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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-743

Filed 06 June 2023

Mecklenburg County, No. 18 CVS 9595

NATIONSTAR MORTGAGE, LLC d/b/a MR. COOPER, Plaintiff,

v.

MARK P. MELARAGNO a/k/a MARK PETER MELARAGNO, WENDY KINKEL MELARAGNO, CERTUSBANK, N.A., s/b/m MYERS PARK MORTGAGE, INC., THE BUILDING CENTER, INC., and SUBSTITUTE TRUSTEE SERVICES, INC.,
Substitute Trustee, Defendants.

Appeal by Defendants from order entered 7 January 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2023.

Troutman Pepper Hamilton Sanders LLP, by D. Kyle Deak, for Plaintiff-Appellee.

Hausler Law Firm, PLLC, by Kurt F. Hausler, for Defendant-Appellants.

GRIFFIN, Judge.

Defendants Mark and Wendy Melaragno appeal from an order granting Plaintiff's motion for summary judgment, dismissing Defendants' counterclaims with prejudice, and ordering Plaintiff recover \$1,412,379.65 together with interest and attorney's fees in the amount of \$155,956.02 from Defendants, arguing the trial court

granted the order in error. Upon review, we hold the trial court did not err in granting Plaintiff's motion for summary judgment as Plaintiff is the holder of the Note, and as holder, has the right to enforce the Note. Further, we hold the trial court did not err in dismissing Defendants' counterclaims as they are without merit.

I. Factual and Procedural Background

On 5 April 2006, Defendants Mark and Wendy Melaragno contracted to acquire full ownership of a home located at 1641 Brandon Road in Charlotte, North Carolina. On 11 April 2006, Defendants executed a promissory note ("Note") in favor of First National Bank of Arizona ("FNBA") for a mortgage loan of \$630,000. To secure the Note, Defendants granted FNBA a deed of trust ("Deed of Trust") to the home. The Deed of Trust was originally in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for FNBA and FNBA's successors and assigns. The Deed of Trust was properly recorded on 17 April 2006. On 1 July 2006, the loan was securitized as part of a pool of loans in Lehman Mortgage Trust Mortgage Pass-Through Certificates, Series 2006-4 ("LMT") with Structured Asset Securities Corporation ("SASC") as depositor, Aurora Loan Services ("Aurora") as master servicer, and Citibank, N.A. ("Citibank") as trustee.

On 1 July 2006, Aurora began servicing the loan. Aurora sent a letter to Defendants stating Defendants were to begin making payments to Aurora rather

than FNBA.¹ Defendants made payments to Aurora from 2006 to 2009. Defendants failed to make payments beginning November 2009.

In 2010, Aurora had possession of the Note, alleged it was the holder of the Note, and initiated a foreclosure by power of sale (“First Foreclosure”). Defendants contested the First Foreclosure and appealed to the Assistant Clerk of Superior Court. On 7 October 2011, the Assistant Clerk of Superior Court ruled Aurora was authorized to proceed and Defendants appealed to superior court for a de novo hearing. On 6 March 2012, Aurora and Plaintiff, Nationstar Mortgage, LLC, contracted by residential servicing asset purchase agreement for Plaintiff to purchase and acquire all assets of Aurora including the right to service loans owned by LMT. On 28 June 2012, the First Foreclosure came on for de novo hearing before Judge Forest D. Bridges and was dismissed without prejudice.

On 16 July 2012, Plaintiff informed Defendants of its acquisition of the servicing of Defendants’ loan and noted it was now servicing the loan on behalf of LMT. On 4 February 2013, Plaintiff commenced a second foreclosure action by power of sale (“Second Foreclosure”). On 5 August 2014, the Assistant Clerk of Superior Court issued an order stating there was insufficient evidence presented to sustain the Plaintiff’s authority to proceed with the Second Foreclosure and denied the application for authority to proceed. Plaintiff appealed but later abandoned the

¹ On 30 June 2008, FNBA was merged into First National Bank of Nevada (“FNBN”). Neither FNBA nor FNBN remains in existence today.

appeal, withdrawing the Second Foreclosure.

On 15 May 2018, Plaintiff filed a judicial foreclosure action (“Third Foreclosure”) against Defendants. On 30 June 2018, Defendants served their answer and counterclaims. On 14 December 2018, Plaintiff replied. On 29 July 2020, Plaintiff moved for summary judgment on all claims and counterclaims. On 30 July 2020, Defendants moved for summary judgment on all of Plaintiff’s claims. On 5 October 2021, the matter came on for hearing before Judge Karen Eady-Williams, in Mecklenburg County Superior Court. On 7 January 2022, the trial court entered an order granting Plaintiff’s motion, dismissing Defendants’ counterclaims with prejudice, and ordering Plaintiff recover \$1,412,379.65 together with interest and attorney’s fees in the amount of \$155,956.02 from Defendants. On 4 February 2022, Defendants filed notice of appeal.

II. Standard of Review

Summary judgment is proper where “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[.]” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). A genuine issue is one that can be proven by substantial evidence while a material fact is one which would “constitute or irrevocably establish any material element of a claim or a defense.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982).

We review an appeal from summary judgment de novo. *In re Will of Jones*, 362

N.C. 569, 573, 669 S.E.2d 572, 576 (2008). “Such judgment is appropriate only 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.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Defendants argue the trial court erred in granting Plaintiff’s motion for summary judgment as to Plaintiff’s affirmative claims and Defendants’ counterclaims. We disagree.

In North Carolina, there are two methods of foreclosure: foreclosure by action and foreclosure by power of sale. *Phil Mechanic Constr. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985). Foreclosure by action is a civil proceeding and 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.” *Id.* As such, the Rules of Civil Procedure apply, and while the mortgagee “is entitled to submit and prove by evidence at trial its right to foreclose[,]” the borrower is also “free to defend the action, such as by raising evidentiary objections and testing the legal sufficiency of the [mortgagee’s] case.” *United States Bank Nat’l Ass’n v. Pinkney*, 369 N.C. 723, 728–29, 800 S.E.2d 412, 417 (2017) (citation omitted).

A. Plaintiff’s Affirmative Claims

Defendants argue the trial court erred in granting summary judgment in favor

of Plaintiff's affirmative claims. Specifically, Defendants contend there exist genuine issues of material fact (1) as to whether Plaintiff has the authority to enforce the Note and Deed of Trust and (2) concerning the provenance, validity, and veracity of the allonge.

1. Plaintiff's Authority to Enforce the Note and Deed of Trust

Defendants contend the trial court erred in granting summary judgment in favor of Plaintiff because there are genuine issues of material fact concerning the chain of title of the Note and whether Plaintiff is a proper holder or is a non-holder in possession with rights of a holder, and therefore has the authority to enforce the Note.

As mentioned above, a judicial foreclosure is “an ordinary civil action governed by the liberal standard of notice pleading.” *Pinkney*, 369 N.C. at 723, 800 S.E.2d at 414. Therefore, a complaint to bring a judicial foreclosure is “sufficient if it alleges a debt secured by a deed of trust, a default, and the plaintiff's right to enforce the deed of trust.” *Id.* A plaintiff has the right to enforce a deed of trust or other instrument if, inter alia, he is the holder of the instrument or a non-holder in possession of the instrument who has the rights of a holder. N.C. Gen. Stat. § 25-3-301 (2021).

Holder is defined, in N.C. Gen. Stat. § 25-1-201(21)(a), as “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]” N.C. Gen. Stat. § 25-1-201(21)(a) (2021). The bearer is the person in possession of the negotiable instrument payable

to the bearer or indorsed in blank. N.C. Gen. Stat. § 25-1-201(5) (2021).

An indorsement is:

a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument[.]

N.C. Gen. Stat. § 25-3-204(a) (2021). Notably, “[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.” *Id.* This paper is often an allonge or “a slip of paper [] attached to a negotiable instrument for the purpose of receiving further indorsements[.]” *Allonge*, Black’s Law Dictionary 95 (11th ed. 2019).

Moreover, the UCC provides for two methods of indorsement: (a) special indorsement and (b) blank indorsement. N.C. Gen. Stat. § 25-3-205 (2021).

Specifically, the statute states:

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a “special indorsement”. When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. . . .

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement”. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

N.C. Gen. Stat. §§ 25-3-205(a)-(b). Thus, where a deed of trust is securitized by a promissory note, and the person in possession of said note is not the original holder, the note, if payable to an identified person, must be indorsed by each previous holder for transfer of the note to be proper. *In re Foreclosure of a Deed of Trust Executed by Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013). However, possession of a note raises the presumption that the possessor is a holder thereof and he may sue thereon without proof of indorsement, since a mere holder of a negotiable instrument may sue thereon in his own name. N.C. Gen. Stat. § 25-3-301 (“A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”); *see also Dillingham v. Gardner*, 219 N.C. 227, 230, 13 S.E.2d 478, 479 (1941); *In re Foreclosure of a Deed of Tr. Executed by Rawls*, 243 N.C. App. 316, 321–22, 777 S.E.2d 796, 800 (2015) (“Based on the plain language of N.C. Gen. Stat. § 25-3-205(b) . . . we hold that a petitioner’s production of an original note indorsed in blank establishes that the petitioner is the holder of the note.”).

Here, Defendants executed the Note secured by the Deed of Trust. Plaintiff is in possession of the original Note. Attached to the Note is an allonge featuring indorsements from FNBA to FNBN and from FNBN to Aurora. The Note itself contains an indorsement from Aurora in blank. Because the Note is indorsed in blank and does not contain a special indorsement, it may be transferred and negotiated by transfer of possession alone and does not require indorsements from preceding

holders. *See* N.C. Gen. Stat. § 25-3-205(b). As such, Plaintiff is the holder of the Note and has the right to enforce the Note. *See Rawls*, 243 N.C. App. at 321–22, 777 S.E.2d at 800. As we hold Plaintiff is the holder of the Note, we need not address Defendant’s proposed issues concerning Plaintiff’s rights as a non-holder in possession.

2. Prevenance, Validity, and Veracity of the Allonge

Defendants contend genuine issues exist as to the allonge because it may not be an actual allonge containing valid indorsements, there may be multiple copies of the purported allonge, and the allonge itself may not have been affixed to the original Note so as to constitute an allonge. Specifically, Defendants argue there are genuine issues with the validity of the allonge asserting: (1) the indorsement from FNBA to FNBN is on FNBN letterhead which is evidence the allonge was not created by FNBA; (2) the allonge contains two punch holes at the top of the page whereas there are no punch holes on the original note to which it is attached; and (3) there are numerous staple holes on both the allonge and original note which is evidence it has been removed from the original note and not affixed to and not a part of the original note.

Although Defendants attempt to challenge the validity of the allonge, the indorsement from Aurora in blank is not contained within the allonge but is instead on the original Note, of which Plaintiff is the holder. Thus, it is seemingly irrelevant whether the allonge is authentic because, as stated above, a note indorsed in blank may be transferred and negotiated by transfer of possession alone and does not require indorsements from preceding holders. *See Supra* III.A.1. Because the

indorsement in blank is contained on the Note itself and Plaintiff is the holder of the Note indorsed in blank, Plaintiff has the right to transfer and negotiate by transfer of possession alone without the need for indorsements from preceding holders.

Nonetheless, Defendants attempt to undermine the validity of the allonge by contending it is a photocopy of the original allonge. However, regardless of whether the allonge is a photocopy, our Court previously stated, “a party need not present the original note or deed of trust and may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust.” *Dobson v. Substitute Tr. Servs., Inc.*, 212 N.C. App. 45, 48, 711 S.E.2d 728, 730 (2011); *see also In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010) (“photocopies of the promissory note and deed of trust were sufficient competent evidence to establish the required elements under [the foreclosure statute]”). Thus, even if the allonge is a photocopy, that evidence alone is insufficient to overcome the presumption of the validity of signatures on the allonge.

Because Plaintiff’s right, as holder, to enforce the Note stems not from the allonge, but from the Note itself, the validity of the allonge is not relevant here.

B. Defendants’ Counterclaims

Defendants argue the trial court erred in granting summary judgment on Defendants’ counterclaims as Defendants presented sufficient evidence of Plaintiff’s unfair debt collection practices and, in the alternative, Plaintiff’s unfair and deceptive trade practices.

Defendants assert Plaintiff engaged in unfair debt collection practices under the North Carolina Debt Collections Act, Section 75-54, as Plaintiff did not have the right to enforce the Note and Deed of Trust and, therefore, should have known its claims to be false. Defendants also contend, for the same reasons, Plaintiff engaged in unfair and deceptive trade practices under the North Carolina Unfair and Deceptive Trade Practices Act, Section 75-1.1. *See* N.C. Gen. Stat. §§ 75-1.1, 75-54 (2021).

However, as stated above, Plaintiff was the holder of the Note and is entitled to enforce the Note. As such, Defendants' counterclaims here are without merit.

IV. Conclusion

For the aforementioned reasons, we affirm the order of the trial court.

AFFIRMED.

Judges COLLINS and STADING concur.

Report per Rule 30(e).