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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-405-2

Filed 21 February 2023

Durham County, No. 18 SP 1035

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY Executive Office Park
of Durham Association, Inc., Petitioner,

v.

MARTIN E. ROCK a/k/a MARTIN A. ROCK, Respondent.

LIEN DATED: October 23, 2018

LIEN RECORDED: 18 M 1195

IN THE CLERK'S OFFICE, DURHAM COUNTY COURTHOUSE

Appeal by respondent from order entered 4 March 2019 by Judge John M. Dunlow in Durham County Superior Court. This case was originally heard in the Court of Appeals 27 April 2021. *See Foreclosure of a Lien by Exec. Off. Park of Durham Ass'n v. Rock*, 277 N.C. App. 444, 2021-NCCOA-211, 861 S.E.2d 353 (2021). Upon remand from the Supreme Court of North Carolina.

Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Hope Derby Carmichael, for petitioner-appellee.

Mark Hayes for respondent-appellant.

TYSON, Judge.

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The Supreme Court of North Carolina reviewed and disagreed with this Court's holding Executive Office Park of Durham Association, Inc. ("Petitioner") did not possess the right to the power of sale foreclosure. *See In re Foreclosure of a Lien by Exec. Office Park of Durham Ass'n v. Rock*, 382 N.C. 360, 365, 2022-NCSC-106, ¶ 19, 879 S.E.2d 169, 173 (2022) Upon remand to this Court, we address Martin Rock's ("Respondent") argument he was not in default. We vacate and remand.

I. Background

The facts and procedural history underlying this case are set forth in detail in this Court's prior opinion, *Foreclosure of a Lien by Exec. Off Park of Durham Ass'n*, 277 N.C. App. at 445-46, 2021-NCCOA-211, ¶ 2-9, 861 S.E.2d at 354. The pertinent facts are:

Executive Park Developers, LLC developed Executive Office Park. Executive Park Developers, LLC filed a "Declaration of Unit Ownership" creating a governing entity for the development, [Petitioner] on or about 9 November 1982, pursuant to N.C. Gen. Stat. § 47A (2019). Petitioner "consist[s] of all the unit owners [in the development] acting as a group in accordance with the Bylaws and this Declaration."

The terms of the Declaration provided Petitioner would be governed by "the provisions of the North Carolina Unit Ownership Act." *See* N.C. Gen. Stat. § 47A. Petitioner's board of directors was granted "all of the powers and duties set forth in the [North Carolina] Unit Ownership Act, except as limited by this declaration (sic) and the Bylaws." The Declaration required unit owners be subject to assessments ordered by the Board of Directors.

If the assessment was not paid after "more than

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thirty (30) days,” “[a]ny sum assessed remaining unpaid . . . shall constitute a lien upon the delinquent unit or units when filed of record with in (sic) the Office of the Clerk of Superior Court of Durham County in the manner provided for by Article 8 of Chapter 44 of the General Statutes of North Carolina as amended.”

The Declaration provided “the Bylaws” “shall be in the form attached here to as Exhibit ‘E.’” Attached to the Declaration labeled “Exhibit E” were model bylaws which could be adopted by the Petitioner. No document titled as “Exhibit E” was executed.

Respondent owns three units within Executive Office Park. Petitioner alleged Respondent was in default under the Declaration because of non-payment of assessments. Respondent countered the amounts Petitioner asserted were inflated by unreasonable fines, interest, and fees.

Respondent also sought to offset amounts allegedly owed against costs he incurred for Petitioner’s alleged failure to repair flood damages to his units. This flood damage caused a mold problem in the units rendering them unusable.

Petitioner alleged Respondent was in arrears for fees and assessments since September 2013 totaling a balance due of \$69,751.89 as of 14 December 2017. Respondent made a redemption payment of \$80,950.00, which Petitioner received and accepted two weeks later on 28 December 2017. On 19 January 2018, Petitioner assessed Respondent \$35,890.00 in legal fees. Petitioner’s ledger shows \$24,706.89 in write-off credits and Respondent owes a balance of \$780.00.

On 22 October 2018, Petitioner filed a claim of lien, alleging Respondent owed \$8,475.00 plus attorney’s fees and costs of \$590.50. Petitioner sought a non-judicial foreclosure sale of Respondent’s three units. After a hearing, an order was filed by the clerk of court authorizing sale of the three properties on 13 December 2018. An

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“Order Affirming Order Authorizing Sale” was filed in Superior Court on 4 March 2019.

Id.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

Respondent argues he was not in default following Petitioner’s acceptance of his redemption payment of more than the balance owed.

IV. Standard of Review

This Court reviews the trial court’s order authorizing an association’s non-judicial power of sale foreclosure *de novo*. *In re Foreclosure of Clayton*, 254 N.C. App. 661, 667, 802 S.E.2d 920, 925 (2017) (citation omitted).

V. Respondent’s Alleged Default

Before the trial court, Respondent presented a file for a prior foreclosure action, which had been dismissed. This prior non-judicial foreclosure action had file number 15 SP 815, of which the trial court took judicial notice during the hearing. The clerk of court had dismissed the action filed in 15 SP 815 because: “[t]he Petitioner has failed to show that the Executive Office Park Association of Durham Inc. has the power to impose or collect sums of money denoted specifically as ‘fines’ or dues from it’s association members.”

Respondent asserts the subsequent foreclosure on 22 October 2018 was based upon alleged defaults, which were included in the prior dismissed foreclosure action.

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Respondent argues Petitioner is barred from proceeding again with a non-judicial foreclosure based upon the same alleged defaults, included in the prior unsuccessful action and dismissal. *See In re Foreclosure of Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 507 (2016) (“While it is true that Deutsche Bank is barred from proceeding again with non-judicial foreclosure based on the *same default*, the Bank may nonetheless proceed with foreclosure by judicial action. The Bank may also proceed with non-judicial foreclosure based upon a *different default*.”).

In *Lucks*, our Supreme Court held: “While the creditor is prohibited from proceeding again with a non-judicial foreclosure on the *same* default, the creditor can proceed with a judicial foreclosure.” *Id.* at 227, 794 S.E.2d at 506 (citation omitted).

The ledger from the 2018 action and the ledger from the 2015 action include the same charges and amounts on the same units. Due to the prior dismissal not being appealed, these charges asserted in the prior action cannot be asserted in a subsequent non-judicial foreclosure. *Id.* The trial court’s order authorizing a sale of Respondent’s three office condominium units is vacated and this cause is remanded for an adjudication of Respondent’s liabilities, if any, without the prior asserted charges included in the dismissed 2015 action.

VI. Conclusion

Petitioner asserted charges in their 2018 non-judicial foreclosure action with the same charges and amounts on the same units as their prior 2015 dismissed action. The “Order Affirming Order Authorizing Sale” is vacated and remanded for

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adjudication of Respondent's liabilities, if any. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).