Foreclosure Case Summaries

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January 1, 2015 – October 6, 2015

Rule 41 Two-Dismissal Rule

In re Foreclosure of Beasley, N.C. App. (June 2, 2015)

Trustee on behalf of lender filed power of sale foreclosure. Trustee then filed a notice of voluntary dismissal of the foreclosure proceeding. Fifteen months after the dismissal, the trustee filed a second power of sale foreclosure. Prior to the foreclosure hearing before the clerk, the borrower filed a motion to dismiss the action with prejudice and the trustee filed a second voluntary dismissal of the foreclosure. At the hearing, the clerk entered an order finding that the second voluntary dismissal filed by the trustee operated as an adjudication on the merits pursuant to Rule 41(a) and granted the borrower's motion to dismiss with prejudice. Lender appealed. In its opinion, the court addressed two issues raised by the application of Rule 41 to a power of sale foreclosure.

- First, the court noted that Rule 41 allows a plaintiff to dismiss the action any time prior to resting the plaintiff's case and file a new action on the same claim within one year after the dismissal. The court held that this one year time period is a "savings provision" that constitutes an extension beyond the general statute of limitations. It does not limit the statute of limitations if it has not yet expired. In the case of a foreclosure, there is a 10 year statute of limitations. Therefore, Rule 41 did not preclude the second power of sale foreclosure in the instant case even though it was filed more than one year after the first dismissal because the 10 year statute of limitations had not yet expired.
- After determining that Rule 41 did not preclude the second foreclosure filing by the trustee, the court then analyzed the effect of the second dismissal under Rule 41(a). The court held that if the second action is based on different defaults or new period of defaults from the first action then a subsequent action is not barred by res judicata, regardless of whether the lender accelerated debt due under the note. The court adopted the view that the lender's acceleration of the note does not necessarily place future payments at issue and prevent a subsequent foreclosure based on new defaults.

Application of Rule 52(a): Findings of Fact and Conclusions of Law; De Novo review

In re Foreclosure of Garvey, N.C. App. (June 2, 2015)

The court restated language from earlier decisions that the N.C. Rules of Civil Procedure apply to power of sale foreclosures. Specifically, the court held that Rule 52(a), which requires the trial judge to make written findings of fact and conclusions of law, applies when a superior court judge conducts a hearing *de novo* on appeal from an order of the clerk. The order of the judge must include more than a summary conclusion that the party seeking to foreclose satisfied the statutory requirements. The judge must make findings as to each of the six factors required to foreclose under Chapter 45 and do so by conducting a *de novo* hearing on appeal, which is more than a *de novo* review of the clerk's order. After the *de novo* hearing, the judge must make the judge's own findings of fact and conclusions of law before entering an order as to whether the trustee may proceed with the foreclosure.

Authority to Cancel a Note

In re Dispute over the sum of $375,757.47, N.C. App. (April 21, 2015)

The NC Court of Applies applied G.S. 25-3-604 to determine whether the original lender had the authority to cancel a note where the original lender recorded a Certificate of Satisfaction with the Register of Deeds. The NC Court of Appeals determined, based on a review of the allonge to the note and the original note submitted into evidence by the current holder of the note, that the original lender did not have the authority to cancel the note because at the time of the recording of the satisfaction, the lender had previously assigned the note, no longer owned the loan, and was not a "person entitled to enforce the instrument" under G.S. 25-3-604.

Holder of the Note; Indorsements

In re Dispute over the sum of $375,757.47, N.C. App. (April 21, 2015)

The NC Court of Appeals summarized applicable law under G.S. Chapter 25 to indorsements and the assignment of notes. The court then applied the holding of In re Bass, 366 N.C. 464 (2013), which states that there is a presumption that an indorsement to a note is valid, to the indorsements challenged by the borrower. The court held that where a purported holder appears in court with the original note and the note is the subject of a clear chain of indorsements ending with a blank indorsement, the court could find sufficient competent evidence that purported holder was in fact the holder of the note. The burden then shifts to the borrower to provide evidence that the purported holder is not in fact the holder. The court determined that both arguments made by the borrower failed to overcome the legal presumption and physical fact that the purported holder was the actual holder of the note. The first argument made by the borrower was that the version of the note presented in court did not match an earlier version faxed to the borrower's counsel. The court did not find this argument persuasive because the only substantive difference the court found between the copy and the original presented in court was the addition of the most recent indorsement, which was dated after the date the copy of the note was faxed to the borrower's counsel. Second, the court held that the borrower's arguments that MERS improperly assigned the note were without merit. The court held that MERS was merely the nominee under the deed of trust and had no authority to assign the note as MERS was never the holder of the note. The court held that the deed of trust followed the note and therefore any assignment of the note resulted in an assignment of the deed of trust.

In Matter of Foreclosure of Rawls, N.C. App. (Oct. 6, 2015)

The clerk of superior court entered an order authorizing sale in a power of sale foreclosure proceeding. The owner of the real property appealed. At the *de novo* hearing before the superior court judge, the party seeking the order of foreclosure produced the original promissory note indorsed in blank. The owner of the real property disputed whether the party seeking the order of foreclosure produced sufficient competent evidence that it was the holder of the note. The NC Court of Appeals held that production of the original note indorsed in blank by the party seeking the order of foreclosure is alone enough to establish that the party is the holder.

Statute of Limitations

In Matter of Foreclosure of Brown, ____ N.C. App. _____ (April 21, 2015)

Mortgagor/Borrower challenged foreclosure on the basis of the expiration of the statute of limitations applicable to a foreclosure under G.S. 1-47(3). Provided that the mortgagor remains in absolute possession of the property during the 10 year period, court held that the 10 year statute of limitations period runs from the last to occur of the following: (i) the date that the power of sale becomes absolute, (ii) the date of the last payment made on the loan, and (iii) the date of the forfeiture of the mortgage. The court also held that the power of sale becomes absolute on the date the loan is accelerated and, if the loan is not accelerated, on the maturity date.

Deficiency Action filed in connection with a Power of Sale Foreclosure

BB&T v. Smith, N.C. App. (Feb. 17, 2015)

Lender loaned $1,675,000 to borrower, secured by real estate. In connection with the loan, the lender entered into guaranty agreements with eight different individuals. Borrower defaulted, lender foreclosed on the property, and lender entered a credit bid at the sale in the amount of $800,000. Lender was the high bidder, leaving a deficiency in the amount of approximately $700,000 based on the balance remaining on the loan. Lender filed a civil deficiency action in superior court against each of the eight individual guarantors, which included one guarantor who had executed a limited guaranty agreement capping his liability at $418,750. As a defense, the limited guarantor raised G.S. 45-21.36, arguing that the amount bid was substantially less than the true value of the property, and therefore he was entitled to defeat or offset any deficiency judgment against him. Lender objected and argued that defense/offset provisions under G.S. 45-21.36 do not extend to guarantors. The Court of Appeals held the defense/offset set forth in G.S. 45-21.36 is available to guarantors, even if the mortgagor is dismissed from the case. The court remanded the case to allow the guarantor the opportunity to present evidence regarding the true value of the property.

United Community Bank v. Wolfe, N.C. App. (July 7, 2015)

Lender foreclosed and was the high bidder at the foreclosure sale. Lender's bid was less than the total value of the debt. Lender filed a deficiency action against the borrowers for the remaining amount due on the loan. Superior court granted summary judgment in favor of the lender and borrowers appealed. NC Court of Appeals reversed and remanded. The court's analysis included a discussion of the defenses available to a borrower under GS 45-21.36 in a deficiency action: (1) the property was worth more than the outstanding debt, or (2) the amount of the lender's bid was substantially less than the true value of the property. The court held that an affidavit from the owner of the property setting forth the specific value of the property is sufficient to raise a genuine issue of material fact whether the value of the property was fairly worth the amount of the debt and thus defeat a summary judgment motion. The court noted prior case law from the NC Supreme Court that the owner's opinion of value is competent to prove the property's value.

Jurisdiction

In Matter of Foreclosure of Foster, N.C. App. (Feb. 17, 2015)

Lender filed a power of sale foreclosure before clerk of superior court. The clerk dismissed the foreclosure and the lender appealed. While the lender's appeal was pending, the borrowers filed a motion in the same proceeding for permanent injunctive relief based on fraud by the lender. The Court of Appeals held that permanent injunctive relief is an equitable remedy and is outside the subject matter jurisdiction of the court in a power of sale foreclosure under Chapter 45, regardless of whether the request for relief is made before the clerk or on appeal before the superior court judge.

Liability of a Default Bidder

Glass v. Zaftrin, LLC, N.C. App. (Feb. 3, 2015)

Bidder entered a high bid of $315,000.00 during the upset bid period of a foreclosure proceeding. In connection with the bid, the bidder paid a deposit of $15,750.00. After expiration of the upset bid period, the bidder notified the substitute trustee that it would be unable to complete purchase of the property and thus defaulted on its bid. The substitute trustee moved the court for an order to resell the property and at the second sale the high bid was $350,000.00. The original defaulting bidder sought the return of the full amount of its deposit from the first sale. Question before the Court of Appeals was whether G.S. 45-21.30(d) allows the costs of the resale to be deducted from the deposit refund where the resale price was more than the defaulting bid plus the costs of resale. The court held that a defaulting bidder is only liable on its deposit to the extent that the final sale price is less than the bid plus the costs of resale. In this case, the final sale price from the resale ($350,000.00) exceed the total of the defaulting bid ($315,000.00) plus the costs of resale ($1,469.80), therefore the defaulting bidder was entitled to the return of its entire deposit ($15,750.00).