An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-279

No. COA21-362

Filed 19 April 2022

Durham County, No. 20-CVS-1731

WEST 4TH, LLC, Plaintiff,

v.

VONDELLE BROWN, WANDA HASKINS, JAEDA GREEN and TA-LETTA BRYANT as guardian ad litem of JADE GREEN (a minor), Defendants.

Appeal by Defendants VonDelle Brown, Wanda Haskins, and Jaeda Green from an order entered 2 February 2021 by Judge James E. Hardin, Jr. in Durham County Superior Court. Heard in the Court of Appeals 15 December 2021.

Manning Fulton & Skinner P.A., by Robert S. Shields, Jr., for Plaintiff-Appellee.

Law Office of Bryant & Brown, PLLC, by Robert Brown, Jr., for Defendants-Appellants VonDelle Brown, Wanda Haskins, and Jaeda Green.

INMAN, Judge.

¶ 1 Defendants-Appellants VonDelle Brown, Wanda Haskins, and Jaeda Green (collectively, "Defendants") appeal from an order granting Plaintiff West 4th, LLC, ("Plaintiff") summary judgment on its claims that Defendants breached a contract for

the sale of real property. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 Defendants, along with their minor relative Jade Green ("Ms. Green"), each inherited fractional interests in a home in Durham, North Carolina (the "Property"), following the death of a family member. Defendants all executed a contract of sale (the "Contract") to sell the Property to Plaintiff in March 2019. The Contract provided for a sale price of $38,000.00. At the time the Contract was executed, State Employees Credit Union ("SECU") held a deed of trust in the Property with an outstanding balance of approximately $12,000.

¶ 3 Defendants opened a guardianship matter and obtained the appointment of a guardian ad litem ("GAL") to represent Ms. Green's interests in the contracted sale of the Property to Plaintiff. In May 2019, the Clerk of Superior Court and Senior Resident Superior Court Judge of Durham County entered an order of sale in the guardianship proceeding, authorizing the GAL to sell the Property to Plaintiff pursuant to the Contract. The order of sale required any proceeds first satisfy SECU's deed of trust—who had already pursued and calendared a foreclosure sale—before being deposited with the Clerk for Ms. Green's benefit.

¶ 4 Defendants, the GAL, and Plaintiff executed a HUD-1 Settlement Statement and proceeded to closing on 28 May 2019. But the closing did not happen as planned. Defendants tendered three separate deeds, each conveying their fractional interests,

without offering any deed conveying Ms. Green's share of the property. When Plaintiff requested a single deed executed by all four interested sellers, Defendants did not immediately provide one. Instead, Defendants posted the Property for upset bid pursuant to the statutes governing judicial sales of guardianship real property. *See* N.C. Gen. Stat. §§ 35A-1301, 1-339.25, and 1-339.36 (2021) (collectively providing that a minor ward's real property is noticed and subject to upset bidding under Chapter 1, Article 29a's judicial sale procedures).

¶ 5 With the private sale under the Contract stalled and upset bidding on the guardianship sale underway, SECU agreed to continue its foreclosure until 24 July 2019. The Property continued to receive upset bids, however, and Defendants dismissed the guardianship sale proceeding. The Property was eventually sold through SECU's foreclosure proceeding for $99,750.00, and a deed conveying the property for that amount was recorded with the Durham County Register of Deeds. After satisfaction of SECU's interest, the foreclosure sale netted $78,818.56 in surplus funds.

¶ 6 On 30 December 2019, Defendants filed a petition and special proceeding with the clerk to receive the surplus funds from the foreclosure sale. Before that petition was heard, Plaintiff filed suit against Defendants on 9 January 2020, seeking: (1) a preliminary injunction halting disbursement of the surplus funds; (2) a judgment

declaring them owner of the surplus funds; and (3) compensatory damages for breach of the Contract.[1]

¶ 7 The clerk entered an order on Defendants' petition for disbursement of the surplus funds before Plaintiff could be heard on its claim for preliminary injunctive relief in superior court. Per the clerk's order, Defendants were awarded possession of the surplus funds despite Plaintiff's claim of ownership because Plaintiff had not sought to formally intervene in the special proceeding by interpleader. The clerk's order was never appealed.

¶ 8 Now in possession of the surplus funds, Defendants filed their answer to Plaintiff's complaint in May 2020. That answer, in asserting an affirmative defense for termination of contract by operation of law, included several material statements acknowledging the terms of the Contract and Defendants' inability to perform thereunder. Specifically, Defendants' answer acknowledged:

> 54. No place in the contract was it stated [sic] that the Buyer was buying the individual property interests of [Defendants] and [Ms.] Green. At all times, all parties understood that the collective property interests of all parties were being sold.
>
> 55. There is no place in the contract which states that the sale price would be divided in any fashion between the

[1] Plaintiff named Ms. Green as a defendant through her GAL but later dismissed all claims against her prior to summary judgment. And, because the summary judgment order on appeal was against Defendants only, it provides no basis for recovery of any monies from Ms. Green. We therefore omit further discussion of Ms. Green's involvement in this action.

> parties individually.
>
> . . . .
>
> 72. The foreclosure sale terminated any ability the Defendants had to sell the inherited interests in [the Property].
>
> . . . .
>
> 75. Nowhere in the contract does it state that the Defendants could require the Plaintiff to accept the sale of the Defendants' individual interests. More important, there is no provision in the contract for the payment for the individual interests of the Defendants.
>
> 76. . . . The contract required [Defendants] and the minor, [Ms.] Green to jointly sell their collective interest for ONE sale price of $38,000. And until the minor's interest could be sold as provided by[ ]law, the terms of the contract could not be fulfilled.

In short, Defendants acknowledged in their answer that: (1) the Contract required the conveyance of the entire Property; (2) their tender of three separate deeds for their incomplete, fractional interests failed to comply with the terms of the Contract;[2] and (3) Defendants ultimately did not perform under the Contract.

¶ 9 Plaintiff moved for summary judgment on 16 October 2020. Defendants responded by filing an affidavit executed by Defendants' attorney. That affidavit

---

[2] Indeed, the Contract, which was attached to Plaintiff's complaint, plainly required Defendants to convey "*a* GENERAL WARRANTY DEED for the Property." (Emphasis added). Defendants admitted to executing that document "collectively" and relied on specific provisions of that Contract elsewhere in their answer.

simply recounted the factual and procedural history behind the abandoned guardianship sale and eventual foreclosure by SECU and did not dispute the terms of the Contract or Defendants' failure to perform thereunder as alleged in their answer. Plaintiff did not file an affidavit in support of its motion, electing instead to rely on the pleadings.

¶ 10 The trial court heard Plaintiff's summary judgment motion on 2 December 2020. At that hearing, Plaintiff asserted that no party disputed that Defendants failed to comply with the terms of the Contract, as "[n]o affidavits have been filed contesting that there was no breach[.]" Plaintiff's counsel also argued that the market value of the Property was established by the foreclosure sale for $99,750.00. As a result, Plaintiff contended that its compensatory damages—the difference between the Contract price and the fair market value of the property—was established, and "[t]here's no affidavits disputing the amount of damages." Plaintiff's counsel ultimately requested judgment in the amount of $59,881.00, roughly $2,000 less than their claimed actual damages, because it would "put the parties in the same position they would have been in had it closed. . . . [I]t's only fair that [Defendants] walk away with the same amount of money that they would have walked away with at closing."

¶ 11 As for its claim for a judgment declaring it owner of the surplus funds, Plaintiff contended that the clerk's dispensation of those funds and Plaintiff's recovery on its

breach of contract claim would render the issue immaterial, telling the trial court that "[w]hat the clerk did with those [surplus] monies, that's fine. We're not here appealing that or whatever. . . . But that in no way affects our ability to seek summary judgment in a claim for contract damages."

¶ 12 In response to Plaintiff's breach of contract argument, Defendant's counsel contended that there was no breach "because we actually gave [Plaintiff] . . . three signed executed deeds from [Defendants]." But Defendants' answer acknowledged that the Contract required conveyance of the entire Property and Defendants' deeds conveying their fractional interests did not and could not fulfill the Contract's terms. Defendants' counsel later conceded that tendering three fractional deeds did not comply with the Contract:

> What we could—what we could [do] is transfer the—the interest that we had individually to the property. But that's . . . not what the contract required. The contract required it all. . . . It says everybody has to sign.
>
> . . . .
>
> It says that everybody had to do it, everybody had to deliver a fee simple interest to them. And we raised this issue from day one.
>
> You know, we would never have gone through all this process if it was just a matter of them saying well, you know, here it is in the contract, you get to divide up once—once its interest is equal to this much and this is how you're going to get paid, this is how much—if they had said that.

Based on this concession, Defendants' counsel argued that their nonperformance should be excused for impossibility: "And so it was impossible for everybody to sign, and because the foreclosure made it impossible for anybody to sign, then . . . there was no breach on our part. . . . And so we couldn't perform what they wanted."

¶ 13 In addressing Plaintiff's request for a judgment declaring it owner of the surplus funds, Defendant argued that the trial court lacked jurisdiction in light of the clerk's order, contending instead that the proper resolution was to remand the matter to the clerk:

> [I]nsofar as the surplus funds is concerned, jurisdiction is still with the clerk's office.
>
> . . . .
>
> [E]verybody was present at the time and [Plaintiff's] counsel didn't ask for it, didn't request it be appealed or be set on and here we are.
>
> . . . .
>
> [T]he proper thing . . . [would be] to remand it back to the clerk where the clerk may do what he was supposed to do [in resolving Plaintiff's claim of ownership of the funds].

¶ 14 Plaintiff's counsel responded that if they prevailed on their claim for contractual damages, the issue of ownership for surplus funds would be rendered moot:

> I mean, remanding it back to the clerk, that issue is moot. The money has been distributed to his clients.

> . . . .
>
> [I]t's over. The money has been distributed.
>
> . . . .
>
> [W]e're not here today arguing about that hearing [before the clerk for disbursement of surplus funds] other than the jurisdictional argument. Not here asking for—to disburse. That money is gone to [D]efendants.
>
> . . . .
>
> [T]he argument . . . would be the same two weeks from now or a month from now that it is right here. That it's a simple breach of contract case, no genuine issue of fact on the contract breach and no genuine issue as to the amount of damages.
>
> . . . .
>
> To me it would be a waste of the parties' money, judicial resources to go back to the clerk, do it the right way, and we're right back in here today arguing summary judgment on my contract claim, okay.
>
> . . . .
>
> [I]f that money was still sitting there and hadn't been disbursed, but even if the money was sitting there, why go through the hoops and make these people spend money. . . . [N]othing would be any different if—if you remanded it back[.]

¶ 15 At the conclusion of the hearing, the trial court took the matter under advisement. On 2 February 2021, the trial court entered an order granting Plaintiff's

motion and, consistent with Plaintiff's reduction of roughly $2,000 off its initially claimed damages, decreed "Defendants, jointly and severally, shall pay the Plaintiff the sum of $59,881.00 within 14 days of the entry of this Order." Defendants filed timely notice of appeal.

II. ANALYSIS

¶ 16 Defendants present four principal arguments on appeal: (1) the trial court erred in relying on the pleadings in granting summary judgment for Plaintiff; (2) the trial court erred in granting summary judgment because Plaintiff, not Defendants, breached the contract when it rejected the three deeds tendered by Defendants; (3) the trial court was without jurisdiction to enter judgment on Plaintiff's declaratory judgment claim, as only the clerk of superior court could determine ownership of the surplus funds; and (4) no injunctive relief concerning the surplus funds could issue, because the clerk had already disbursed those funds to Defendants. We disagree with Defendants' first two arguments and, because the record shows Defendants' other arguments are moot, we affirm the trial court.

1. Standard of Review

¶ 17 The standard of review on appeal from summary judgment is *de novo*. *DeBaun v. Kuszaj*, 238 N.C. App. 36, 38, 767 S.E.2d 353, 355 (2014). We will affirm a trial court's grant of summary judgment "when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter

of law." *Id.* (citation and quotation marks omitted). Our Supreme Court has described the burden facing each party at summary judgment as follows:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. . . . Once the moving party satisfies [its burden], the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.

DeWitt v. Eveready Battery Co., Inc., 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (citation and quotation marks omitted) (second alteration in original).

2. The Pleadings and Defendants' Affidavit Do Not Raise Any Genuine Issue of Material Fact Regarding Plaintiff's Breach of Contract Claim

¶ 18 In their first argument, Defendants contend that under no circumstances may a trial court consider unverified pleadings in ruling on a motion for summary judgment. Plaintiff, on the other hand, argues that because the record pleadings establish Defendants' breach of the Contract, it was under no obligation to tender any additional evidence in support of its summary judgment motion. Based on the record before us, we agree with Plaintiff.

¶ 19 Rule 56 of our Rules of Civil Procedure and our caselaw establish that a movant may prevail at summary judgment when the pleadings contain admissions of material facts. *See, e.g., Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("[U]nder Rule 56 the court may receive and consider various kinds of evidence. Evidence which may be considered under Rule 56 *includes admissions*

in the pleadings." (emphasis added) (citations omitted)). Additional evidence by affidavit is not required: "A party seeking to recover upon a claim . . . may . . . move *with or without supporting affidavits* for a summary judgment in his favor upon all or any part thereof." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(a) (2021) (emphasis added). The Rule also provides that summary judgment shall be rendered "if the *pleadings*, depositions, answers to interrogatories, and admissions on file, together with the affidavits, *if any*, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.*, 56(c) (2021) (emphasis added). Thus, "[w]here the pleadings *or* proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted." *Kessing*, 278 N.C. at 534-35, 180 S.E.2d at 830 (emphasis added) (citation and quotation marks omitted).

¶ 20 Our caselaw also establishes that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). This includes factual allegations found in a defendant's answer pleading affirmative defenses. *Tate v. Action Moving & Storage, Inc.*, 95 N.C. App. 541, 545-46, 383 S.E.2d 229, 232 (1989). "Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader as well

as the court." *Universal Leaf Tobacco Co., Inc. v. Oldham*, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181 (1994). Such allegations remain binding judicial admissions at summary judgment, so much so that a trial court errs in considering a defendant's affidavit that contradicts the allegations in its answer. *See id.* at 494, 439 S.E.2d at 181 ("These affidavits contradicted the allegations of INA's Answer. . . . Thus, we hold that the trial court erred by considering the affidavits [in ruling on summary judgment] to the extent that they were inconsistent with, or contradictory to, the allegation in INA's pleading.").

¶ 21 In this case, Plaintiff alleged that Defendants contracted to sell the Property pursuant to the Contract and that Defendants failed to do so. In their answer, Defendants alleged that: (1) they were required by the Contract to convey all interest in the Property; (2) their provision of three deeds conveying fractional interests failed to fulfill that term of the Contract; and (3) they were ultimately unable to perform under the Contract due to SECU's foreclosure on the property. Having made these allegations without amending, altering, or withdrawing them, Defendants judicially admitted to the Contract's terms and their ultimate failure to perform thereunder, and the trial court was bound to accept those admissions as fact. *Id.* at 494, 439

S.E.2d at 181.[3] Defendants' affidavit did not—and could not—contradict those binding admissions, *id.*, nor could counsel's argument at the hearing. *Davis*, 261 N.C. at 686, 136 S.E.2d at 34; *see also Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018) ("[A]rguments of counsel are not evidence[.]" (citation omitted)).

¶ 22 We are unconvinced by Defendants' argument, premised on several distinguishable cases, that trial courts may never consider unverified pleadings at summary judgment. *See McLaughlin v. Bailey*, 240 N.C. App. 159, 162, 771 S.E.2d 570, 574 (2015); *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011); *Allen R. Tew, P.A. v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999); *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 292, 826 S.E.2d 746 (2019). None of these cases involved pleadings containing judicial admissions by the nonmovant. *McLaughlin*, 240 N.C. App. at 176-78, 771 S.E.2d at 582-83 (summary judgment resolved by documentary evidence, deposition testimony, and affidavits); *Rankin*, 210 N.C. App. at 214, 706 S.E.2d at 312 (affidavit); *Allen R. Tew, P.A.*, 135

---

[3] That these allegations were made in support of Defendants' affirmative defense that the Contract terminated by operation of law is immaterial. *Id.* at 493-94, 439 S.E.2d at 181. While our dissenting colleague would reverse and remand for summary judgment in favor of Defendants on arguments implicating this affirmative defense and/or the affirmative defenses of mistake and impossibility, Defendants do not argue these affirmative defenses on appeal. We respectfully disagree with the dissent that Defendants are entitled to summary judgment based on the merits of affirmative defenses they have not argued on appeal. *See* N.C. R. App. P. 28(b)(6) (2022) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

N.C. App. at 764, 522 S.E.2d at 128 (verified complaint and affidavit); *BDM Invs.*, 264 N.C. App. at 299, 826 S.E.2d at 761 (depositions).

¶ 23 Instead, a close reading of each of those cases discloses that they all involved: (1) a movant who met its initial burden; and (2) a nonmovant who could not respond with a forecast of evidence disclosing the existence of a genuine issue of material fact. *McLaughlin*, 240 N.C. App. at 178, 771 S.E.2d at 583; *Rankin*, 210 N.C. App. at 220-21, 706 S.E.2d at 316; *Allen R. Tew, P.A.*, 135 N.C. App. at 766, 522 S.E.2d at 129; *BDM Invs.*, 264 N.C. App. at 299, 826 S.E.2d at 761. Thus, to the extent those cases address unverified pleadings, they do so for the settled and uncontroversial proposition that a nonmovant cannot respond to an adequately supported summary judgment motion by merely relying on unverified pleadings. *See* N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(e) (2021) ("When a motion for summary judgment is made and supported as provided in this rule, an *adverse party* may not rest upon the mere allegations or denials of his pleadings." (emphasis added)); *see also Roumillat v. Simplistic Enters., Inc.,* 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992) (recognizing that "allow[ing] [nonmovants] to rest on their [unverified] pleadings[] [would] effectively neutraliz[e] the useful and efficient procedural tool of summary judgment"), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Defendants' reliance on these cases for reversing the trial court's summary judgment order is misplaced.

3. Defendants' Prior Breach Defense Fails

¶ 24 Defendants' second argument—that their nonperformance should be excused by Plaintiff's prior breach in rejecting their three fractional deeds—fails for the same reason as their first. Defendants admitted in their answer (and conceded at the summary judgment hearing) that their tender of three deeds conveying fractional interests in the Property did not fulfill the Contract's terms. In light of these binding judicial admissions, Defendants cannot be heard to contend otherwise, *Davis*, 261 N.C. at 686, 136 S.E.2d at 34, and their argument that Plaintiff first breached the Contract by rejecting the three fractional deeds fails.

4. Defendants' Remaining Arguments Are Moot

¶ 25 Defendants' final two arguments pertain to Plaintiff's claim for a declaratory judgment recognizing it as owner of the surplus funds and for injunctive relief prohibiting the disbursement of those funds by the clerk. As revealed by Plaintiff's argument at the summary judgment hearing, a judgment awarding Plaintiff compensatory damages for breach of contract would duplicate and thus render moot any claim to the surplus funds.[4] Because we affirm the trial court's judgment awarding Plaintiff those damages, the duplicative question of whether Plaintiff is

[4] This is reflected in the text of the summary judgment order, which allowed Plaintiff's motion *in toto* before simply decreeing that "Defendants' jointly and severally, shall pay the Plaintiff the sum of $59,881.00" without otherwise explicitly declaring Plaintiff owner of the surplus funds.

owner of the surplus funds can have no practical effect. We therefore decline to address that issue, as well as the related claim for preliminary injunctive relief, as moot. *See Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (noting that a case is moot when its determination "cannot have any practical effect on the existing controversy" (citation omitted)); *Austin v. Dare Cnty.*, 240 N.C. 662, 663, 83 S.E.2d 702, 703 (1954) ("It is quite obvious that a court cannot restrain the doing of that which has been already consummated.").

III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the trial court's entry of summary judgment in favor of Plaintiff.

AFFIRMED.

Judge HAMPSON concurs.

Judge ARROWOOD dissents by separate opinion.

Report per Rule 30(e).

ARROWOOD, Judge, dissenting.

¶ 27 I respectfully dissent from the majority's decision to affirm the trial court's order. Although the majority concludes that defendants admitted the breach in their pleadings, I believe that defendants' pleadings do not establish that defendants breached a contract with plaintiff. I would reverse the trial court's order on the grounds that there was no valid contract between the parties, as Ms. Green was not a party to the contract.

¶ 28 "We review a trial court's order granting or denying summary judgment *de novo*. . . . [and u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).[5] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). In a breach of contract action, the complaint must allege that a contract exists between the parties, as well as "the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to [the] plaintiff from such breach." *Howe v. Links Club Condo. Ass'n, Inc.*, 263 N.C. App. 130, 139, 823

[5] Although the majority notes that it is not the role of this Court to create an appeal for an appellant, this Court is free to substitute its own judgment for the trial court if the evidence does not support the trial court's judgment.

S.E.2d 439, 448 (2018) (quotation marks omitted) (alteration in original) (quoting *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977)).

¶ 29 In order for a valid contract to exist between two parties,

> an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Id. (quoting *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823-24 (1960)).

¶ 30 To establish this necessary element, there must be allegations setting forth that the contract at issue "constituted a binding contract to which" the parties are bound. *See id.* at 141, 823 S.E.2d at 449 (affirming dismissal of breach of contract claim where defendant did not execute contract nor was named as a party). As a matter of law, a non-party to a contract "cannot be held liable for any breach that may have occurred." *See Canady v. Mann*, 107 N.C. App. 252, 259, 419 S.E.2d 597, 601 (1992), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993).

¶ 31 The Contract identified four individuals on the "Seller" line: VonDelle Haskins Brown, Wanda Haskins, Jaeda Green, and DeMario Green "in care of: Jade Green[.]" DeMario Green is Ms. Green's biological father but was not appointed as GAL to represent Ms. Green's interests and did not have any ownership interests in the property. At the bottom of each contract page, the sellers provided the following

initials: V.B., W.H., D.G., and J.G. Each of the aforementioned sellers, including DeMario Green, signed their names on the last page of the Contract. Ms. Green did not sign or initial any portion of the Contract, nor did the GAL later appointed to represent Ms. Green's interests.

¶ 32 In May 2019, defendants prepared, executed and delivered separate deeds to plaintiff's attorney, with each deed conveying the respective defendant's interest in the property to plaintiff. Plaintiff rejected the separate deeds and requested a single deed that included Ms. Green's interest. Although plaintiff insisted on delivery of a single deed signed by all parties including Ms. Green, plaintiff also retained possession of the separate deeds.

¶ 33 Defendants subsequently sought the appointment of a GAL for Ms. Green, leading to an order entered on 16 May 2019 that "authorized, empowered[,] and directed" the GAL "to enter into the sale of the real property interest of Jade Green in the property located at 2416 Nebo Street, Durham, N.C." The order noted that the Clerk had ordered a foreclosure sale on the property, scheduled for 29 May 2019.

¶ 34 The record reflects that the Contract was not amended or otherwise changed to indicate the GAL's appointment.

¶ 35 The order at issue in this appeal provided that defendants, "jointly and severally, shall pay the Plaintiff the sum of $59,881.00 within 14 days of the entry of this order." Notably, plaintiff voluntarily dismissed Ms. Green and her GAL with

prejudice prior to the entry of this order. **A**lthough Ms. Green and her GAL remain listed as defendants in the heading of the order at issue, it does not appear that Ms. Green was included in or bound by the order.

¶ 36 In sum, to establish a valid contract, plaintiff was required to set forth that the offer was accepted in its exact terms, with all parties assenting "to the same thing in the same sense[.]" Although the Contract did include Ms. Green's name, neither Ms. Green nor her GAL signed or initialed any portion of the Contract. Instead, Ms. Green's biological father, who has no ownership interest in the property and was not appointed to represent Ms. Green's interests, signed and initialed the Contract. Because neither Ms. Green nor her GAL signed the Contract, and the Contract was never amended to recognize the appointment of Ms. Green's GAL, Ms. Green was not a party to the Contract.

¶ 37 Following the conclusion that Ms. Green was not a party to the Contract, a review of the remaining terms reveals there was not a valid contract. The "Property" subsection of the Contract lists "2416 Nebo Street" which indicates that a fee simple interest in this property was contemplated. Without Ms. Green, however, defendants were unable to convey a fee simple interest in 2416 Nebo Street. Accordingly, defendants were unable to assent to the terms provided in the Contract, and there was no meeting of the minds between the parties.

¶ 38 It is also noteworthy that plaintiff intended for the Contract to convey a fee

simple interest in the property. This intent is apparent from the provisions of the Contract and plaintiff's rejection of separate deeds. Despite this intent, plaintiff did not ensure that Ms. Green or a GAL representing her interests was included in the contract. Furthermore, once it became clear that Ms. Green was unable to convey her interest without the appointment of a GAL, and even after a GAL was appointed, plaintiff took no steps to amend the Contract or execute a new contract that would in fact bind all parties with an ownership interest and operate to convey a fee simple interest in the property. I would hold that plaintiff's failure to ensure the existence of a valid contract precludes plaintiff from succeeding in its breach of contract claim.

¶ 39 I believe it is also worthwhile to discuss the Contract in the context of the foreclosure sale and upset bid process. Defendants' answer notes that the property was subject to a deed of trust with State Employees Credit Union as beneficiary, and that foreclosure proceedings had been instituted in early 2019, prior to the execution of the contract. Defendants' brief on appeal further notes that although the upset bid process was underway, plaintiff did not tender payment to defendants pursuant to the Contract and did not submit an upset bid.

¶ 40 "Foreclosure under Chapter 45 pursuant to power of sale does not create new rights in the underlying property or the deed of trust in third parties, including the third party bidder." *In re Menendez*, 259 N.C. App. 460, 463, 813 S.E.2d 680, 684 (2018). "Chapter 45 does create fixed rights of a third party bidder at the end of the

10-day statutory upset bid period." *Id.* (citing N.C. Gen. Stat. §§ 45-21.27, 45-21.29A (2017)). However,

> the only rights that are "fixed" upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price. The rights of other parties, including those in possession, are not necessarily affected.

Sprouse v. North River Ins. Co., 81 N.C. App. 311, 316, 344 S.E.2d 555, 559 (1986). As a general rule, a sale of real property "is executed only by delivery of the deed. The prior proceedings amount merely to a contract of sale." *Id.* (citation and quotation marks omitted). Additionally, "foreclosure by power of sale arises under contract and is not a judicial proceeding." *In re Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016) (citation omitted).

¶ 41 Although the parties did not negotiate the Contract as part of the foreclosure sale, the Contract was executed after the foreclosure proceedings had begun. Based on the circumstances, I believe it is appropriate to view plaintiff similarly to a third party bidder. Accordingly, in order to fix its rights in the property, plaintiff was required to succeed in the upset bidding process or remain the highest bidder after the upset bidding process began. Plaintiff, however, did not submit any upset bids, much less emerge as the high bidder. Because plaintiff failed to fix its rights in the property, plaintiff is unable to prevail in its breach of contract claim.

¶ 42 Based on the foregoing, I would hold that plaintiff failed to establish that defendants breached a contract, and I vote to reverse the trial court's order granting summary judgment to plaintiff.