In re Foreclosure of Kenley: Proving Possession of the Note in a Power of Sale Foreclosure Proceeding

In an opinion published on January 5, 2016, a three-judge panel of the NC Court of Appeals addressed a frequently contested issue in power of sale foreclosure proceedings: whether the party seeking to foreclose by power of sale provided sufficient evidence to establish it was the holder of the note under G.S. 45-21.16(d)(i). *See* In re Foreclosure of Kenley, ____ N.C. App. ____ (Jan. 5, 2016).

NC courts have determined that the definition of holder from the UCC applies to G.S. 45-21.16(d)(i). *See* In re Foreclosure of Bass, 366 N.C. 464, 468 (2013); In re Foreclosure of Adams, 204 N.C. App. 318, 322 (2010). In practice, this results in a two part analysis: (i) the party must establish that it has possession of the note, and (ii) the party must show that the note is payable to it specifically or indorsed in blank or to bearer. *Id.*

The note produced in Kenley was indorsed in blank, meaning that whoever had possession of it was entitled to enforce it as the holder. After Bass, a case that I previously blogged about here, it is clear that indorsements to a note are presumed to be valid and authorized. The same is true to a certain extent for signatures on a negotiable note. G.S. 25-3-308(a). No additional evidence is required from the party seeking to enforce the note (hereinafter, referred to as the "lender") as to the validity or the authority of such signatures. The burden then shifts to the borrower to provide evidence to overcome the presumption in favor of the signatures. *See* Bass at 469. The property owner in Kenley did not dispute the validity of the note or the indorsement on the note from the original lender in blank.

Instead, the property owner disputed whether the lender sufficiently established that it had possession of the note. In the order authorizing sale entered by the superior court judge, the judge made a finding that counsel for the lender produced the original note at the hearing on appeal from the clerk. In addition, the lender filed an affidavit in the proceeding signed by an officer of the servicer of the loan attesting to the lender's status as the noteholder. The court may consider affidavits at a hearing held under G.S. 45-21.16 in addition to any other evidence permitted by law. G.S. 45-21.16(d).

Citing language from an earlier decision of the court in In re David A. Simpson, P.C., the property owner argued that mere production of the original note does not alone constitute sufficient evidence that the lender is the holder of the note. 211 N.C. App. 483, 491 (2011). In an appellate brief to the court, the property owner asserted that the lender must present evidence to illustrate how it came into possession of the note, such as the date of possession and that possession was transferred to the lender for the purposes of enforcement. The property owner further argued that the affidavit from the servicer of the loan did not provide any evidence of the transfer of the note or information as to how the lender came into possession of the note.

Deciding in favor of the lender, the NC Court of Appeals did not address the adequacy of the affidavit from the servicer regarding the lender's possession of the note. This is because the court's holding was that **production of the original note indorsed in blank at a power of sale foreclosure hearing is sufficient to establish that the lender is the holder of the note.** The court stated that whenever the court previously held that mere possession of the original note was insufficient to satisfy the definition of a holder, (1) the original notes were either 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.

Because of another recent NC Court of Appeals opinion, it appears that even if the trial court fails to make a finding regarding possession in the order authorizing sale, it may not constitute a viable basis for an appeal by a party disputing the foreclosure. *See* In re Foreclosure of Rawls, ___ NC App. ___ (Oct. 6, 2015). In Rawls, the lender produced the original note indorsed in blank at the foreclosure hearing and the trial court entered an order authorizing the sale. The property owner cited the failure of the trial court to make specific findings on possession as a basis for the appeal to the Court of Appeals. Affirming the trial court's order, the court noted that the failure of the trial court to make a finding on the element of possession did not require the court to remand the case because the fact that the lender was in physical possession of the note at the hearing was not disputed and the court was not required to remand the matter for additional findings on facts that were not in dispute.

It is clear based on the holdings in Rawls and Kenley that production of an original note indorsed in blank is sufficient to establish the lender is in possession of the note. Once that occurs, the burden then shifts to the party disputing the foreclosure to provide some evidence to the contrary. It is not clear after these cases what evidence a property owner could introduce to disprove possession by the lender who appears at the hearing with the original note indorsed in blank.

**This post was updated on January 26, 2016 to include the last two paragraphs and provide additional information regarding the decision of the NC Court of Appeals in In re Foreclosure of Rawls.*