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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-117

No. COA21-166

Filed 15 February 2022

Durham County, No. 20 CVS 002932

TAMMY UTLEY, a/k/a TAMMY MATTHEWS, Plaintiff,

v.

SWANN'S MILL HOMEOWNERS ASSOCIATION, FROSTY PROPERTY, LLC, and
CARA B. WILLIAMS, in her role as substitute trustee, Defendants.

Appeal by Plaintiff from order entered 12 November 2020 by Judge Michael
O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 16
November 2021.

J.C. White Law Group PLLC, by James C. White, for Plaintiff-Appellant.

*Adams, Howell, Sizemore & Adams, P.A., by Ryan J. Adams, for Defendant
Appellee Swann's Mill Homeowners Association.*

David J. Martin for Defendant-Appellee Frosty Property, LLC.

JACKSON, Judge.

¶ 1

Plaintiff Tammy Utley appeals from an order granting Defendant Frosty
Property, LLC's ("Defendant Frosty") Motion to Dismiss. After careful review, we
affirm.

I. Factual and Procedural Background

¶ 2

Plaintiff owned a home in Durham, North Carolina, and was required to pay regular dues to Defendant Swann’s Mill Homeowners Association (“Defendant Association”). On 28 December 2018, Defendant Association filed a Claim of Lien against Plaintiff’s home for unpaid dues. On 19 February 2019, Defendant Association filed a Notice of Foreclosure Hearing, seeking to foreclose on the Claim of Lien. On 20 March 2019, the Durham County Clerk of Court entered an order authorizing the sale of Plaintiff’s home. After several delays, the foreclosure sale took place on 18 March 2020. Defendant Association was the highest bidder at the sale with a bid of \$3,152.35. That same day, Defendant Frosty submitted an upset bid in the amount of \$3,902.35.

¶ 3

In response to the COVID-19 pandemic, on 19 March 2020, Chief Justice Cheri Beasley issued an order stating that “all pleadings, motions, notices, and other documents and papers that were or are due to be filed . . . on or after 16 March 2020 . . . shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020.” On 13 April 2020, Chief Justice Beasley issued an order stating that “all pleadings, motions, notices, and other documents and papers that were or are due to be filed . . . on or after 16 March 2020 . . . shall be deemed to be timely filed if they are filed before the close of business on 1 June 2020.” On 21 May 2020, Chief Justice Beasley issued an order reiterating that the time for filings remained

extended to 1 June 2020 and clarified that “[a]ll periods of limitation that were set to expire between 16 March 2020 and 31 July 2020, inclusive of those dates, are hereby extended until the close of business on 31 July 2020.” Further, a 2 April 2020 Emergency Directive issued by Chief Justice Beasley stipulated that “[b]eginning 1 June 2020, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court shall be deemed timely filed if received within five (5) business days of the date the filing is due.”

¶ 4

On 2 July 2020, Plaintiff contacted Defendant Cara B. Williams, the substitute trustee, about submitting an upset bid on her home. Defendant Williams advised Plaintiff that the sale to Defendant Frosty had fixed and that she could not submit an upset bid. On 6 August 2020, Plaintiff attempted to submit an upset bid in the amount of \$4,652.35 via the U.S. Postal Service. The Durham County Clerk of Court ultimately declined to accept the bid.

¶ 5

Plaintiff brought this action on 7 August 2020 requesting an order declaring her the highest bidder and ordering the Clerk of Court to accept the bid she mailed on 6 August 2020. Defendant Frosty moved to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) on 29 September 2020. The Motion to Dismiss came on for a hearing before the Honorable Michael O’Foghludha on 10 November 2020. The trial court granted the Motion, entering an order dismissing Plaintiff’s Complaint with prejudice on 19 November 2020.

¶ 6 Plaintiff entered timely notice of appeal on 11 December 2020.

II. Analysis

¶ 7 Plaintiff raises three arguments on appeal: (1) Defendant Frosty lacked standing to bring a Motion to Dismiss Plaintiff's claim against Defendant Association; (2) the trial court should have converted Defendant Frosty's Motion to Dismiss into a motion for summary judgment because Defendant Frosty's Motion contained matters outside the pleadings; and (3) Plaintiff had a right to place an upset bid pursuant to Chief Justice Beasley's COVID-19-related orders.

A. Standing

¶ 8 Plaintiff argues that because she only seeks relief from Defendant Williams, Defendant Frosty as a third-party bidder lacked standing to move to dismiss Plaintiff's Complaint. We disagree.

¶ 9 "Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001).

The rationale of the standing rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (cleaned up). “Standing is a question of law which this Court reviews *de novo*.” *Chávez v. Wadlington*, 261 N.C. App. 541, 544, 821 S.E.2d 289, 292 (2018).

¶ 10 In a foreclosure sale, an upset bid must be filed with the clerk of superior court by close of business on the tenth day after the sale or the last upset bid was filed. N.C. Gen. Stat. § 45-21.27(a) (2021). “When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.” *Id.* The highest bidder thereafter acquires contractual rights that require the trustee to deliver “the deed upon tender of the purchase price[.]” *Sprouse v. N. River. Ins. Co.*, 81 N.C. App. 311, 316, 344 S.E.2d 555, 559 (1986). Notably, if a homeowner is able to reinstate their loan prior to the ten-day period closing and the foreclosure sale is subsequently set aside, then a third-party highest bidder would not have standing to force the forfeiture. *In re Menendez*, 259 N.C. App. 460, 464-65, 813 S.E.2d 680, 684-85 (2018).

¶ 11 Here, Defendant Frosty submitted an upset bid on 18 March 2020. Ordinarily, the ten-day window for filing additional upset bids would have closed on 30 March 2020, as 28 March 2020 was a Saturday. Chief Justice Beasley’s Orders, however, extended the deadline for filing upset bids. Even if we accept Plaintiff’s argument that the upset bid period was extended to 7 August 2020 for bids to be received by mail, no further upset bids were timely filed between 18 March 2020 and 7 August

2020, as explained below. Accordingly, Defendant Frosty's contractual rights as the highest bidder became fixed when the bidding period closed and as a named party in Plaintiff's complaint with a sufficient stake in the outcome of the controversy, Defendant Frosty had standing to bring its Motion to Dismiss.

B. Matters Outside the Pleadings

¶ 12 Plaintiff next argues that Defendant Frosty included multiple items outside of the record in its Motion to Dismiss and therefore the trial court should have treated the Motion to Dismiss as a motion for summary judgment. We disagree.

If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen Stat. § 1A-1, Rule 12(b) (2021). However, “the trial court [is] not required to convert a motion to dismiss into one for summary judgment simply because additional documents were submitted[.]” *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 252, 552 S.E.2d 186, 189 (2001). “Requests, explanations, and arguments of counsel relating to a motion to dismiss are not considered matters outside the pleadings. Reviewing courts have looked to cues in the trial court’s order to determine whether it considered matters outside the pleadings.” *Charlotte Motor*

Speedway, Inc. v. Tindall Corp., 195 N.C. App. 296, 300, 672 S.E.2d 691, 693 (2009) (internal citation omitted).

¶ 13 Defendant Frosty attached to its Motion to Dismiss the 2 April 2020 Executive Order from Chief Justice Beasley listing the Emergency Directives made in response to COVID-19 as well as a list of foreclosure sales that occurred in North Carolina between 13 March 2020 and 10 April 2020. During the hearing, Plaintiff's counsel stated:

If [Defendant Frosty] does have standing, I think there's also an issue with the filed motion, which your Honor can either consider or not, but the filed motion incorporates matters outside the pleadings. So to the extent that the Court is going to consider Frosty Property's file pleading, certainly not [counsel for Defendant Frosty's] argument, but the filed motion, then we would ask that we be allowed to present actual evidence. If the Court is not going to consider the filed motion but simply consider the argument, I don't know that we have an issue there.

In its Order, the trial court stated: "THE COURT, having considered the Motions, and the arguments of counsel at the hearing, CONCLUDES that the Motions should be GRANTED pursuant to N.C. R. Civ. P. 12(b)(6)."

¶ 14 Looking at the cues in the trial court's Order, the trial court only states it considered Defendant Frosty's Motion and arguments of counsel. Additionally, Plaintiff's counsel asked the trial court to be allowed to present actual evidence if the trial court was going to consider the outside matters and the trial court did not grant

this request. As Plaintiff's counsel pointed out, if the trial court was not going to consider the outside matters, then the trial court did not need to allow Plaintiff to present additional evidence or to convert the Motion into a motion for summary judgment. The trial court's lack of responsive action at the hearing, in combination with the language of the Order, gives this Court ample reasonable grounds to conclude the trial court did not consider the outside matters. As such, the trial court did not need to convert Defendant Frosty's Motion to Dismiss into a motion for summary judgment and allow Plaintiff to present additional evidence.

C. Time Frame for Filing Upset Bid

¶ 15 Lastly, Plaintiff argues that according to a reasonable interpretation of Chief Justice Beasley's orders, Plaintiff had until 7 August 2020 to file her upset bid and her mailing of an upset bid on 6 August 2020 was therefore timely. We disagree.

¶ 16 Plaintiff contends that the placing of an upset bid should be construed as a period of limitation and thus the deadline for filing upset bids was extended to 31 July 2020 and to 7 August 2020 for receipt of mailed bids. We do not need to determine whether extending the deadline for placing an upset bid is an extension of a period of limitations or an extension of time for filing to properly resolve this matter. Even if we accept Plaintiff's argument that extending the timeframe should be categorized as the extension of a period of limitation rather than an extension of time for filing, which would have only extended the deadline to 8 June 2020 for receipt of

mailed bids, Plaintiff still did not timely file her upset bid.

¶ 17 We note first that Plaintiff's contact of Defendant Williams on 2 July 2020 to inquire about submitting an upset bid does not equate to properly filing an upset bid with the Clerk of Court. Accordingly, the attempt at issue is Plaintiff's mailing of an upset bid on 6 August 2020. If the deadline for submitting upset bids was 31 July 2020, a Friday, then per Emergency Directive 15, which deems pleadings and other documents "timely filed if *received* within five (5) business days of the date the filing is due[.]" then Plaintiff's bid had to be received by the Clerk of Court before close of business on Friday, 7 August 2020 in order to be deemed timely filed.

¶ 18 Here, Plaintiff *mailed* her bid on 6 August 2020. If Plaintiff had gone in-person to the Clerk of Court on 6 August 2020 to file her upset bid instead of mailing it, the bid would have been rejected as untimely. Significantly, Plaintiff made no allegation in her Complaint that her upset bid was received by the Clerk of Court by 7 August 2020, only that she mailed her bid on 6 August 2020.

On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

In re Lynn v. Fed. Nat'l Mortg. Ass'n, 235 N.C. App. 77, 80, 760 S.E.2d 372, 374-75 (2014) (cleaned up). Even construing the pleading liberally, where a complaint

contains no allegations of one or more elements of a claim, dismissal of the claim is proper. *See e.g., Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 125, 633 S.E.2d 113, 116 (2006) (affirming dismissal of a breach of contract claim where there were no allegations in the complaint of plaintiff being charged different rates). Further, the appellant has the burden to prepare the record and ensure its completeness. *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). Where the record is absent of evidence to support an appellant's argument, affirmance of the trial court's ruling is proper. *See e.g., H. McBride Realty, Inc. v. Myers*, 94 N.C. App. 511, 516, 380 S.E.2d 586, 589 (1989) (affirming an order to pay fees where the record contained no evidence to support appellant's contention that he filed the wrong motion at the directive of the trial court).

¶ 19 As Plaintiff's Complaint did not allege that her upset bid was *received* by the Clerk of Court on or before 7 August 2020, she has failed to state a claim upon which relief can be granted. Specifically, Plaintiff has failed to sufficiently allege that she timely filed her upset bid even when interpreting Chief Justice Beasley's Orders to establish the latest deadline possible. Reinforcing this conclusion is the fact the record contains no evidence that the Clerk of Court received Plaintiff's upset bid before the close of business on 7 August 2020. The trial court, therefore, properly granted Defendant Frosty's Motion to Dismiss.

III. Conclusion

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Opinion of the Court

¶ 20

For the foregoing reasons, the trial court properly granted Defendant Frosty's Motion to Dismiss as Defendant Frosty had standing to bring a Motion to Dismiss, the trial court properly considered the Motion as a motion to dismiss rather than a motion for summary judgment, and Plaintiff did not timely file her upset bid.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

Report per Rule 30(e).