



CASE LAW 2016

Chicago Title
February 2017



EMAIL HACKING & WIRE FRAUD:

ARE YOU SECURE?

HACKERS CONTINUE TO PERPETRATE WIRE TRANSFER FRAUD IN REAL ESTATE TRANSACTIONS

ALERT: Wire Fraudsters Targeting Real Estate Transactions

Scary new scam could swipe all your closing money



Hackers sought to steal over \$3 billion through wire-transfer fraud: FBI

REUTERS Reuters June 14, 2016



Cybercriminals have been hacking into the computer accounts of real estate agents, then sending wiring instructions. The scam can cost victims hundreds of thousands of dollars. (Ikon Images / Getty Images)

Real Estate Wire Transfer Fraud



A magnifying glass is held in front of a computer screen in this picture illustration taken in Berlin 2013. The Financial Times' website and Twitter feeds were hacked May 17, 2013, renewing questions about whether the popular social media service has done enough to tighten security as cyber-attacks intensify. The attack is the latest in which hackers commandeered the Twitter account of a prominent news organization to push their agenda. Twitter's 200 million users worldwide send more than 400 million tweets a day, making it a potent distributor of news. REUTERS/Pawel Kopczak

NYC couple sues lawyer for negligence over \$1.9M cyber scam

John Marzulli NEW YORK DAILY NEWS 04/18/2016 6:07 PM ET



InfiniteHistoryProject MIT/Youtube

Robert Millard, a Manhattan investment banker, and his wife are suing their lawyer, whose email was hacked, causing the couple to wire \$1.9 million to cyber crooks.

TRIAD
BUSINESS JOURNAL

Hackers make off with \$200K in real estate sale funds in savvy scam

Apr 27, 2015, 7:51am EDT



American Land
Title Association
Protecting the American Dream Since 1907

New Email Fraud Scheme Targets Title Agents, Earnest Money

April 24, 2014



RISK MANAGEMENT ALERT

WEBSITE YOUR POLICY RISK MANAGEMENT CLE CLAIMS ABOUT US

August 2016

WIRE INSTRUCTION FRAUD CONTINUES TO PLAGUE NORTH CAROLINA LAWYERS



MALPRACTICE ALERT

WEBSITE YOUR POLICY RISK MANAGEMENT CLE CLAIMS ABOUT US

May 2015

If you are holding funds in trust for disbursement and receive a change in payment instructions, **STOP**.



RISK MANAGEMENT ALERT

WEBSITE YOUR POLICY RISK MANAGEMENT CLE CLAIMS ABOUT US

May 2016



NC State Bar Scam Warning from Peter Bolac

DON'T BE A VICTIM OF WIRE INSTRUCTION FRAUD

- DO NOT make *last minute* changes (especially late Friday or before a holiday) without:
 - *Personal verification, by phone (not just email)*
 - *Known contact information for the payee from reliable third party, not the email requesting the change!*

- Confirm in writing *and* verbally

- Double-check email addresses. Spoofing examples:

Real email address is “jonathan.doe@chicagotitle.com” but one sees:

<i>jonathan.doe@chicag0title.com</i>	<i>← the number “0” is suspect</i>
<i>jonathan.doe@chicagotit1e.com</i>	<i>← the number “1” is suspect</i>
<i>jonathan.doe@chicagotitlee.com</i>	<i>← the extra “e” is suspect</i>
<i>jonathan.doe@chicagottle.com</i>	<i>← the lack of an “i” is suspect</i>

Real email address is “jane.doe@fsu.edu”, but one sees:

<i>jane.doe.fsu.edu@gmail.com</i>	<i>← where the “.fsu.edu@gmail.com” is suspect</i>
<i>jane.doa@fsu.edu</i>	<i>← where the “a” is suspect</i>

Prevent BEC *

- Verify payment change requests via a trusted ‘out of band’ method like **calling a previously verified phone number to confirm the real party sent the request** (the phone number should be taken from an *already established* contact list that was previously verified – not a new number received via email);
- Limit the number of employees with authority to approve/conduct/make payment transfer and changes;
- Have a 2nd person as designated approver for any wire transfer request involving:
 - *Dollar amounts over a specific threshold; and/or*
 - *Transactions with business partners who were not previously approved to receive payments; and/or*
 - *New bank or account numbers for current business partners; and/or*
 - *Wire transfers to locations outside areas where partners normally do business (i.e. transfers to different countries, or even different states in certain circumstances).*
- While it is important to refrain from opening attachments or clicking on links from *unknown* sources, it is just as important to do the same thing from *trusted* sources when such communications are *unexpected*. **If you receive an email where you believe the instructions or content is questionable (whether or not attachments or links are included), call the sender to confirm the real party actually sent the material.**
- Call to verify receipt

* BEC = Business
Email Compromise

The Fraudulent Instructions Rider provides coverage for misdirected funds when a fraudulent party provides false instructions. The availability of the coverage is dependent on acceptable answers regarding precautionary measures the applicant agrees or disagrees to follow.

1. a. Will the applicant verify original funding instructions and any changes to funding instructions? Yes No
- b. If yes, as part of the verification for original and changes to funding instructions, will you adhere to the following call back procedure?
 - i. Make an answered outbound telephone call using a phone number obtained from an independent source, such as the Internet or original sales contract to confirm the identity of the person who requested the change in funding instructions? Yes No
 - ii. Document the following details of the phone conversation: Yes No
 1. Phone number and independent source used
 2. Date and time of phone call
 3. Name of person who verified the funding instructions
2. Will you provide regular training to staff members on fraudulent funding instructions including how they can avoid these types of losses through following a proper call back procedure? Yes No
3. Will you agree to have the applicant's **entire staff**, including principals and part time employees, sign off on the statement below as soon as practical but no later than 30 days from the date this questionnaire is signed?
 Yes No

I understand that funding instructions not received in person may be fraudulent. I agree to verify all such instructions by following a call back procedure.

"Sign off" can be completed by providing this statement to your entire staff and obtaining confirmation that they have read and agree to the statement.


4. Do you agree to include the following warning just below the signature line and above any advertising or disclaimer language in all of your email correspondence for internal and external use?
 Yes No

WARNING – FRAUDULENT FUNDING INSTRUCTIONS


Email hacking and fraud are on the rise to fraudulently misdirect funds. Please call your escrow officer immediately using contact information found from an independent source, such as the sales contract or internet, to verify any funding instructions received. We are not responsible for any wires sent by you to an incorrect bank account.

The undersigned represents and warrants on behalf of the Named Insured and all persons/entities for whom this insurance is being purchased, that to the best of your knowledge and belief, the statements set forth herein and attached hereto are true and accurate and that there has been no attempt at suppression or misstatement of any material facts known or that should be known. We will rely upon this application and all such attachments in issuing the policy.

Cyber policy questionnaire



Federal Bureau of Investigation Internet Crime Complaint Center(IC3)



[Home](#) [File a Complaint](#) [Press Room](#) [About IC3](#)

Filing a Complaint with the IC3

The IC3 accepts online Internet crime complaints from either the actual victim or from a third party to the complainant. We can best process your complaint if we receive accurate and complete information from you. Therefore, we request you provide the following information when filing a complaint:

- Victim's name, address, telephone, and email
- Financial transaction information (e.g., account information, transaction date and amount, who received the money)
- Subject's name, address, telephone, email, website, and IP address
- Specific details on how you were victimized
- Email header(s)
- Any other relevant information you believe is necessary to support your complaint

File a Complaint


Welcome to the IC3

🔍

Site Navigation

- [Alert Archive](#)
- [FAQs](#)
- [Disclaimer](#)
- [Privacy Notice](#)
- [Internet Crime Prevention Tips](#)
- [Internet Crime Schemes](#)

Annual Report



2015 IC3 Annual Report

Reporting

- ic3.gov → FBI Internet Crime Center
- NC Attorney General
- Your malpractice carrier
- Your title insurer(s)
- NC State Bar

Data Breach Reporting,
 NCGS 75-60 et seq.,
Identity Theft Protection Act



NC SUPREME COURT

2016



In Re Foreclosure of Lucks

___ N.C. ___, 794 S.E.2d 501 (#162A-16, 12-21-2016)

HELD BY NC SUPREME COURT:

- Creditor failed to establish authority to proceed, per trial court. Copies of power of attorney with “significant internal inconsistencies” affidavit were not adequate to prove the elements of N.C.G.S. 45-21.16 for a power of sale foreclosure.
- Non-judicial foreclosure is in contract, not a judicial action; the Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply.
- Same default → judicial foreclosure required
- New default → *new* power of sale foreclosure available

REVERSED THE COURT OF APPEALS, ___ N.C. App. ___, 785 S.E.2d 185, COA #15-581, April 5, 2016 (unpublished)

Kirby v. NC Dept. of Transportation

368 N.C. 847, 786 S.E.2d 919 (#56PA14-2, June 10, 2016)

- Map Act is a cost-controlling mechanism
- By recording a corridor map, NCDOT
 - *Identifies property “with a mind toward property acquisition,”*
 - *Affects (decreases) the future price and salability of the property*
 - *Is a perpetual restriction on the property*
 - *Is the exercise of the State's power of eminent domain to take property of owners affected by and noticed of a transportation corridor map recorded under N.C. Gen. Stat. 136-44.50*
 - *Requires payment of just compensation.*

*SEE Legislative report
on RESCISSION of the
Map Act, S.L. 2016-90!*

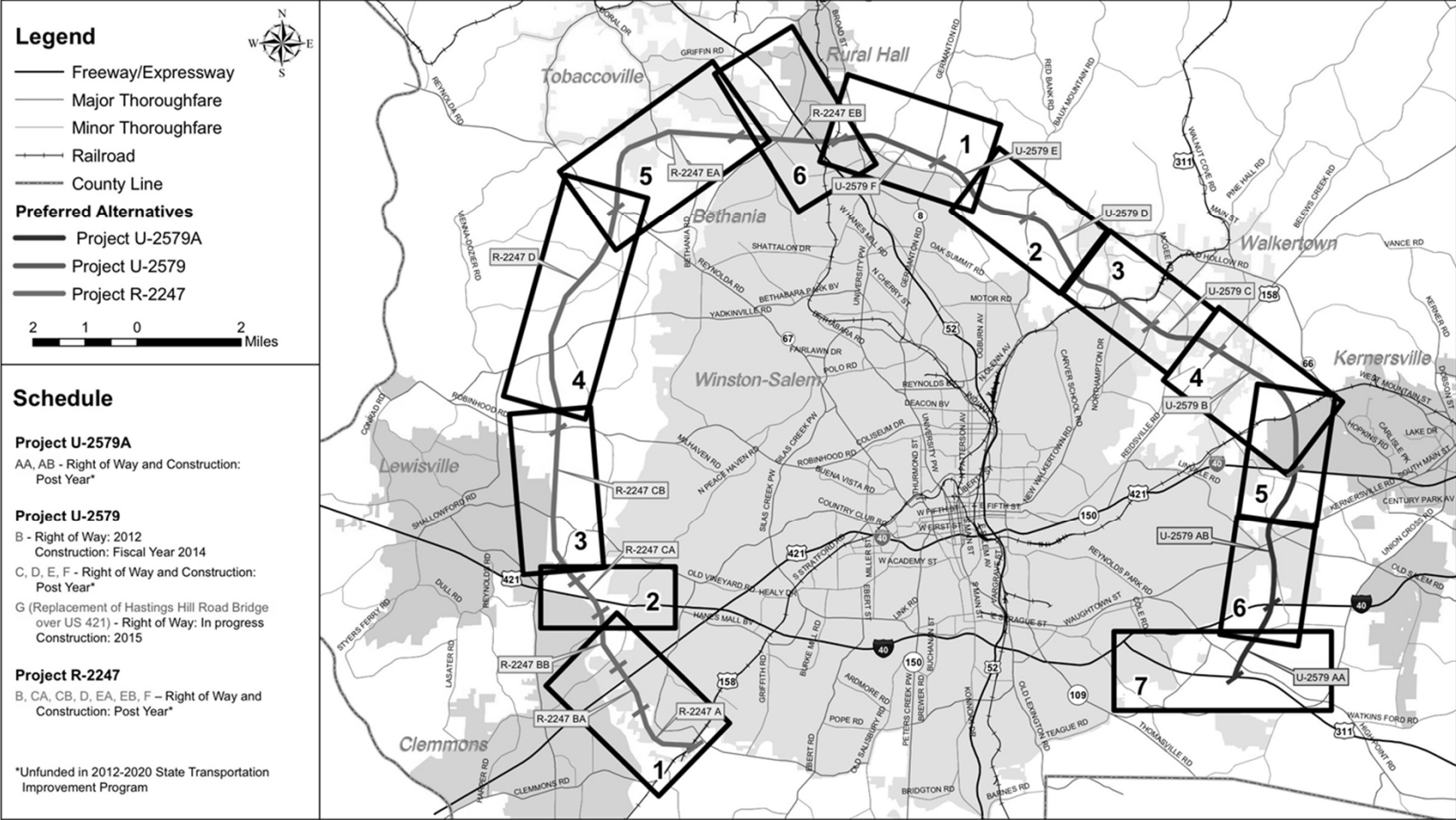
Affirming
___ N.C.App. ___, 769 S.E.2d 218 (COA14-184, Feb. 17, 2015)
Citing N.C. Gen. Stat. §§136-44.50 through 136-44.53.

Kirby v. NCDOT



Winston-Salem Northern Beltway

Project R-2247, Project U-2579, and Project U-2579A



Atlantic Coast Props., Inc. v. Saunders

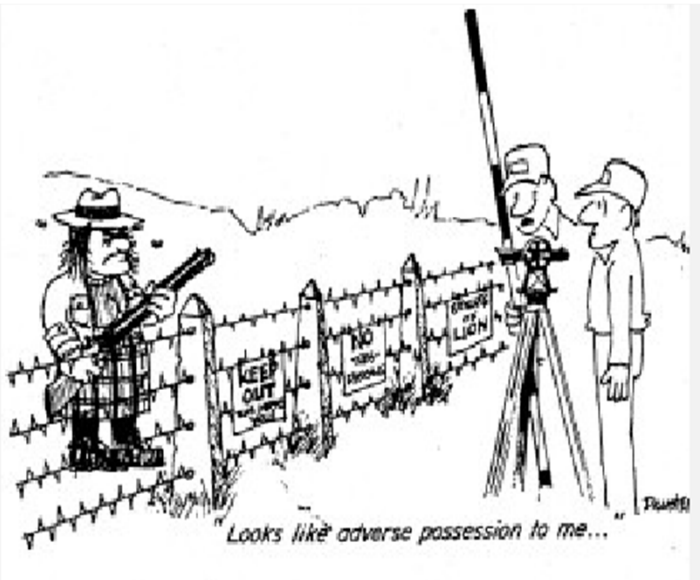
___ N.C. App. ___, 777 S.E.2d 292 (COA14-1278), *aff'd per curiam* 368 N.C. 776, 783 S.E.2d 733 (365A15, April 15, 2016)

Petition by purchaser of undivided one-half interest in land to partition the property

Issue: Partition and Constructive ouster of co-tenant:

HELD:

- “sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed.”
- However, if actions by co-tenant(s) in possession do “anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise.”



Nies v. Town of Emerald Isle

____ N.C. App. ____, 780 S.E.2d 187, (NC COA 15-169, 11-17-2015),
discr, rev. allowed 4-13-16, then dismissed 12-14-16

HELD:

- “[T]he ‘ocean beaches’ of North Carolina include both the wet sand beaches – generally, but not exclusively, publically owned – and the dry sand beaches – generally, but not exclusively, privately owned.”
 - *subject to public trust rights unless those rights have been expressly abandoned by the state.*
 - right to freely use and enjoy the state’s ocean and estuarine beaches
 - public access to and use of ocean beaches
 - *public trust rights on privately-owned dry sand beaches – test:*
 - “Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.”
 - The landward boundary of NC “ocean beaches is the *discernable reach of the ‘storm’ tide*”
 - G.S. §§ 1-45.4, 113A-134.2. and GS 77-20

Town may enforce ordinances reserving
unimpeded access over dry sand beaches.

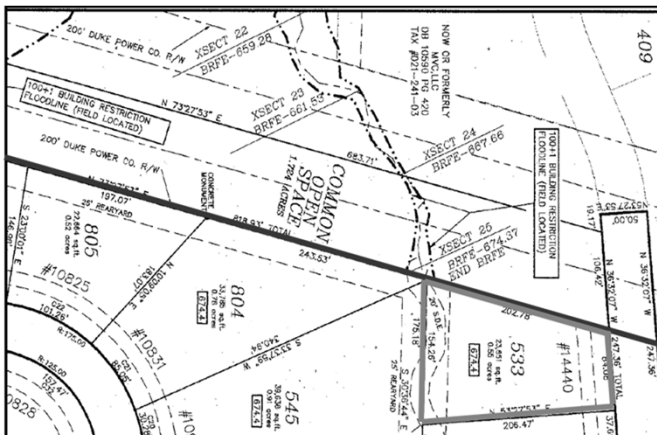


Duke Energy Carolinas, LLC v. Gray ___ N.C. ___, 789 S.E.2d 445 (108PA14-2, Aug. 19, 2016)

- 10-2006: Certificate of Occupancy
- 12-2012: Duke Energy sued Gray for removal of the encroachment

HELD: The applicable statute of limitations:

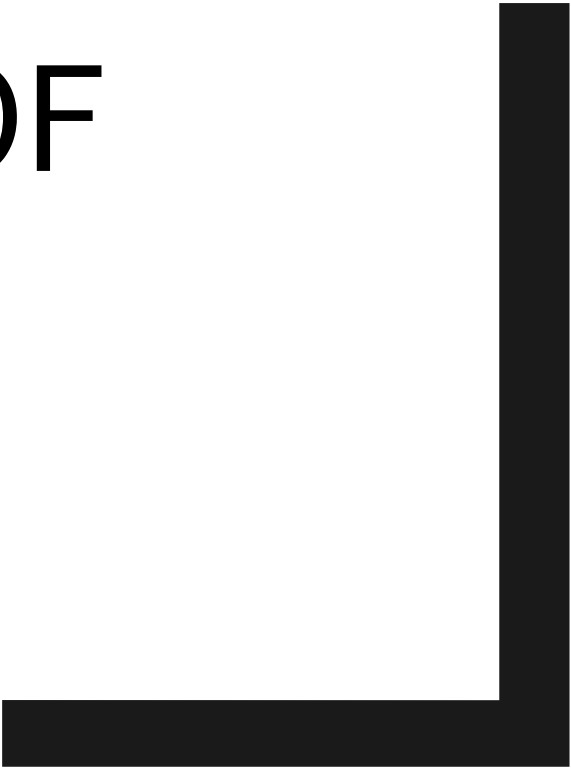
- Recovery of a real property interest – 20 years, G.S. 1-40
- NOT injury to an incorporeal hereditament – 6 years, G.S. 1-50
- *Pottle v. Link* (2007) overturned to the extent it held G.S. 1-40 inapplicable to encroachments onto easements





NC COURT OF APPEALS

2016



RECURRING THEME: FINISH OUT YOUR TRANSACTION, LAWSUIT, FILINGS



B S K Enterprises, Inc., v Beroth Oil Co.

___ N.C. App. ___, 783 S.E.2d 236 (COA15-189, 3/1/2016)

- Petroleum product migration causing Groundwater contamination

- Generally, temporary trespass damages:
 - *Remediation rather than diminution in value*

- If remediation is substantially more than diminution in value
 - *Trial court could limit damages to diminution in value*

 - *Discretionary Review denied, 787 S.E.2d 385 & 787 S.E.2d 39 (6-9-16)*



Henderson v. Garcia Motorrad

789 S.E.2d 569 (COA 15-1250, June 21, 2016,
unpublished)

- Co-tenant could lease property to third party, to the extent of his interest *only*, but cannot bind the non-joining co-tenant's interest
- Other co-tenants entitled to share of fair rental value, absent effective ouster
- Court reviewed other co-tenancy issues:
 - *Quantum meruit*
 - *Quantum valebant*
 - *Unjust enrichment*
 - *Breach of contract*
 - *Ouster*
 - *Trespass to Real Property*
 - *Necessary parties*

Jamestown Pender, L.P. v. NC Dept. of Transportation
792 S.E.2d 187 (COA15-925, Nov. 1, 2016, *unpublished*)

Wilmington Urban Area Metropolitan
Planning Organization (WMPO)
transportation corridor official map was
also a “taking” under Kirby.



PAT McCrory
 Governor
 NICHOLAS J. TENNYSON
 Secretary

August 5, 2016

Tammy Theusch Beasley
 Register of Deeds
 New Hanover County
 320 Chestnut Street
 Wilmington, NC 28401

Dear Ms. Beasley,

House Bill 959 was signed into law July 11, 2016. Section 17(a) of the bill rescinds all transportation corridor official maps filed or amended to date. A list highlighting the affected map(s) in your jurisdiction is enclosed for your reference. This letter serves as official notification in compliance with Section 17(b) of HB 959.

Section 17(a) of HB 959 further states that all restrictions imposed under Article 2E of the North Carolina General Statutes, "Transportation Corridor Official Map Act," are no longer applicable to properties located within corridors designated under the rescinded maps. This would include the prohibitions on issuance of building permits and subdivisions of property stipulated in NCGS 136-44.51(a).

As a result of the rescission of all previously filed maps, property owners cease to be eligible for the tax reductions provided for under NCGS 105-277.9 (unimproved property) and NCGS 105-277.9A(a) (improved property).

Please update your internal records and procedures as necessary to comply with Section 17(a) of HB 959. Please contact Mr. Ray McIntyre at rmcintyre@ncdot.gov with any questions.

Sincerely,

Patrick Norman, PE
 Director of Planning and Programming

Enclosure

cc: Nicholas J. Tennyson, Secretary of Transportation
 Sandra Fountain, Board of Transportation
 Karen Collette, PE, Division Engineer
 Carr McLamb, NCDOT General Counsel

Nothing Compares

New Hanover County Map Book 2, Page 324, Corridor Map notation in Register of Deeds index AND rescission letter on map link

NC DEPT OF TRANSPORTATION				
NC DEPT OF TRANSPORTATION (GRANTOR)				
DATE	CODE-BOOK-PAGE	TYPE	DESCRIPTION	
11/22/2011	MAP-2-324	HIGHWAY MAP	PD:MAP RESCINDED - SEE HOUSE BILL 959 SECTION 17(A)	

TIP PROJECT NO.	COUNTY	DESCRIPTION	DATE OF ADOPTION	RECORD REGISTER OF DEEDS
R-3300	NEW HANOVER PENDER	US 17 HAMPSTEAD BYPASS (US 17 TO US 17 NORTH OF HAMPSTEAD)	11/16/2011*	11/22/2011
U-4751	NEW HANOVER	MILITARY CUTOFF ROAD EXTENSION (MILITARY CUTOFF ROAD TO US 17) AMENDED	**	8/4/2005
U-3338B	NEW HANOVER	MARTIN LUTHER KING BOULEVARD - NORTH KERR AVENUE NW QUADRANT OF THE PROPOSED HALF CLOVER SW QUADRANT OF THE PROPOSED HALF CLOVER	4/20/2010** 9/17/2010**	11/22/2011 5/28/2010 9/17/2010

* - ADOPTED BY WILMINGTON MPO
 ** - ADOPTED BY CITY OF WILMINGTON

Parks Building Supply Company v. Blackwell Homes, Inc.

(COA 15-727, April 19, 2016, *unpublished*)

- “Owner” under NC mechanics’ lien statute, GS 44A, Article 2, includes contract purchaser (Blackwell Homes) who is contracting for supplies *even before their closing*.
 - Thus, “Contractor,” Parks Building Supply Company, had priority over construction draws under Blackwell’s construction loan.

Reaffirming Dalton Moran Shook vs. Pitt Development (1994)

- Name discrepancy was latent ambiguity, resolvable by parol evidence.

DAVIS V. DAVIS

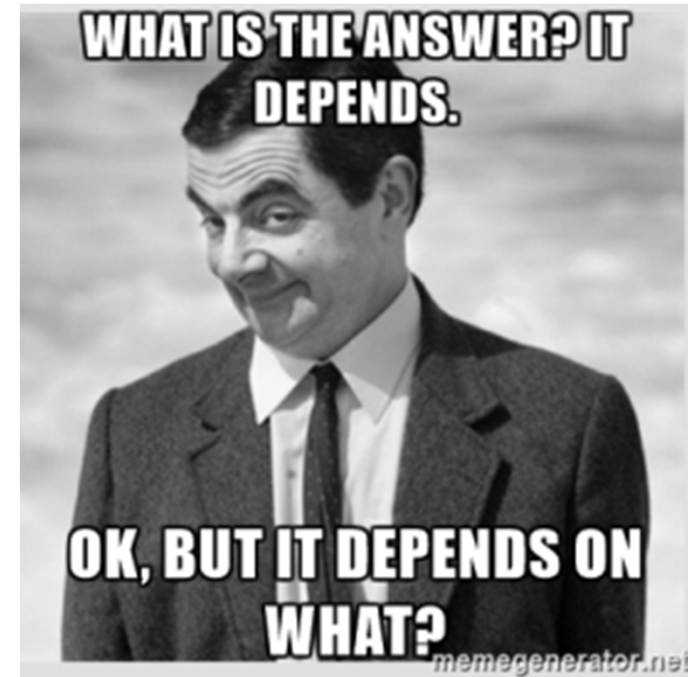
791 S.E.2d 714 (COA16-400, 11-1-2016)

RESTRAINT ON ALIENATION:

Restriction by grantor reserving life tenancy that it “be personal to the use of the Grantors” ... “and not be utilized by any other person”

HELD: Unreasonable restraint on alienation, void *ab initio*

QUESTION: WHAT IS “REASONABLE?”



Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.

___ N.C.App. ___, 791 S.E.2d 906 (COA 15-689, Nov. 1, 2016)



Facts:

- March 2004: HELOC
- August 2004: Wells Fargo \$350K mortgage; HELOC subordinated
- November 2006: Wells Fargo refinanced, paid off Wells Fargo 2004 prior; HELOC *not* subordinated
- December 2006: Wells Fargo satisfied the Aug 2004 deed of trust
- August 2013: Wells Fargo rescinded satisfaction under G.S. 45-36.6;
Their error / mistake: They did not “intend” to lose priority

■ HELD:

- (1) “erroneously” filed satisfaction can be rescinded under G.S. 45-36.6, for any error or mistake (including that did not intend to lose priority by not obtaining a new subordination) – question of law
- (2) “intentional” act (satisfying the 2004 deed of trust) may not be “erroneous” – question of fact

REMANDED for court factual determination

Cobblestone HOA Of Clayton, Inc.

___ N.C.App. ___, 791 S.E.2d 238 (COA15-1281, Sept. 6, 2016)

Plaintiffs-homeowners paid dues to HOA for years, under mistaken instruction that they were members of the HOA, - though they “rarely, if ever” used the primary amenities and the HOA denied them access to amenities

HOA notified them they were not members of the HOA

NC Court of Appeals **HELD:**

- Not “implied in fact” contract → HOA cannot collect dues
- Unjust enrichment is based on quasi-contract, implied in *law*
- Unjust enrichment or quantum meruit are not appropriate if there is an actual contract (implied in *fact* rather than implied in *law*). See *Lake Toxaway Cmty. Ass’n, Inc. v. RYF Enters., Inc.*, (2013)
- Plaintiffs-homeowners entitled to refund of dues erroneously paid to HOA

On appeal to NC Supreme Court,

793 S.E.2d 248 (10/13/16), consolidated cases:

(Sanchez, COA15-1281)
(Sain, COA15-1302)
(Christopher, COA15-1282)
(Franks, COA15-1303)
(Draughon, COA15-1280)



Dabbondanza v. Hansley

___ N.C.App. ___, 791 S.E.2d 116 (COA16-117, Aug. 16, 2016)

ISSUE: Rule 70 transfer of title:

Equitable distribution action

- 2007: Court order for husband to convey property to Wife
- Husband refused to sign deed
- 2008: Trial court *orally* ordered Clerk to convey property to wife under Rule 70
- 4 years later: Hansley judgment against Husband
- Later: Attempted *nunc pro tunc* order by Trial Court and Clerk conveyance

HELD:

Rule 58 requires the order to be *in writing* prior to the Clerk's Rule 70 deed

The third party (Hansley) judgment attached to the Husband's interest prior to the transfer to the Wife.



WARNING!
RECORD
YOUR DEEDS
&
JUDGMENTS!

Kimler v. The Crossings At Sugar Hill Prop. Owner's Ass'n, Inc.

___ N.C.App. ___, 789 S.E.2d 507 (COA15-1301, Aug. 12, 2016)

ISSUE: Applicability of Planned community act amendments

FACTS:

1997 Declaration provided for:

- Single lot HOA dues on purchase of multiple contiguous lots “from the developer”
- Reserved amendment rights to developer, never assigned to HOA

2012 Amendment would charge dues on per lot basis on all contiguous lots if *not* purchased “from the developer”

HELD:

Amendment of declarations by vote of over 67% of members, in compliance with G.S. 47F-2-117 was effective, since:

- Not prohibited by PRE-1999 declarations or articles
- “Largely to clarify” the 1997 language
- Not “unreasonable” under the *Armstrong v. Ledges* holding



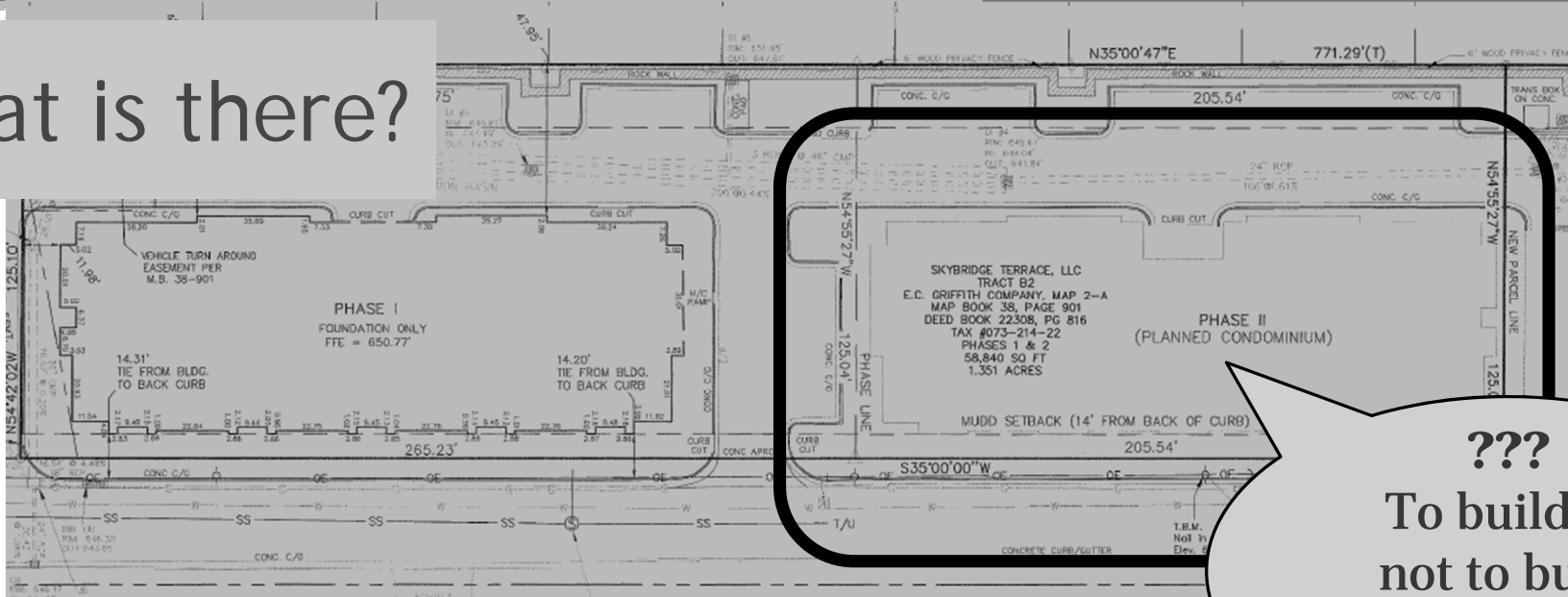
In re: Skybridge Terrace, LLC

___ N.C.App. ___, 786 S.E.2d 5 (COA 15-810, Apr. 5, 2016)

- Declaration reserved to the Condominium developer the right to withdraw any portion of the property
- Plat failed to indicate portions that “Need Not Be Built” as required by statute
- HELD: “Condominium developer’s failure to include its reservation of withdrawal rights on plat, and omission of withdrawal right time limits from condominium declaration, which was comprehensive and demonstrated substantial compliance with the Condominium Act, were not material and thus did not prevent developer from exercising right to withdraw property ... [in unbuilt phases]”

Business Court Case #12 CvS 22411
March 23, 2015

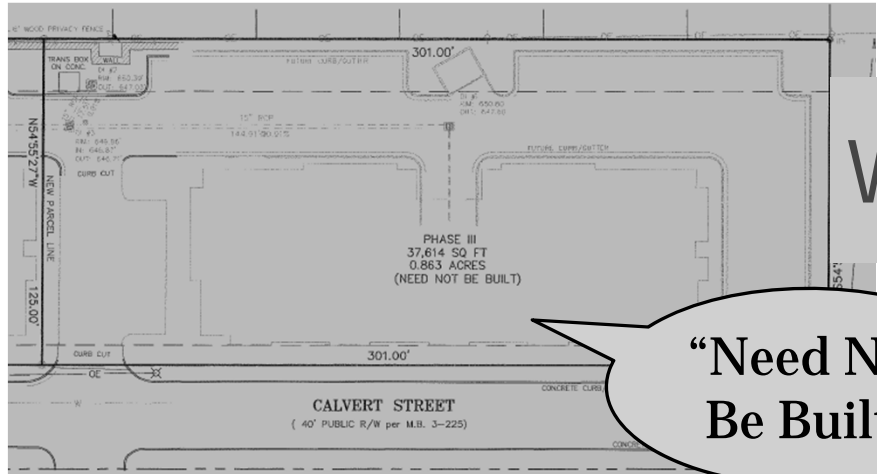
What is there?



???

To build or not to build ??

And WHEN ??



What is not?

“Need Not Be Built”

Skybridge Terrace
NC COA 15-810

In Re: Foreclosure of Herndon

___ N.C.App. ___, 781 S.E.2d 524 (COA15-488, January 19, 2016)

ISSUE: Power of Sale and Rule 41 of Rules of Civil Procedure – “2 dismissal” rule

FACTS:

- Borrower defaults on DT (30 year 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.

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.”



KB Aircraft Acquisition, LLC v. Berry

___ N.C.App. ___, 790 S.E.2d 559 (COA15-823, Aug. 16, 2016)

- Uniform Voidable Transactions Act
- Claim must be brought within 4 years of “transfer” or within one year of when creditor could have reasonably discovered the transaction with reasonable due diligence
- “Transfer” is time of conveyance, not when discovered by creditor
- G.S. 39-23.9 is a statute of repose (an immutable deadline) not a statute of limitations (which can sometimes be excused, such as for defendant misconduct)



In re: Estate of La-Reko A. Williams

___ N.C.App. ___, 783 S.E.2d 253 (COA15-619, March 1, 2016)

ISSUE: Intestate Succession of purported illegitimate son

FACTS:

- Decedent was named on birth certificate and signed Affidavit of Parentage.
- Affidavit of Parentage was not filed with Clerk

HELD:

- STRICT COMPLIANCE with the procedures under N.C.G.S. 29-19 *et seq.* is required.
- The procedures are *constitutional*.
- Thus, the Affidavit of Parentage by the putative father must be filed with the Clerk of Superior Court, in compliance with N.C.G.S. 29-19, for the child to inherit from the putative father's intestate estate under G.S. 29-15.

A jagged, starburst-shaped warning sign with a black outline and a grey fill. Inside the sign, the text "WARNING! FILE YOUR REQUIRED DOCS!" is written in a bold, sans-serif font.

WARNING!
FILE YOUR
REQUIRED
DOCS!

A rectangular sign with a black border and a grey background. The word "MANDATORY" is written in white, bold, sans-serif capital letters.

MANDATORY

A rectangular sign with a black border and a grey background. The word "Compliance" is written in white, bold, sans-serif capital letters. Below it, the words "Straight Ahead" are written in a smaller font, followed by two white upward-pointing arrows.

Compliance

Straight Ahead ↑↑

Appeal denied, 787 S.E.2d 30 (June 9, 2016)

Greene v. Trustee Services of Carolina, LLC AND In Re: Foreclosure of Kenley

___ N.C.App. ___, 781 S.E.2d 664 (COA15-90 & 15-97, Jan. 5, 2016)

ISSUE: Noteholder in foreclosure, note indorsed in blank

FACTS:

- Kenley defaulted on note and DT to bank
- Bank initiates foreclosure (stayed by borrower Bankruptcy for some period of time)
- Before completion of foreclosure, HOA files lien for dues, forecloses and 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*
- Greene files separate suit against the Trustee alleging lack of authority to initiate foreclosure.



Mr. Greene

HELD:

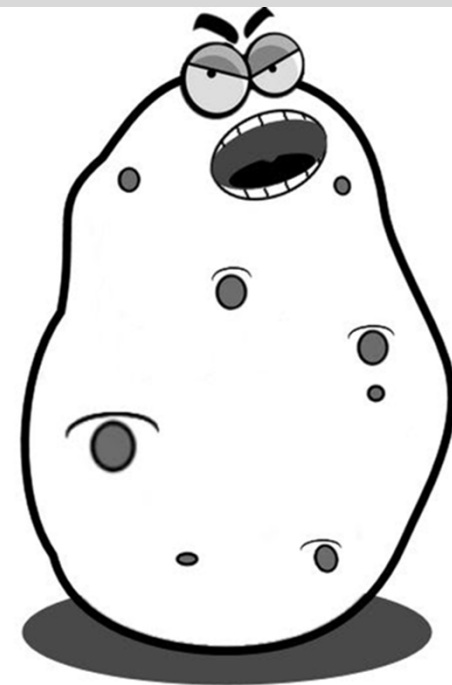
- Whenever this Court has held that mere possession of the original note was insufficient to satisfy the definition of a holder, the “original notes were either (1) not drawn, issued, or indorsed to the party, to bearer, or in blank, or (2) the trial court neglected to make a finding in its order as 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.

Discretionary review denied, 786 S.E.2d 268 (June 9, 2016)₃₄

Tater Patch Estates Home Owner's Association v. Sutton

____ N.C.App. ____, ____ S.E.2d ____ (COA 16-787, Jan. 17, 2017)

- 2000: Sutton bought 4 lots, but recombined 3 together
- 2007: "HOA" sent bill, then incorporated & had organizational meeting, sending invoice for 2 lots initially – the combined "lot" and Lot 2 (which does not use subdivision roads). Sutton refused to pay
- HOA sues for assessments on 4 lots
- Sutton replies:
 - *Only "2" lots (because of her recombination of 3)*
 - *Lot 2 should not be subject to assessments because does not use road*
 - *Counterclaims that HOA allowed improper grading of road, obstructing her access to her combined lot.*
- Jury verdict: \$8,040 to HOA for assessments; \$8,040 to Sutton for road obstruction
- *Affirmed!*



Agi-Tater

Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.

___ N.C.App. ___, 787 S.E.2d 388 (COA15-444, April 5, 2016)

- 2007: Developer contracted with Contractor to build project; 2007: Contractor obtained payment and performance bonds from Hartford; 2007: Developer obtained construction financing from United Bank

- 2009: Contractor obtains judgment against Developer with lien on property

- 2013 litigation:

United Bank files declaratory judgment action for a determination its deed of trust has priority. Hartford answers (on behalf of Contractor) that Contractor has priority (started before construction closing)

- *HELD: Validity of subordination by Contractor (missing book/page of deed of trust) is based on intent of parties, N.C. Gen. Stat. § 39-6.6(a) and surrounding circumstances if any ambiguities*

Hartford alleged misrepresentation torts by Bank on which Hartford relied in making the bonds,

- *HELD: not res judicata or collateral estoppel from prior lawsuits against Contractor; interests of Hartford are different from Contractor*



Banks v. Hunter

___ N.C.App. ___, ___ S.E.2d ___
(COA 16-666 Jan. 17, 2017)



FACTS:

- Note and Deed of Trust allowed for power of sale foreclosure
- “Lender” filed action for money owed and “sought specific performance to have Defendant’s Real Property judicially conveyed to him.”

HELD:

Foreclosure must be by either power of sale (if allowed in deed of trust) or judicial sale.

Complaint was for “strict foreclosure”, not recognized in North Carolina

Thus, District Court did not have subject matter jurisdiction.

Judgment vacated

Adelman v. Gantt

___ N.C.App. ___, ___ S.E.2d ___ (COA16-339, Dec. 30, 2016)

ISSUE: Easement by necessity; easement implied by prior use; motion for new trial

FACTS:

- Lots 1 & 18 jointly owned until conveyed to different purchasers in 1978
- Lot 18 now owned by Plaintiff Adelman; Lot 1 owned by Defendant Gantt
- 2-foot strip of driveway used exclusively for Lot 18, at public street, encroaches onto Lot 1, and has for over 40 years, as well as (mislocated) chain link fence separating the properties
- May 2014 Defendant removes old fence, places new fence on exact line, so entering Lot 18 driveway was difficult. Plaintiff cannot get out at night, renters won't rent, truck could not enter.
- Aug 2014 Plaintiff filed suit for nuisance, prescriptive easement, easement by prior use, and easement by necessity

Adelman v. Gantt (cont'd)

FINDINGS:

- “To establish an **easement implied by prior use**, plaintiff[] must prove that: (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was “apparent, continuous and permanent,” and (3) the claimed easement is “necessary” to the use and enjoyment of plaintiff[’s] land.”
- “[A]n **easement by necessity** will be implied upon proof of two elements: (1) the claimed dominant parcel and the claimed servient parcel were held in common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became “necessary” for the claimant to have the easement.”
 - *It is sufficient to show physical conditions and use which would reasonably lead one to believe that the grantor intended the grantee should have the right of access*
 - *[E]asement is essential to the use and enjoyment of the property*
- Legal Description sufficient: “an easement over the portion of the concrete driveway located on Lot 1” was sufficient given surveys and photos → “plainly visible”



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IN REGISTER
OF DEEDS!

Larsen v. The Arlington Condo. Owners Ass'n, Inc.

___ N.C.App. ___, ___ S.E.2d ___ (COA16-618, Dec. 30, 2016)

ISSUE: “Declarant” sale of parking space; Adverse Possession Under Color of Title

FACTS:

- Declaration of Condominium allowed Declarant to sell additional unit to buyers:
 - *“The Declarant reserves the right to sell to Owners of Residential Units additional parking spaces in the Parking area at the sole discretion of the Declarant (the “Purchases Spaces”).”* which would be appurtenant to condo.
- Condo unit owner purchased unit with undivided interest in common areas per Declaration in 2006, no public record of additional unit, but used 2 spaces until 2013, Association knew it was in the unit purchase agreement.

HELD:

Contract and Declaration are in writing, purport to pass title and contain an adequate description of the property transferred.

Deed referencing declaration was sufficient, without specifying the second parking space.

Seller was not Declarant, which “is why this case falls squarely within the type of cases that amount to possession under color of title: the sale contract addressing the parking spaces was “a writing that purports to pass title to the occupant but which does not actually do so ... because the person executing the writing fails to have title or capacity to transfer the title.”



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JUDGMENTS!

King v. Pender County

___ N.C.App. ___, 790 S.E.2d 680 (COA16-51, Aug. 16, 2016)



ISSUE: Maintenance (or abandonment) of Family Cemetery, Relocation of Graves, and Legal Rights of Relatives to Maintain Cemetery

HELD:

“Persons with an interest” in a family graveyard need not have a fee or leasehold interest.

To hold that persons “with legal right” include only those who own the property would render the statute's requirement that the cemetery be “abandoned” almost meaningless: it is the owner who seeks consent from the government to remove the graves.



Tropic Leisure Corp. v. Hailey

___ N.C.App. 791 S.E.2d 233 (COA15-1254, Aug. 16, 2016)

ISSUE: Full Faith and Credit Clause; Uniform Enforcement of Foreign Judgments Act; Collateral Attack

FACTS:

Judgment entered against defendant in Virgin Islands Superior Court

Property authenticated copy with affidavit that final and unsatisfied filed in Wake County Clerk of Superior Court

HELD:

Judgment valid in rendering state is entitled to Full Faith and Credit in a sister state upon compliance with the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. § 1C-1701 *et seq.* domestication procedures, including:

- Properly authenticated foreign judgment and affidavit that final and unsatisfied, filed with Clerk of Superior Court of North Carolina county, served on defendant, are presumed valid and enforceable
- Defenses are only regarding validity and enforcement of foreign judgment, because defendant was prevented from doing so, such as:
 - *that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification, or that the judgment debtor's due process rights have been violated.*

Turchin v. ENBE, Inc.

790 S.E.2d 751 (COA15-1236, July 19, 2016, *unpublished*)

ISSUES: Collateral Estoppel; Foreclosure; Bona Fide Purchaser

FACTS:

- 2008 deed of trust from Eagles Nest, later some property conveyed to John and Susan Turchin individually
- 2011 default, foreclosure filed, appealed, bankruptcy filed, stay lifted, foreclosure challenged in Superior Court on basis that Susan Turchin was not properly served, order that foreclosure could continue, appealed to NC Court of Appeals (dismissed 3-15-2012), but confidential settlement agreement mooted appeal to NC Supreme Court, foreclosure proceeded.
- December 2012 post-foreclosure conveyance to ENBE Holding Company, LLC
- March 2013 conveyance to Defendant, ENBE, Inc.
- August 2014 Turchins file complaint to quiet title, seek declaratory judgment and for trespass to real property ... again based on Susan not having been properly served in the 2011 foreclosure proceeding.

HELD:

- Collateral estoppel barred the same issue, Susan's service
- Defendant is a *bona fide* purchaser and title became final at the conclusion of the statutorily mandated 10-day upset bid period and cannot be disturbed.
 - “[W]here the defect in a foreclosure sale renders the sale voidable, as in the case at bar, the mortgagor's right of redemption can be cut off if the land is bought by a bona fide purchaser for value without notice. In such instances, a plaintiff is left with an action for damages against the trustee as his only remedy.”

Discretionary review denied, 793 S.E.2d 698 (Dec. 12, 2016)



Myers v. Clodfelter

___ N.C.App. ___, 786 S.E.2d 777 (COA15-1307, June 7, 2016)

ISSUE: Prescriptive easement; hostile use; claim of right; sole means of access and egress.

FACTS:

- Plaintiffs and their predecessors used road to access their properties and provide utilities to their properties for over 60 years
- Plaintiffs never asked Defendants for permission to use the road; Defendants never gave Plaintiffs permission to use the road; Plaintiffs have used the road by claim of right; and, Plaintiffs have maintained the road.
- 2005, Defendants dug large ditch across Coe Road and cut off Plaintiffs' access when Plaintiffs objected to Defendants' commercial paintball field.
- HELD:
 - Four elements of prescriptive easement were met:
 - (1) *use is adverse, hostile, or under claim of right*
 - (2) *use has been open and notorious - true owner had notice*
 - (3) *use has been continuous and uninterrupted for at least 20 years*
 - (4) *substantial identity of the easement claimed throughout the 20-year period.*
 - “hostile” (rather than permissive):
 - *not necessary to show that there was heated controversy, or manifestation of ill will, or that claimant was in any sense enemy of owner of servient estate;*
 - *hostile use is simply use of such nature and exercised under such circumstances as to manifest and give notice that use is being made under claim of right.*



NC Dept. of Transportation v. Mission Battleground Park, DST ___ N.C.App. ___, 791 S.E.2d 478 (COA 16-125, Sept. 6, 2016)

HELD:

- Real estate broker who is not a licensed appraiser:
 - *Can not testify or offer an opinion as to “fair market value”*
 - *Can not prepare a “valuation appraisal”*
 - *Can testify as to “probable selling price” and sales and leasing prices*
- Fair market value should not include the diminution in value of the remainder of the property caused by the acquisition and use of the adjoining lands of others for the same undertaking (*i.e.* the wetland area across the street owned by the City)



Settlers Edge Holding Co., LLC v. RES-NC Settlers Edge, LLC, ___ N.C.App. ___, 793 S.E.2d 722 (COA 15-1055, Dec. 6, 2016)

ISSUE: FDIC repudiation of construction-development loan draws; State court jurisdiction over litigation with FDIC-controlled bank

FACTS:

- Settlers Edge developed Mountain Air Country Club, using 2007 development loan from Integrity Bank
- Bank was taken over by FDIC and sold to RES-NC
- FDIC *stopped honoring draw requests* in 2008

- **HELD:**
- FDIC effectively repudiated the bank's obligation for construction loan advances by failing to respond to plaintiff's requests for draws

- Raising claims against Bank is only through receivership procedures under FIRREA, 12 U.S.C.A. 1821.

- However, Settlers Edge could properly raise repudiation as an affirmative defense in the lawsuit.



In re: Fox Den Dev., LLC

782 S.E.2d 122 (COA15-471, Feb. 2, 2016, *unpublished*)

FACTS:

- Fox Den entities were owned by Goforths and Burkes, operated without fully documenting. Goforths and Burkes each loaned the Fox Den Companies \$1,000 to develop Phase IV
- 2004 Goforth died, so Fox Den gave note and recorded deed of trust to estate, and nearly identical documents to Burkes
- Each family contributed another \$1.5 million, not documented with notes until 2009 (\$2.5MM notes combined debts) and no deeds of trust
- 2013 Goforths filed foreclosure; Superior Court held lack of authority for 2004 note and deed of trust.

- HELD:
- Authority is question of fact and trial court had found lack of authority, since Fox Den managers had never met and officially approved the 2004 documents (even though they were the sole owners of the LLC and beneficiaries of the note and deed of trust), as a matter of law (all that can be raised in a foreclosure-related proceeding)
- However, this does not preclude any actions in equity, including ratification, substitution and novation, which were not before the trial court at that time.



Henkel v. Triangle Homes, Inc.

___ N.C.App. ___, 790 S.E.2d 602 (COA15-1123, Sept. 20, 2016)



FACTS:

- 2007 Lynch purchases property
- 2011 and 2012 Federal tax liens
- 11/13/2013 Village filed Complaint for property taxes, obtained default judgment and held foreclosure Nov. 13, 2013 to Village – *never joined IRS as a party*. Triangle Homes filed upset bid in Village foreclosure; forewarned about IRS priority
- 11/14/2013 IRS foreclosure sale to Henkel
- 12/16/2013 Form 2435 Certificate of Sale delivered to Henkel, and 6/6/2014 recorded deed (after expiration of 180-day redemption period)
- 1/3/2014 Village Commissioner's Deed to Triangle

HELD: Where IRS was not given required notice under 26 U.S.C. 7425, their lien is not extinguished by the local property tax sale, despite super-priority of local taxes under G.S. 105-356.

DWC3, Inc., v. Kissel

784 S.E.2d 237 (COA15-252, March 15, 2016, *unpublished*)

ISSUE: Fraudulent transfers

FACTS:

- Wife entered agreement to sell her business to DWC3, was sued for “material misrepresentations”, lost in arbitration
- Prior to arbitration judgment, Wife conveyed NC assets to Husband, including NC tenancy-by-entirety tracts, as part of divorce settlement, and moved to Florida

HELD:

- Though “love and affection” is consideration for GS 52-10, it is NOT “reasonably equivalent value” under Chapter 39



Discretionary Review Denied, 787 S.E.2d 23 (June 9, 2016)

The logo consists of two thick black L-shaped lines. The first L-shape is on the left, with a vertical line extending downwards and a horizontal line extending to the right. The second L-shape is on the right, with a vertical line extending upwards and a horizontal line extending to the left. These two shapes meet at the center, forming a rectangular frame around the text.

U.S. DISTRICT COURT

Dreamstreet Investments Inc. v. MidCountry Bank

842 F.3d 825 (U.S.D.C., 4th Cir., Nov. 30, 2016)

FACTS:

- Dreamstreet sold unimproved lot to Buyer, with loan from MidCountry and “seller holdback agreement” for \$43,500 purchase price balance owed on lot, which would not be disbursed to Dreamstreet if Buyer-borrower defaulted ... which he ultimately did
- 2009: Dreamstreet realizes the funds were not intended for buyer’s construction budget and should not have been held back
- 2013: Dreamstreet files suit against MidCountry, alleging constructive fraud and fraudulent and deceptive trade practices

HELD:

- (1) Limitations period under NC Fraudulent and Deceptive Trade Practices Act runs from date knew or should have known with reasonable diligence; Dreamstreet had documents from beginning of loan
- (2) Contract, representation by counsel, consultation with banker and appraiser, so no fiduciary relationship or constructive fraud by MidCountry



HSBC Bank USA v. PRMC, Inc.

___ N.C.App. ___, 790 S.E.2d 583 (COA16-96, Sept. 6, 2016)

FACTS:

On business loan, President (individual) of PRMC asserts breach of fiduciary duty to the *corporation* by employee of HSBC

HELD:

“[W]hile an individual may appear *pro se* before the court, a corporation is not an individual under North Carolina law, and must be represented by an agent. Seawell v. Carolina Motor Club, 209 N.C. 624, 631, 184 S.E. 540, 544 (1936) (holding that “[a] corporation cannot lawfully practice law. It is a personal right of the individual,”). Further, a corporation cannot appear *pro se*; it must be represented by an attorney licensed to practice law in North Carolina, pursuant to certain limited exceptions.”

