2015 WL 690851
Only the Westlaw citation is currently available.
Court of Appeals of North Carolina.

BRANCH BANKING AND TRUST COMPANY, Plaintiff,
v.
Hui S. SMITH, Chong Su Kim, Jerry D. Smith, Joon Hee Nam, Mounib Aoun, Jihad L. Libbus, Yon Su Nam, and Hosun Kim, Defendants.

No. COA14–554. | Feb. 17, 2015.

Synopsis

Background: After lender purchased foreclosed property, it brought deficiency action against guarantors of loan secured by foreclosed property, for the $700,000 remaining on the loan debt. Lender moved for summary judgment. The Superior Court, Wake County, R. Allen Baddour, J., granted summary judgment against guarantors. One guarantor appealed.

Holdings: The Court of Appeals, Dillon, J., held that:

[1] genuine issue of material fact existed as to the value of the property at the time of the foreclosure sale, precluding summary judgment;

[2] guarantor was entitled to assert the defense that the purchase price of foreclosed property was less than property's fair market value; and

[3] guarantor did not waive its potential statutory defense by signing guaranty agreement.

Reversed and remanded.

West Headnotes (6)

[1] Mortgages Deficiency and Personal Liability

Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale; however, this general rule does not

apply in situations where the foreclosing creditor ends up purchasing the property at the foreclosure sale. West's N.C.G.S.A. §§ 45–21.31(a)(4), 45–21.36.

Cases that cite this headnote

[2] Appeal and Error Nature or Subject-Matter in General

Guarantor of loan secured by foreclosed property did not waive his argument that he could assert statutory defense that purchase price of foreclosed property was less than property's fair market value by conceding that the deficiency amount was established by the amount paid by lender at foreclosure in deficiency action brought by lender, who purchased foreclosed property; guarantor pleaded the statutory defense as an affirmative defense, bank argued at hearing the defense was only available to the borrower, and guarantor responded that the bank's dismissal of its claims against borrower did not foreclose its ability to raise the defense. West's N.C.G.S.A. § 45–21.36.

Cases that cite this headnote

[3] Judgment Guaranty

At the summary judgment stage of deficiency action brought by lender against guarantor of loan secured by foreclosed property to collect the deficiency following foreclosure sale, the burden rested with guarantor, the non-moving party, to forecast evidence to create an issue of fact that either (1) the property was worth more than the amount of the debt or (2) the amount the lender paid to purchase the property was substantially less than the property's true value. West's N.C.G.S.A. § 45–21.36.

Cases that cite this headnote

[4] Judgment Guaranty Cases

Genuine issue of material fact existed as to the value of the property at the time of the foreclosure sale for purposes of guarantor's defense that purchase price of foreclosed property was less than property's fair market value, precluding summary judgment in deficiency action brought by lender against guarantor of loan secured by foreclosed property after lender purchased property in foreclosure sale. West's N.C.G.S.A. § 45–21.36.

Cases that cite this headnote

[5] Guaranty Defenses

Guarantor of loan secured by foreclosed property was entitled to assert statutory defense that purchase price of foreclosed property was less than property's fair market value in deficiency action by lender, who purchased foreclosed property, pursuant to statute allowing "mortgage, trustor, or other maker of any such obligation whose property has been so purchased" at foreclosure sale to assert such defense, although lender dismissed deficiency action against borrower. West's N.C.G.S.A. § 45–21.36.

Cases that cite this headnote

[6] Guaranty Waiver or Estoppel of Guarantor

Loan guarantor did not waive its potential statutory defense to a deficiency action, that the purchase price of foreclosed property purchased by lender was less than fair market value, by signing the guaranty agreement, where agreement waived any statutory obligation by lender to first pursue its remedies against borrower before pursuing guarantor, and did not mention waiver of guarantor's potential statutory defense. West's N.C.G.S.A. §§ 26–7, 45–21.36.

Cases that cite this headnote

***1** Appeal by Defendant Mounib Aoun from order entered 30 October 2013 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 5 November 2014.

Attorneys and Law Firms

Howard, Stallings, From & Hutson, P.A., Raleigh, by John N. Hutson, Jr. and Michael A. Burger, for Plaintiff–Appellee.

Harris Sarratt & Hodges, LLP, Raleigh, by H. Clay Hodges, for Defendant–Appellant.

DILLON, Judge.

I. Background

In 2008, Plaintiff Branch Banking and Trust Company ("Bank") made a loan ("Loan") to Garrett Enterprise, LLC ("Borrower–LLC") [1] for a real estate project in Durham. The Loan was in the principal amount of $1,675,000.00 and was secured by the Durham real estate ("the Property").

The Bank entered into separate guaranty agreements with the eight individual Defendants ("Guarantors")—including Mounib Aoun ("Appellant")—to guaranty the Loan. The guaranty agreement executed by Appellant limited his liability to $418,750.00, plus interest, costs, and fees.

By 2012, the Loan was in default with over $1.4 million still owing, and the Bank foreclosed on the Property. At the foreclosure sale, the Bank was the sole bidder, purchasing the Property for $800,000.00. After the net proceeds from the foreclosure sale were applied, a deficiency of approximately $700,000.00 remained on the Loan debt.

Following the foreclosure sale, the Bank commenced this action against the Borrower–LLC and the eight Guarantors to collect the deficiency. Appellant and the other Defendants filed responsive pleadings.

The Bank voluntarily dismissed all claims against the Borrower–LLC and filed a motion for summary judgment against the Guarantors. Following a hearing on the matter, the trial court entered an order granting summary judgment in favor of the Bank against all eight Guarantors. The amount of the judgment entered against Appellant was $502,309.52.

Appellant filed a timely appeal from the order against him. However, none of the other Guarantors noticed an appeal.

II. Analysis

[1] This action involves the application of N.C. Gen.Stat. § 45–21.36 (2013), which makes available a statutory defense or offset to certain loan obligors in actions brought by a lender to recover the deficiency following the foreclosure sale of the collateral. Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale. *See*N.C. Gen.Stat. § 45–21.31(a)(4) (2013). However, this general rule is abrogated by G.S. 45–21.36 in situations where the foreclosing creditor—which in this case is the Bank—ends up purchasing the property at the foreclosure sale. Specifically, G.S. 45–21.36 provides that where the foreclosing creditor purchases the property and subsequently sues to collect the deficiency, certain obligors may "as [a] matter of defense" show that the collateral "was fairly worth the amount of the [entire] debt [,]" a showing which would "defeat ... any deficiency judgment against [any said obligor]."N.C. Gen.Stat. § 45–21.36. Alternatively, G.S. 45–21.36 provides that the obligor may by way of "offset" show that the creditor's winning foreclosure bid was "substantially less than [the collateral's] true value[,]" a showing which would "offset any deficiency judgment against [any said defendant]."*Id.* [2]

***2** On appeal, Appellant argues that summary judgment was inappropriate because there was an issue of fact as to whether he was entitled to the G.S. 45–21.36 offset/defense. For the reasons below, we agree and reverse the summary judgment entered *against Appellant* and remand the matter to the trial court for further proceedings. [3]

A. Appellant Preserved The Issues Raised in this Appeal

[2] Initially, we address the Bank's contention that Appellant waived his right to argue the G.S. 45–21.36 defense/offset because he did not make this argument at the summary judgment hearing. *See*N.C.R.App. P. 10(b)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make").

The record before us reveals that Appellant pleaded G.S. 45–21.36 as an affirmative defense. At the summary judgment hearing, the transcript shows that Appellant's counsel cited G.S. 45–21.36 as a basis for his position that his client was not liable for the deficiency. Specifically, at the hearing, the Bank's counsel argued that the offset defense was only available to the Borrower–LLC and could not be used by the Guarantors since the Bank had dismissed its claims against the Borrower–LLC. The trial court then asked Appellant's counsel if he agreed with the Bank's argument. In his response, Appellant's counsel did make an argument based on the statute: "[The fact that the Bank dismissed its claims against the Borrower–LLC] does not foreclose, however, the issues that are raised by that statute [G.S. 45–21.36]."

We note that Appellant's counsel conceded that the deficiency amount was established by the amount paid by the Bank at foreclosure. However, this concession does not waive Appellant's argument that G.S. 45–21.36 provides him a defense or offset to his liability for the deficiency.

In sum, Appellant's counsel did raise G.S. 45–21.36 as a defense during the argument; Appellant also raised this ground in his pleading which was before the trial court; and the trial court considered this ground in its questioning of counsel. Accordingly, we overrule this argument and proceed to the merits of Appellant's appeal.

B. There Is An Issue of Fact Regarding the Property's Value

[3] **[4]** At the summary judgment stage, the burden rested with Appellant, the non-moving party, to forecast evidence to create an issue of fact that either (1) the Property was worth more than the amount of the approximately $1.4 million debt *or* (2) the amount the Bank paid to

purchase the Property ($800,000.00) was substantially less than the Property's true value. *See Azar v. Presbyterian Hosp.*, 191 N.C.App. 367, 370, 663 S.E.2d 450, 452 (2008), *cert denied*,363 N.C. 372, 678 S.E.2d 232 (2009). We believe that Appellant met his burden. For example, an affidavit of one of the Guarantors authenticated an e-mail sent by an officer of the Bank indicating that an appraisal ordered by the Bank five months prior to the foreclosure sale indicated that the Property was worth over $2.1 million [4]. Accordingly, we hold that there was evidence before the trial court which created a genuine issue of material fact as to the value of the Property at the time of the foreclosure sale.

C. Section 45–21.36 Applies to Appellant as a Guarantor Even Though the Borrower–LLC Had Been Dismissed

***3** **[5]** The Bank argues that Appellant is not entitled to the defense/offset provided by G.S. 45–21.36. The language in the statute provides that the defense/offset is available to "the mortgagor, trustor or other maker of any such obligation whose property has been so purchased [at foreclosure by the creditor]."N.C. Gen.Stat. § 45–21.36. Many decisions from this Court appear to support the position of the Bank that the G.S. 45–21.36 defense/offset is not available to a mere guarantor. *See First Citizens Bank & Trust Co. v. Martin*, 44 N.C.App. 261, 264, 261 S.E.2d 145, 148 (1979) (holding that "it seems clear that the General Assembly intended to limit protection [afforded by G.S. 45–21.36] to those persons who held a property interest in the mortgaged property, and that such protection was not applicable to other parties liable on the underlying debt"); *see also Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, —— N.C.App. ——, ——, 742 S.E.2d 201, 204 (2013); *NCNB Nat. Bank of N. Carolina v. O'Neill*, 102 N.C.App. 313, 316, 401 S.E.2d 858, 860 (1991); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C.App. 761, 762–63, 394 S.E.2d 294, 296 (1990) (holding that "[t]he protection of [G.S. 45–21.36] is limited ... to persons who hold a property interest in the mortgaged property"); *Borg–Warner Acceptance Corp. v. Johnston*, 97 N.C.App. 575, 579–80, 389 S.E.2d 429, 432 (1990).

We are compelled, however, by our Supreme Court's holding in *Virginia Trust Company v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938) to conclude that Appellant, though merely a guarantor, is entitled to the G.S. 45–21.36 defense/offset, even where the Borrower–LLC has been dismissed from the action.

The loan at issue in *Dunlop* was secured by a borrower's real estate collateral and guaranteed by a separate guarantor. *Id.* at 196–97, 198 S.E. at 645. When the borrower defaulted, the creditor foreclosed on the collateral and cast the winning bid at the foreclosure sale; however, the creditor's bid was less than the amount of the debt, resulting in a deficiency. *Id.* at 197, 198 S.E. at 645. As a result, the creditor brought a deficiency action against the guarantor's estate, but did not name the borrower in the suit. *Id.*

The guarantor's executors, in their answer, pleaded the defense provided under G.S. 45–21.36, alleging that the fair market value of the collateral exceeded the indebtedness. *Id.*

In response, the creditor filed a motion to strike the executors' defense, arguing that the protections of the statute were "unavailable to a guarantor of the debt."*Id.* at 198, 198 S.E. at 645. After the creditor's motion to strike was denied, the creditor immediately appealed the trial court's ruling.

On appeal, our Supreme Court applied the following standard of review:

> On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial. If the defense provided in [section 45–21.36] is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial.

***4** *Id.* at 198, 198 S.E. at 646 (citations omitted). In other words, the allegations brought by the guarantor's estate could survive the creditor's motion to strike *only if* they were relevant and constituted a valid defense. In its ruling, our Supreme Court held that because the allegations were relevant based "upon the merits[,]" *id.* at 199, 198 S.E. at 646, the guarantor's estate had a right to "present the facts" concerning the statutory defense at trial. *Id.* at 198, 198 S.E. at 646. While explaining its conclusion, our Supreme Court further stated that

> [i]t is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

Id. In so many words, the Court affirmed the guarantor's executors' right to assert the statutory defense, but appropriately declined to comment on whether the guarantor's executors could produce the evidence to support the defense.

The Bank argues that *Dunlop* does not apply because the Supreme Court was not making a "clear and unequivocal" decision regarding whether the statutory defense was available to a guarantor. It is true that in certain cases under the pleading practices of that time our Supreme Court often chose not to rule on the relevancy of a pleaded defense in an interlocutory appeal, but would rather remand the matter so that the relevancy could be determined *after* evidence was offered at the trial court level, as in the case of *Hildebrand v. Telephone Co.*, 216 N.C. 235, 4 S.E.2d 439 (1939), a case cited in the Bank's brief.

However, in *Dunlop*, the Supreme Court—while noting the interlocutory nature of the appeal in that case—*did* make a "clear and unequivocal" ruling on the relevancy of the defense pleaded by the guarantor's executors in that case:

> We are not sure of [the creditor's] right to appeal on this matter [ ], since the same question could have been raised on objections to the evidence, and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected. **But since the holding [not to strike the guarantor's pleading] is adverse to [the creditor's] contention, and the appeal has precedent, we prefer to decide the matter upon the merits.**
>
> **The judgment denying the [creditor's] motion is AFFIRMED.**

Dunlop, 214 N.C. at 199, 198 S.E. at 647 (citations omitted and emphasis added). In other words, though *Dunlop* contains dicta which might seem equivocal to the modern reader, as it was written in 1938, the holdings are clear: An irrelevant pleading must be struck, and the Supreme Court considered the issue raised by the creditor's appeal and decided on the legal merits that the trial court did not err in denying the creditor's motion to strike the statutory defense pleaded by the guarantor's executors. We are bound by this holding until our Supreme Court speaks on this issue and renders a holding contrary to that in *Dunlop*, notwithstanding holdings by this Court which may appear to conflict with *Dunlop*. [5]

D. Appellant Did Not Waive the G.S. 45–21.36 Defense/Offset

***5 [6]** Finally, the Bank argues that even if the G.S. 45–21.36 defense/offset is available to Appellant, Appellant waived the defense under the terms of his guaranty agreement. Specifically, the Bank cites to language in the guaranty agreement which states that "the undersigned [Appellant] hereby waives the benefits of all provisions of law[.]" However, the Bank omits the rest of the clause which limits the scope of the waiver:

> the undersigned hereby waives the benefits of all provisions of law, including but not limited to the provisions of N.C.G.S., section 26–7, or its successor, for stay or delay of execution or sale of property or other satisfaction of judgment against the undersigned on account of obligation and liability hereunder until judgment be obtained therefor against the [Borrower–LLC] and execution thereon returned unsatisfied, or until it is shown that the [Borrower–LLC] has no property available for the satisfaction of the indebtedness, obligation or liability guaranteed hereby, or until any other proceedings can be had[.]

When read in its entirety, the language makes no mention of a waiver of Appellant's potential G.S. 45–21.36 defense/offset. Rather, it only purports to waive any obligation by the Bank under law to

first pursue its remedies against the Borrower–LLC and the collateral before pursuing Appellant. Accordingly, this argument is overruled.

III. Conclusion

In conclusion, we hold that the trial court erred in granting summary judgment against Appellant. We hold that under our Supreme Court's decision in *Dunlop, supra*, Appellant is entitled to assert the defense/offset provided under G.S. 45–21.36. Further, we hold that there was sufficient evidence before the trial court at the summary judgment hearing to create a genuine issue of material fact as to the value of the Property. Accordingly, we reverse the order against Appellant and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

Footnotes

1 Garrett Enterprise, LLC was previously a Defendant in this suit but on 21 August 2013 the Bank dismissed all claims against it without prejudice.

2 By way of illustration, if a lender forecloses on collateral securing a $1 million loan and the lender purchases the collateral at the sale for $600,000, the lender would normally have a valid deficiency claim for $400,000 against the obligors. However, the obligors to which G.S. 45–21.36 applies could "defeat" the claim by way of a "defense" by showing that the collateral was worth at least $1 million (the full loan amount). Alternatively, those obligors could "reduce" their liability by way of an "offset" by showing that the $600,000 bid was "substantially less" than the actual value of the collateral. For example, if the collateral was shown to be worth $850,000 and if $600,000 was determined to be "substantially less" than $850,000, then those obligors' liability for the deficiency would only be $150,000.

3 Appellant also argues that summary judgment was inappropriate on the Bank's claims against the *other seven Guarantors on their respective guaranty agreements*, as well. However, since the other Guarantors failed to notice an appeal, we lack jurisdiction to review the summary judgment order as to them. *See, e.g., Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (holding that "only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions").

4 We note that the date of the appraisal was several months prior to the date of foreclosure, which is the relevant date for purposes of G.S. 45–21.36. However, the appraisal providing an opinion of value as of a date not too remote from the foreclosure date is some evidence of value as of the relevant date. It is for the jury to determine how much weight to afford the appraisal.

5 This issue is currently before our Supreme Court in *High Point Bank & Trust Co. v. Highmark Props., LLC* —— N.C.App. ——, 750 S.E.2d 886 (2013), *petition for discretionary review allowed*,367 N.C. 321, 755 S.E.2d 627 (2014).