Case Law Update
For Real Property Lawyers

Chicago Title Insurance Company

February 2016

Town of Midland v Wayne

368 N.C. 55, 773 S.E. 2d 301 (2015)

KEY WORDS

Condemnation, Inverse Condemnation, Development Rights,

Facts: Wayne and LLC each owned a tract contiguous to the other. Both tracts were part of a single multiphase development approved by the town. Town condemns a portion of the Wayne tract for gas line and fiber optic.

Issue: Both Wayne and LLC allege that taking affects approved development plans requiring compensation.

Town of Midland v Wayne

368 N.C. 55, 773 S.E. 2d 301 (2015)

KEY WORDS

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Held: for Defendant. Contiguous tracts may be considered as a single tract (GS 40A-67)for condemnation purposes where there is:

1) unity of possession
2) unity of use; and
3) physical unity

Loss calculated must include “any loss of the ability to develop the subdivision under [a] vested right”

High Point Bank & Trust Co. v Highmark Properties

776 S.E. 2nd 838 (N.C. 2015)

KEY WORDS

Anti-deficiency, Guarantors, GS 45-21.36

Facts: Bank sought deficiency judgment against non-borrower guarantors of foreclosed Deed of Trust.

Held:

- Non-mortgagor guarantors are permitted to utilize statutory anti-deficiency defense under GS 45-21.36
- "permitted to stand in the shoes of the principal borrower and thus raise section 45-21.36 anti-deficiency defense in their own right"
- "waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy"

Byrd v. Franklin County NC

778 S.E. 2nd 268 (N.C. 2015)

KEY WORDS

Development ordinance, zoning and planning, table of uses

Facts: Byrd desired to build a shooting range. That use was not listed in the Table of Uses for the UDO. Planning director indicated that a shooting range would be permissible under the UDO as "Grounds and Facilities for Open Air Games and Sporting Events". Petition for Special Use Permit was denied by Commissioners. UDO prohibited all uses not expressly listed.

Held: COA held that UDO prohibits any use that it does not specifically list.

COA dissent argued that "the law favors uninhibited free use of private property over governmental restrictions" and that therefore the UDO's provision prohibiting all uses not explicitly allowed in the ordinance is without legal effect.

The Supreme Court adopted the dissent in a one sentence opinion in overruling the COA majority.

In Re: Herndon

COA15-488 (January 19, 2016)

KEY WORDS

Foreclosure, Power of Sale, Two-Dismissal Rule

Facts:

-Borrower defaults on DT (30 yr note @ 11.25%)

-Foreclosure Petition (June 2010) → multiple continuances→ Voluntary Dismissal

-2nd Foreclosure Petition (Dec 2011)→multiple continuances→ Order→ Voluntary Dismissal (one day prior to appeal by borrower)

-3rd Foreclosure Petition (Feb 2014)→ multiple continuances→ Order→ Appeal by Borrower to Superior Court

-Superior Court reversed clerk's order and dismissed the action:

> "dismissal in [second foreclosure] acted as an adjudication on the merits pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure"

-IMPORTANT FACT: Borrower continued in default throughout.

In Re: Herndon

COA15-488 (January 19, 2016)

KEY WORDS

Foreclosure, Power of Sale, Two-Dismissal Rule

Rule 41. Dismissal of actions.
(a) Voluntary dismissal; effect thereof. -
(1) …Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim….

HELD: Because the "claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply" here, and therefore the dismissal of the second foreclosure petition "did not operate as an adjudication on the merits."

In Re: Kenley

No. C.O.A. 15-90 & 15-97, (N.C. App. January 5, 2016)

KEY WORDS

Foreclosure, HOA Foreclosure, Holder in Due Course, Quiet Title, Trustee, Trustee as Proper Party

Facts:

- Kenley defaulted on note and DT to bank
- Bank initiates F/cl (stayed by borrower Bankruptcy for some period of time)
- Before completion of F/cl, HOA files lien for dues
- HOA Forecloses and Mr. Greene purchases (for $4,706.41)
- Foreclosure Hearing on Bank note
- Greene appeals Clerks' order alleging Bank was not holder of note
  - Bank had original note
  - Indorsed in blank
- files a separate suit against the Trustee alleging it had no authority to initiate f/cl, seeking to enjoin and to quiet title.

In Re: Kenley

No. C.O.A. 15-90 & 15-97, (N.C. App. January 5, 2016)

KEY WORDS

Foreclosure, HOA Foreclosure, Holder in Due Course, Quiet Title, Trustee

Held:

- Whenever this Court has held that mere possession of the original note was insufficient to satisfy the definition of a holder, the "original notes were either (1) not drawn, issued, or indorsed to the party, to bearer, or in blank, or (2) the trial court neglected to make a finding in its order as to which party had possession of the note at the hearing."
- Mr. Greene's bond posted per GS 45-21.16 was paid to Bank (typically 1% of principal balance)
- For improperly joining the Trustee (GS 45-45.3), court awarded attorney's fees to Trustee.

Mr. Greene

Quinn v. Quinn

No. C.O.A.14-979, (N.C. App. October 6, 2015)

KEY WORDS

Notary, Adverse Possession, Color of Title, Gift Deed

Facts:

- Leslie signs deed to his brother, Thomas in 1999
- Notarized by Pat in 2004
- Grantee had been changed to Danny and Pat
- Deed Recorded
- Leslie sues to have deed set aside
  - Pat notarized it
  - Gift deed not recorded w/in 2 years
- Danny and Pat counterclaim
  - Adverse possession under color of title
  - Unjust enrichment
  - Betterments

Held: the Deed was void either because 1) it was notarized by a Grantee, which is a violation of NCGS §10B-20(c)(5-6); or 2) the Deed was materially altered after execution without the consent and knowledge of the Grantor.

The decision was reversed and case was remanded to the Trial Court since the claim for Adverse Possession under Color of Title involves genuine issues of material fact which were not proper for Summary Judgment and need to be tried.

Arnesen v. Rivers Edge, et al

No. C.O.A. 15-92, (N.C. App. December 15, 2015)

KEY WORDS

Property Owners Association, Injunction, Attorneys fees for Enforcement

Facts: Multiple owners of lots in several Brunswick County communities including, Rivers Edge, Ocean Ridge, Ocean Isle Palms and Seawatch have sued the developer, BB&T and its appraisers alleging that the Bank and its appraisers participated in a scheme to defraud investors by artificially inflating property values in the years preceding the national real estate crisis and that the plaintiffs would have not purchased real property in the developments but for faulty appraisal information

NOTE: The litigation is ongoing with the developer and this case deals only with the allegations against the bank and its appraisers.

Held:

- No legal duty exists at law between a debtor and creditor or between a bank's appraisers and a purchaser
- Plaintiffs failed to sufficiently allege justifiable reliance on any omission by the bank before they purchased the investment properties and failed to sufficiently establish that any action by BB&T was the proximate cause of their harm
- no duty of care owed to the plaintiffs by the appraisers or any justifiable reliance by the plaintiffs on an actual appraisal or a representation of the appraiser

Residences at Biltmore Condominium Owners Assoc. v. Power Development, LLC

No. C.O.A.14-1222 (N.C. App. November 3, 2015)

KEY WORDS

Condominium, Declarant's Rights, Declarant Retained Property, Common Elements

Facts:

- Developer recorded plats and plans showing certain areas of the condo as being Declarant Retained Property, some of which were inside the building where the units were located
- Developer encumbers its retained property with a DT
- Developer Defaults…Foreclosure initiated
- Developer records Supplemental Declaration: "it was always the Declarant's intention that the property labeled as Declarant Retained Property . . . be a portion of the unit owners' common elements." Without a vote or joinder of Lender.
- Developer records "Agreement to Transfer Declarant Retained Property & Rights" with Lender as grantee…and contrary to the Supplement Dec. it says that Developer HAD RETAINED Declarant Retained Property.
- On the same day, Lender executed Management Agreement with Biltmore Management.
- POA engages Southern Resort Group to manage POA Files Suit alleging 1) POA is owner of Declarant Retained Property AND 2) that Agreement to Transfer Declarant Retained Property & Rights was "null and void and of no effect on the title of the property interests of the members of Plaintiff Association."

Residences at Biltmore Condominium Owners Assoc. v. Power Development, LLC

No. C.O.A.14-1222 (N.C. App. November 3, 2015)

KEY WORDS

Condominium, Declarant's Rights, Declarant Retained Property, Common Elements

Held:

- The defining feature of a condominium is that it is comprised of two — *and only two* — types of property:
  1) units (defined as the "physical portion[s] of the condominium designated for separate ownership or occupancy, the boundaries of which are described [in the declaration]"); and
  2) common elements (meaning all portions of the condominium other than units).

- the right to ownership of the disputed areas that Power Development contends it reserved here far exceeds the scope of those special declarant rights permissible under the Act.

- N.C. Gen. Stat. § 47C-2-115 does not permit a declarant that avails itself of the right to maintain offices on common elements to own these portions of the common elements.

Federal Point Yacht Club v. Moore

No. C.O.A. 15-92, (N.C. App. December 15, 2015)

KEY WORDS

Property Owners Association, Injunction, Attorneys fees for Enforcement

Facts:

- Mr. Moore is fined multiple times by HOA for his bad conduct in violation
- Heinous acts…
  - Spreading blood-like substance (ketchup) on the Board President's fence and home
  - Slashing tires
  - Crotch grabbing (his own)
  - Defacing clubhouse restroom with urine and feces
  - Communicating threats
  - Using profane language
- HOA sought an obtained an injunction against Mr. Moore's bad behavior
- Mr. Moore, not deterred, appealed the injunction and continued his bad behavior

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KEY WORDS

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Held:

- Court affirmed the award of attorney's fees to the Association in the amount of $100,000
- …after two appeals to the COA by Mr. Moore…