge Vince Rozier in Wake County Superior Court. Heard in the Court of Appeals 22 September 2021.

Noorullah Noori, pro se.

Woodruff and Fortner, by Gordon C. Woodruff, for the Appellee.

DILLON, Judge.

¶ 1 The issue in this case concerns whether the debtor in a foreclosure action should have been allowed to present evidence at a foreclosure hearing that he did not sign a certain deed.

I. Background

¶ 2 In 2017, Noorullah Noori ("Debtor") and his business partner, Nabil Algafni

("Lender"), purchased certain real property as tenants in common. Lender provided substantially all of the consideration for the purchase. Debtor agreed to pay Lender money in the future to cover his share of the purchase price. To that end, Debtor signed a promissory note and a deed of trust, securing the note with his tenant in common interest in the property. A deed of trust was recorded on 19 January 2017.

¶ 3 Debtor never made a payment. Accordingly, on 23 August 2019 (a month after the note was due), Lender sent Debtor a demand letter for payment, threatening to foreclose on Debtor's interest in the property.

¶ 4 On 29 August 2019, the trustee under the recorded deed of trust filed a "Notice of Hearing on the Foreclosure of Deed of Trust." Debtor was served with the Notice. After a hearing on the matter, the clerk of court found all the requirements to allow the foreclosure to proceed were met. The clerk entered an order authorizing the sale of Debtor's interest.

¶ 5 Debtor appealed the clerk's order to the superior court. At that hearing, Debtor did not refute the existence of his indebtedness, but he attempted to introduce evidence showing that the deed of trust he executed was different from the deed of trust that was recorded. Specifically, he claimed that when a draft deed of trust was presented to him, he made handwritten changes on some of the pages prior to executing it; however, the deed of trust which was recorded did not contain his changes.

¶ 6 The trial court disallowed much of Debtor's testimony and refused to admit the document he claimed to be the actual deed of trust he signed. The court based its decision on its conclusion that Debtor was trying to establish an *equitable defense*, being fraud, a defense which may not be heard in a Chapter 45-21.16 proceeding.

¶ 7 The superior court issued a formal order upholding the clerk's order. Debtor timely appealed that decision to our Court.

II. Analysis

¶ 8 Debtor's main contention is that the superior court erred in not allowing him to introduce the deed of trust he claimed he signed (which contained his handwritten changes) to refute the validity of the deed of trust (without his changes) that was recorded and was the instrument being foreclosed upon.

¶ 9 It may be that Debtor's defense is legal in nature. *See Furst & Thomas v. Merritt*, 190 N.C. 397, 401, 130 S.E. 40, 43 (1925) (stating that fraud in the factum is a *legal* defense and arises "where a grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it"). But Debtor did not include as part of the record on appeal a copy of what he purports to be the actual deed of trust. Indeed, our Rules of Appellate Procedure require that the record include "so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal[.]" N.C. R. App. P. Rule 9(a)(1)e. And our Supreme Court has held that it is the duty of the *appellant* to ensure that all documents and exhibits necessary for

an appellate court to consider his arguments are part of the record or exhibits. *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006).

¶ 10 Debtor did attach as an appendix to his appellate brief an incomplete copy of the deed of trust he purports to have signed. In his response brief, Lender pointed out that Debtor's attempt to introduce the document for our consideration in this manner violates our Rules. Debtor has never sought to amend the record in accordance with our Rules to include the document in the record. *See* N.C. R. App. P. Rule 9(b)(5). Accordingly, it is proper for us not to consider the document attached to Debtor's brief, as it is not part of the record on appeal. *See, e.g., Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 551, 577 S.E.2d 154, 156 (2003) (striking appellant's appendix from the Court's consideration where the documents "were neither agreed on by the parties to be part of the record, nor submitted by the [appellant] to this Court pursuant to a motion to amend the record"). And Debtor has not asked our Court to invoke Rule 2 of our Appellate Rules, failing to argue how our consideration of his appendix—a document, like the recorded deed of trust, which contains language allowing for the foreclosure of Debtor's tenant in common interest—is necessary "[t]o prevent manifest injustice to [him]." N.C. R. App. P. Rule 2.

¶ 11 As we are unable to evaluate the arguments of Debtor from the record, we dismiss Debtor's appeal.

DISMISSED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).