

SUPREME COURT OF NORTH CAROLINA

In re Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. against Martin E. Rock a/k/a Martin A. Rock

2022-NCSC-106 · No. No. 240PA21 · Decided November 4, 2022

SUMMARY

The North Carolina Supreme Court held that a condominium created before enactment of the North Carolina Condominium Act may use the statutory power of sale to foreclose an assessment lien for post-1986 nonpayment, unless the condominium declaration expressly provides otherwise. The court concluded that the governing declaration did not expressly exclude nonjudicial foreclosure. The court reversed the Court of Appeals and remanded for consideration of the respondent's remaining argument that he was not in default.

CASE DETAILS

COURT	Supreme Court of North Carolina
WRITING FOR THE COURT	Barringer, Justice
JURISDICTION	North Carolina
DECIDED	November 4, 2022
DOCKET	No. 240PA21
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	On discretionary review under N.C.G.S. § 7A-31 of a unanimous Court of Appeals decision vacating the trial court's order authorizing a power-of-sale foreclosure and remanding for dismissal.
STANDARD OF REVIEW	The Supreme Court reviews Court of Appeals decisions for error of law. Questions of statutory interpretation are reviewed de novo.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of North Carolina
PARTIES	Executive Office Park of Durham Association, Inc. v. Martin E. Rock a/k/a Martin A. Rock

TOPICS

[foreclosure](#)[real estate](#)[statutory interpretation](#)[appellate procedure](#)[standard of review](#)

PRACTICE AREAS

real estate law

condominium law

foreclosure

appellate law

QUESTIONS PRESENTED

1. Whether N.C.G.S. § 47C-3-116(f)'s power-of-sale foreclosure remedy applies to a condominium created before October 1, 1986 when the declaration does not expressly provide to the contrary.
2. Whether the condominium declaration expressly excluded or limited foreclosure by power of sale.
3. Whether the case should be remanded for the Court of Appeals to address Rock's argument that he was not in default.

HOLDINGS

1. Under N.C.G.S. § 47C-1-102(a), N.C.G.S. § 47C-3-116(f)'s power-of-sale foreclosure remedy applies to condominiums created in North Carolina on or before October 1, 1986 for events and circumstances occurring after that date, unless the declaration expressly provides to the contrary.
2. The declaration did not expressly prohibit power-of-sale foreclosure or limit the association's foreclosure authority to judicial foreclosure; therefore, it did not provide to the contrary under N.C.G.S. § 47C-1-102(a).

KEY QUOTATIONS

“Here, the statute is clear: “unless the declaration expressly provides to the contrary,” the power of sale permitted by N.C.G.S. § 47C-3-116(f) “appl[ies] to all condominiums created in this State on or before October 1, 1986 . . . with respect to events and circumstances occurring after October 1, 1986.”” (¶ 10)

“Having construed the statute according to its plain language and determined that Executive Office’s Declaration does not contain a provision “expressly to the contrary” of the power of sale for foreclosure permitted by N.C.G.S. § 47C-3-116(f), we reverse the Court of Appeals’ decision.” (¶ 17)

FACTUAL BACKGROUND

Executive Office Park Developers, LP filed a declaration for the condominium development in 1982, with Executive Office as the governing entity. In 2018, Executive Office filed a claim of lien against three units owned by Martin Rock, alleging that assessments and other charges remained unpaid for more than thirty days. A substitute trustee initiated a power-of-sale foreclosure, and the clerk of superior court entered an order authorizing the sale.

PROCEDURAL HISTORY

Executive Office filed a claim of lien against three condominium units owned by Rock for unpaid 2018 assessments and initiated a power-of-sale foreclosure. The clerk of superior court authorized the sale, and the trial court affirmed that order. The Court of Appeals vacated the trial court's order and remanded for dismissal, concluding that the pre-1985 condominium lacked power-of-sale authority and that its declaration did not authorize nonjudicial foreclosure. The Supreme Court allowed discretionary review, reversed the Court of Appeals, and remanded for consideration of Rock's unresolved argument that he was not in default.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand to the Court of Appeals to address Rock's remaining argument that he was not in default, which the Court of Appeals had declined to reach and which was not before the Supreme Court.

CASES CITED

- Foreclosure of a Lien by Exec. Off. Park of Durham Ass'n v. Rock, 277 N.C. App. 444, 2021-NCCOA-211
- In re Summons Issued to Ernst & Young, LLP, 363 N.C. 612, 616 (2009)
- Hieb v. Lowery, 344 N.C. 403, 409 (1996)
- Diaz v. Division of Social Services, 360 N.C. 384, 387 (2006)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF NORTH CAROLINA 2022-NCSC-106 No. 240PA21 Filed 4 November 2022 IN THE MATTER OF THE FORECLOSURE OF A LIEN BY EXECUTIVE OFFICE PARK OF DURHAM ASSOCIATION, INC. AGAINST MARTIN E. ROCK A/K/A MARTIN A. ROCK On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 444, 2021-NCCOA-211, vacating an order entered on 4 March 2019 by Judge John M. Dunlow in Superior Court, Durham County and remanding for dismissal.

Heard in the Supreme Court on 29 August 2022. Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Hope Derby Carmichael, for petitioner-appellant. Mark Hayes for respondent-appellee. Sellers, Ayers, Dortch & Lyons, PA, by Cynthia A. Jones, for Community Associations Institute, amicus curiae. BARRINGER, Justice. ¶1 In this matter, we address whether a condominium formed prior to the enactment of the North Carolina Condominium Act in 1985 has the power of sale for foreclosure pursuant to section 3-116 of that Act for nonpayment of an assessment IN RE FORECLOSURE OF A LIEN BY EXEC.

OFF. PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court that occurred after 1 October 1986. For the reasons addressed herein, given the plain language of the statute addressing the applicability of the North Carolina Condominium Act and the plain language of the condominium's declaration, we conclude that petitioner Executive Office Park of Durham Association, Inc. (Executive Office) has the power of sale for foreclosure pursuant to N.C.G.S. § 47C-3-116.

Therefore, we reverse the decision of the Court of Appeals, which vacated the trial court's order authorizing sale, and remand to the Court of Appeals to address the argument of respondent Martin Rock (Rock) that the Court of Appeals declined to address.

I. Background ¶2 In 1982, Executive Office Park Developers, LP filed a declaration of unit ownership (Declaration) for a condominium development with Executive Office as the governing entity. As relevant to this matter, Executive Office filed a claim of lien on 23 October 2018 against three units owned by Rock, alleging that assessments and other charges from 2018 remained unpaid for more than thirty days.

Subsequently, the substitute trustee initiated a power of sale foreclosure. The clerk of superior court entered an order authorizing sale, which Rock appealed. The trial court affirmed the order authorizing sale. Thereafter, Rock appealed to the Court of Appeals. ¶3 Before the Court of Appeals, Rock argued that Executive Office lacked the power of sale for foreclosure and that he was not in default.

The Court of Appeals IN RE FORECLOSURE OF A LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court concluded that Executive Office lacked the power of sale for foreclosure because it is the governing entity for a condominium formed and governed by a declaration signed in 1982 that was not amended to bring it within the provisions of the North Carolina Condominium Act.

Foreclosure of a Lien by Exec. Off. Park of Durham Ass'n v. Rock, 277 N.C. App. 444, 2021-NCCOA-211, ¶¶ 19–23. The Court of Appeals also indicated that Executive Office's Declaration did not include the power of non-judicial foreclosure. Id. ¶ 21.

The Court of Appeals, therefore, vacated the trial court's order affirming the clerk of court's order authorizing sale and remanded for dismissal. Id. ¶ 22. The Court of Appeals declined to address Rock's remaining argument that he was not in default. Id. ¶4 Executive Office petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31. This Court allowed the petition for discretionary review.

II. Analysis ¶5 On appeal to this Court, Executive Office argues that the Court of Appeals erred because the clear and express language of N.C.G.S. § 47C-1-102(a) provides that “[section] 47C-3-116 (Lien for Assessments)... appl[ies] to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly IN RE FORECLOSURE OF A LIEN BY EXEC.

OFF. PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court provides to the contrary,” N.C.G.S. § 47C-1-102(a) (2021) (emphasis added),¹ and Executive Office's Declaration does not expressly prohibit power of sale foreclosures. ¶6 We agree that the Court of Appeals erred. This Court reviews decisions by the Court of Appeals for error of law. N.C.

R. App. P. 16(a). Questions of statutory interpretation are questions of law and are reviewed de novo. In re Summons Issued to Ernst & Young, LLP, 363 N.C. 612, 616 (2009). ¶7 In its entirety, N.C.G.S. § 47C-1-102(a) states: This Chapter applies to all condominiums created within this State after October 1, 1986. G.S. 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-2-121 (Merger or Consolidation of Condominiums), 47C-3-102(a)(1) through (6) and (11) through (16)(Powers of Unit Owners' Association), 47C-3- 103 (Executive board members and officers), 47C-3-107.1 (Procedures for fines and suspension of condominium privileges or services), 47C-3-108 (Meetings), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), 47C-3-121 (American and State flags and political sign displays), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees) and G.S.

47C-1-103 (Definitions), to the extent necessary in construing any of these sections, apply to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary. Those sections apply only with respect to 1 In June 2022, the General Assembly amended this subsection. Act of 29 June 2022, S.L. 2022-12, § 3.(a), <https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S278v4.pdf>.

Executive Office has not argued that this amendment applies to this matter. IN RE FORECLOSURE OF A LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums. N.C.G.S. § 47C-1-102(a) (emphasis added). ¶8 As relevant to this matter, the legislature provided in subsection 47C-3-116(f) that: Except as provided in subsection (h) of this section, the association, acting through the executive board, may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more.

N.C.G.S. § 47C-3-116(f) (2021). ¶9 When construing statutes, courts first look “to the language of the statute itself.” Hieb v. Lowery, 344 N.C. 403, 409 (1996). “When the language of a statute is clear and without ambiguity,” courts must “give effect to the plain meaning of the statute.” Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387 (2006).

In these circumstances, “judicial construction of legislative intent is not required.” Id. ¶ 10 Here, the statute is clear: “unless the declaration expressly provides to the contrary,” the power of sale permitted by N.C.G.S. § 47C-3-116(f) “appl[ies] to all condominiums created in this State on or before October 1, 1986... with respect to events and circumstances occurring after October 1, 1986.” N.C.G.S. § 47C-1-102(a).

IN RE FORECLOSURE OF A LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court ¶ 11 Since it is undisputed that the condominium at issue was created in North Carolina before 1 October 1986 and the assessments and non-payment at issue in this case occurred after 1 October 1986, Executive Office possesses the power of sale permitted by N.C.G.S. § 47C-3-116(f) “unless the declaration expressly provides to the contrary.” N.C.G.S. § 47C-1-102(a). ¶ 12 In the Declaration, the declarant indicates its desire and intention “to submit” the property “to the provisions of the North Carolina Unit Ownership Act (Chapter 47A, North Carolina General Statutes).” ¶ 13 Then, in paragraph 12 in the subparagraph entitled “Powers,” the Declaration states as follows: The Association shall have all of the powers and duties set forth in the Unit Ownership Act, except as limited by this Declaration and the Bylaws, and all of the powers and duties reasonably necessary to operate the condominium as set forth in this Declaration and the Bylaws and as they may be amended from time to time. ¶ 14 Subsequently, in paragraph 15 entitled “Assessments,” it states: Any sum assessed remaining unpaid for more than thirty (30) days shall constitute a lien upon the delinquent unit or units when filed of record in the Office of the Clerk of Superior Court of Durham County in the manner provided for by Article 8 of Chapter 44 of the General Statutes of North Carolina as amended.

The lien for unpaid assessments shall also secure reasonable attorney’s fees incurred by the Manager or the Board of Directors incident to the collection of such assessment or the enforcement of such lien. In any foreclosure of a lien for assessments, the owner of the unit subject to the lien shall be required to pay IN RE FORECLOSURE OF A LIEN BY EXEC. OFF.

PARK OF DURHAM ASS'N AGAINST ROCK 2022-NCSC-106 Opinion of the Court a reasonable rental for the unit, and the Manager or Board of Directors shall be entitled to the appointment of a receiver to collect the same. ¶ 15 The foregoing language neither expressly excludes foreclosure by power of sale nor limits Executive Office’s foreclosure authority to only judicial foreclosures.² Rather, the Declaration expressly allows for foreclosure of a claim of lien but does not elaborate further.

In other words, no provision in the Declaration before us is “invalidated” by the application of N.C.G.S. § 47C-3-116(f), which permits the power of sale for foreclosure in certain circumstances. See N.C.G.S. § 47C-1-102(a) (“Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations....”) (emphasis added)). ¶ 16 Rock argues that the declarant’s indication in the Declaration of its desire and intention “to submit” the property “to the provisions of the North Carolina Unit Ownership Act” bars Executive Office’s use of non-judicial foreclosure.

However, the North Carolina Unit Ownership Act neither expressly excludes foreclosure by power of sale nor limits foreclosure authority to only judicial foreclosures. See N.C.G.S. § 47A-22(b) (2021). Further, the North Carolina Unit Ownership Act in effect when the Declaration was filed

required a declaration of intent by the owners to submit 2In fact, the paragraph on “Assessments” uses the term “any foreclosure,” and the subparagraph on “Powers” indicates that Executive Office “shall have... all of the powers and duties reasonably necessary to operate the condominium.” IN RE FORECLOSURE OF A LIEN BY EXEC.

OFF. PARK OF DURHAM ASS’N AGAINST ROCK 2022-NCSC-106 Opinion of the Court their property to the Act to be filed with the register of deeds to create unit ownership. N.C.G.S. § 47A-2 (1981). Thus, this reference to the North Carolina Unit Ownership Act simply satisfies the requirement in N.C.G.S. § 47A-2. Rock’s reliance on this reference is therefore misplaced.

Thus, we conclude that the Declaration does not expressly provide to the contrary. III. Conclusion ¶ 17 The Court of Appeals erred by failing to reference and apply the plain language of N.C.G.S. § 47C-1-102(a) when addressing respondent Rock’s contention that the condominium association Executive Office lacked the power of sale for foreclosure.

Having construed the statute according to its plain language and determined that Executive Office’s Declaration does not contain a provision “expressly to the contrary” of the power of sale for foreclosure permitted by N.C.G.S. § 47C-3-116(f), we reverse the Court of Appeals’ decision.

We further remand this case to the Court of Appeals to address Rock’s remaining argument that he was not in default that the Court of Appeals did not reach and is not before this Court. REVERSED AND REMANDED.