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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-911

Filed 20 June 2023

Wake County, No. 21 SP 1014

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RAMON ALMANZAR DATED MAY 8, 2006 AND RECORDED IN BOOK 11946, PAGE 2377, WAKE COUNTY REGISTRY, TO W. THURSTON DEBNAM, JR., TRUSTEE.

Appeal by respondent from order entered 14 March 2022 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 24 May 2023.

*Roberson Haworth & Reese, PLLC, by Alan B. Powell and Andrew D. Irby, for petitioner-appellee.*

*Law Office of Edward Dilone, PLLC, by Edward D. Dilone, for respondent-appellant.*

ARROWOOD, Judge.

Ramon Almanzar (“respondent”) appeals from the trial court’s order authorizing the foreclosure and sale of certain real property pursuant to a power of sale contained in a deed of trust. Respondent contends that any action on the underlying debt, as evidenced by the promissory note (or “the note”) and secured by the deed of trust, is barred by the statute of limitations. Alternatively, respondent

argues the foreclosure order is void due to the absence of a neutral trustee. We affirm.

I. Background

On 8 May 2006, respondent executed a promissory note in the amount of \$145,000.00 to Bessie C. Batchelor (“petitioner”), trustee under the Robert M. Batchelor Living Trust. The note was a commercial loan to finance the purchase of real property located in Zebulon, North Carolina and was secured by a purchase money deed of trust against the property. The deed of trust was recorded on 9 May 2006 in book 11946, pages 2377-2381 of the Wake County Register of Deeds.

The note provides for monthly principal and interest payments in the amount of \$1,300.00 to begin on 10 June 2006 and “[i]f not sooner paid, the entire remaining indebtedness shall be due and payable on May 10, 2007.” Respondent defaulted on the note and the substitute trustee initiated foreclosure proceedings on 22 June 2021. In support of foreclosure, petitioner’s affidavit stated respondent was nine months past due and \$8,820.00 in arrears with an outstanding balance of \$127,020.00.

On 20 October 2021, Michael J. Geiseman, assistant clerk of Wake County Superior Court, entered an order permitting foreclosure. Respondent timely filed a notice of appeal for a *de novo* Superior Court hearing on 29 October 2021.

A hearing was held on 8 February 2022, Judge Croom presiding. Bruce Young (“Mr. Young”), the bookkeeper assigned to account for respondent’s payments on the note, testified at the hearing. Mr. Young testified that in June 2011, respondent was \$5,803.15 in arrears which increased to \$10,323.15 in September 2014. That same

month, petitioner began accepting \$1,000.00 in reduced monthly payments with \$20.00 per month going towards paying the existing arrearage. Mr. Young further testified that respondent's last payment on the note was 24 September 2021.

The trial court entered an order authorizing foreclosure on 14 March 2022. Respondent filed a notice of appeal on 13 April 2022.

## II. Discussion

Respondent argues the underlying foreclosure action was barred by the statute of limitations as the promissory note matured in May 2007 and there was insufficient evidence that payments were made from 2007 to 2017, when the debt still existed, which might serve to extend the statute of limitations. Moreover, respondent contends the payment made in September 2021 cannot qualify as a "last payment" absent "a proper written acknowledgment" symbolizing his obligation to pay an existing debt.<sup>1</sup> Lastly, respondent asserts the foreclosure order is void due to the absence of a neutral trustee. We disagree.

### A. Standard of Review

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's

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<sup>1</sup> Relatedly, respondent also contends there's no evidence indicating any post-2007 payments were in fact made or how they "applied to the account." We find this argument to be misplaced as all that is required for foreclosure under a power of sale is the existence of "some valid debt, irrespective of the exact amount owed." *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 301 N.C. 90 (1980). Respondent does not contest the existence of a valid debt.

findings of fact and whether the conclusions reached were proper in light of the findings.’ ” *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (citation omitted). “Where such competent evidence exists, this Court is bound by the trial court’s findings of fact even if there is also other evidence in the record that would sustain findings to the contrary. . . . The trial court’s conclusions of law . . . are review[ed] *de novo*.” *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citation omitted), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (Mem) (2006).

B. Statute of Limitations

N.C. Gen. Stat. § 1-47(3) governs the applicable period for the statute of limitations for foreclosure proceedings, which provides:

For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C. Gen. Stat. § 1-47(3) (2022). Therefore, under this section, “two requirements must . . . coexist[]” in order for foreclosure to be barred: “(1) the lapse of ten years after the forfeiture or after the power of sale becomes absolute or after the last payment, and (2) the mortgagor remains in absolute possession during the entire ten-year period.” *In re Foreclosure of Brown*, 240 N.C. App. 518, 521, 771 S.E.2d 829, 831 (2015) (citation and internal quotation marks omitted), *aff’d per curiam*, 368 N.C.

703, 782 S.E.2d 509 (Mem) (2006). Likewise, it is well-settled that “[p]artial payment, intended to acknowledge the underlying debt, will . . . toll the statute of limitations on the original cause of action.” *Am. Multimedia, Inc. v. Freedom Distrib., Inc.*, 95 N.C. App. 750, 753, 384 S.E.2d 32, 34 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 84 (Mem) (1990).

Here, the maturity date of the note was 10 May 2007. Respondent contends the statute of limitations was not tolled because the parties did not enter into a written agreement in violation of N.C. Gen. Stat. § 1-26, therefore, payments made after the note’s maturity date do not qualify as an “acknowledg[ment]” of the debt. We find this argument to be without merit. As Mr. Young’s testimony indicates, respondent consistently made payments subsequent to the note’s maturity date and began making reduced monthly payments in 2014. Additionally, N.C. Gen. Stat. § 1-26 expressly provides that “[n]o acknowledgment or promise is evidence of a new or continuing contract, from which the statute of limitations run, unless it is contained in some writing signed by the party to be charged thereby; *but this section does not alter the effect of any payment of principal or interest.*” N.C. Gen. Stat. § 1-26 (2022) (emphasis added); *see e.g. Pickett v. Rigsby*, 252 N.C. 200, 205, 113 S.E.2d 323, 327 (1960) (finding partial payments by the debtor “start[ed] the statute [of limitations] anew . . . from the date of each payment”).

Accordingly, as it is uncontested that respondent made payments in 2014 until 2021, the statute of limitations was tolled. Respondent’s argument is overruled.

C. Neutral Trustee

Respondent raises a second issue pertaining to the substitute trustee's neutrality. Respondent argues that the substitute trustee was not neutral because the trustee's firm, Smith Debnam, represented both parties in the underlying real estate transaction in 2006 and also "act[ed] in the interests of [petitioner]" when initiating foreclosure proceedings. We disagree.

"An attorney who serves as the trustee or substitute trustee shall not represent either the noteholders or the interests of the borrower while initiating a foreclosure proceeding." N.C. Gen. Stat. § 45-10(a) (2022). Moreover, under N.C. Gen. Stat. § 45-21.16(c)(7)(b), when providing notice of foreclosure, the substitute trustee must provide "[a] statement that the trustee, or substitute trustee, is a neutral party and, while holding that position . . . may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2022).

Respondent asserts that because an attorney from Smith Debnam represented both parties on the underlying real estate transaction, to the extent that they now represent petitioner and advocate against respondent, their former client, a direct conflict of interest exists. North Carolina State Bar Ethics Opinions ("RPCs" and "CPRs") are instructive on this subject:

Prior opinions considering the situation of the attorney who represented one of the parties to a transaction and who is also Trustee have required the attorney either to resign as Trustee if he wishes to represent his client in a contested foreclosure proceeding or related proceedings or

to continue serving as Trustee without representing any party *once the foreclosure proceeding becomes contested* in the foreclosure proceeding itself or in related proceedings. [Our] [Code of Professional Responsibility Rules 305, 297, 220, 201, 166, 137, 94] have recognized that the Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding. However, no prior opinion has held that the Trustee may not serve as Trustee because of prior representation of one of the parties *where he does not continue to represent either party in the contested foreclosure or related proceedings*. Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns of confidences of the client under Rule 4 and its predecessors or because of conflicts of interest under Rule 5.1 or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding.

N.C. RPC 3 (1986) (emphasis added).

Thus, in the present case, Jeff D. Rogers (“Mr. Rogers”), in his capacity as substitute trustee, was not prohibited from serving as substitute trustee despite his firm’s involvement in the real estate transaction for the subject property in 2006. However, respondent contends Smith Debnam, “in violation of the conflict rules, sent adverse collection letters to [respondent] (a former client), on behalf of [petitioner] (a former client), related to the seller financing on the property at the prior closing.” We are not persuaded. N.C. RPC 3 expressly provides that a potential conflict only arises if the substitute trustee were to represent either party in the contested foreclosure proceedings and there’s a concern of confidentiality or “the attorney would be put in the position of inconsistent roles or obligations[.]” RPC 3. In the instant case, the

substitute trustee did not engage in the representation of either party in the contested foreclosure.

In *In re Foreclosure of Simmons*, this Court set aside the trial court's order authorizing foreclosure because the substitute trustee did not remain neutral throughout the foreclosure proceedings. *In re Foreclosure of Simmons*, 285 N.C. App. 569, 573, 879 S.E.2d 725, 727 (2022). The trustee was the closing attorney for the underlying refinancing transaction, "he referred to [the noteholders] as his 'clients[.]" in the [debt collection letters][.]" he "failed to include proper notice of neutrality[.]" and the foreclosed property was sold to his other clients where he was also listed as "trustee for the property." *Id.* at 570-72, 879 S.E.2d at 727. Additionally, "he affirmatively advocated for the noteholders throughout the foreclosure process." *Id.* at 573, 879 S.E.2d at 727. We stated "[a]llowing the foreclosure to proceed on these facts would eviscerate the requirement that trustees remain neutral[.]" *Id.* The circumstances in the present case are factually distinct.

Here, there's no indication Mr. Rogers "was impermissibly acting as an attorney for [petitioner] during the foreclosure proceedings." *Id.* Contrary to the trustee of *In re Foreclosure of Simmons*, Mr. Rogers did not send debt collection letters signed "Attorney at Law" nor state he was retained "by the noteholders to initiate the foreclosure proceeding." *Id.* at 572, 879 S.E.2d at 727. He included a notice of trustee neutrality when he notified respondent of the impending foreclosure and, when the matter became contested, Mr. Rogers remained neutral and petitioner retained



separate counsel. Furthermore, upon review of the hearing's transcript, there's no indication he affirmatively acted on behalf of petitioner. Accordingly, in the absence of evidence indicating Mr. Rogers improperly advocated for petitioner throughout the foreclosure proceedings, respondent's argument is overruled.

III. Conclusion

For the foregoing reasons, the trial court's order authorizing foreclosure is affirmed.

AFFIRMED.

Judges WOOD and GORE concur.

Report per Rule 30(e).