G.S. Chapter 45: Power of Sale Foreclosure
NC Supreme Court and NC Court of Appeals Published Case Summaries
Meredith Smith, UNC School of Government
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Rules of Civil Procedure; Res judicata and collateral estoppel; Rules of Evidence
In re Foreclosure of Lucks (NC162A16; Dec. 21, 2016)
Substitute trustee filed a power of sale foreclosure. Clerk dismissed the proceeding due to the trustee's failure to present sufficient evidence of the trustee's appointment. Less than a year later, a new substitute trustee filed a second power of sale foreclosure. Clerk dismissed the second foreclosure on the basis of res judicata. Lender appealed. Before the superior court, the lender presented a copy of a power of attorney purporting to authorize a servicer to execute the substitution of trustee on behalf of the lender; the borrower objected to this evidence. The court sustained the borrower's objection on the basis that the POA lacked a proper foundation and constituted hearsay. The court dismissed the foreclosure with prejudice. Lender appealed. The NC Court of Appeals reversed; the court found that the trial court erred in excluding the POA given the relaxed evidentiary standard in a non-judicial foreclosure. Borrower appealed to the NC Supreme Court. The NC Supreme Court reversed the court of appeals and held:

1. The NC Rules of Civil Procedure do not apply to non-judicial power of sale foreclosure unless explicitly incorporated by G.S. Chapter 45. This applies to proceedings before both the clerk and before the superior and district court. G.S. Chapter 45 provides the exclusive statutory framework for this proceeding.
2. The rules of evidence are relaxed at the hearing before the clerk and the superior and district court. The superior court's decision to exclude the POA based on internal inconsistencies did not constitute an abuse of discretion. The lender failed to overcome these inconsistencies, which could have occurred by appointing the trustee directly (rather than through a servicer), appropriate witness testimony in person or via affidavit, submitting a certified copy of the POA, or requesting judicial notice of the recorded POA.
3. The doctrines of res judicata and collateral estoppel do not apply to non-judicial foreclosures. If the trustee elects not to proceed with the hearing, the trustee may withdraw the notice of hearing and thus terminate the proceeding. This does not constitute a dismissal and has no collateral consequence. The trustee may file the non-judicial foreclosure again at a later date. Furthermore, the clerk and the superior or district court on appeal do not have the authority to dismiss a non-judicial foreclosure *with prejudice*. If the court enters an order after the hearing that does not authorize the sale, the creditor is prohibited from proceeding again with a non-judicial foreclosure on the same default; the creditor is not prohibited from proceeding with a judicial foreclosure on the same default. However, the creditor may filed another non-judicial foreclosure on another default.

Concurring Opinion: Justices concur with the ultimate outcome of the majority opinion. However, they would not have stated, as the majority did, that the rules of evidence are relaxed before the superior and district court. Such rules are relaxed only before the clerk with regard to affidavits and certified copies, given that the clerk is mentioned in G.S. 45-21.16(d). Otherwise,

they apply as in any other case. In addition, the concurring justices would not have stated that the NC Rules of Civil Procedure do not apply on appeal in superior and district court. They would have limited that portion of the opinion to the proceeding before the clerk because there is a presumption that the rules apply unless a different procedure is prescribed.

Jurisdiction; Injunctive Relief

In re Foreclosure of Foster (COA14-108; Feb. 17, 2015)

Trustee filed a power of sale foreclosure before clerk of superior court. The clerk dismissed the foreclosure and the lender appealed. While the lender's appeal was pending, the borrowers filed a motion in the same proceeding for permanent injunctive relief based on fraud by the lender. The NC Court of Appeals held that permanent injunctive relief is an equitable remedy and is outside the subject matter jurisdiction of the court in a power of sale foreclosure under Chapter 45, regardless of whether the request for relief is made before the clerk or on appeal of the same action before the superior court judge.

Lien Priority

Henkel v. Triangle Homes, Inc. (COA15-1123; Sept. 20, 2016)

The North Carolina Court of Appeals held that a deed to real property obtained at a foreclosure sale without notice to the United States does not extinguish a federal tax lien on the property. The court noted that the general rule that federal tax liens are inferior to local tax liens applies only when the United States is provided prior notice of a foreclosure sale arising from a local tax liability. A senior lienholder foreclosing on a property subject to a federal tax lien must provide the United States notice prior to the foreclosure sale in order to extinguish the lien. If no notice is provided to the United States, then the federal tax lien remains undisturbed by the foreclosure.

Statute of Limitations

In re Foreclosure of Brown (COA14-937; April 21, 2015)

Mortgagor/Borrower challenged foreclosure on the basis of the expiration of the statute of limitations applicable to a foreclosure under G.S. 1-47(3). Provided that the mortgagor remains in absolute possession of the property during the 10 year period, court held that the 10-year statute of limitations period runs from the last to occur of the following: (i) the date that the power of sale becomes absolute, (ii) the date of the last payment made on the loan, and (iii) the date of the forfeiture of the mortgage. The court also held that the power of sale becomes absolute on the date the loan is accelerated and, if the loan is not accelerated, on the maturity date.

Service of Notice of Hearing

In re Foreclosure of George (COA18-611; Feb. 19, 2019), with concurrence and dissent

Non-judicial foreclosure filed before the clerk of superior court related to a claim of lien for unpaid homeowners' association fees in the amount of $204.75 on an otherwise unencumbered property in Mecklenburg County. There were two record owners of the property: Mrs. Hygiena Jennifer George and Mr. Calmore George. The trustee included as evidence of proper notice two returns of service indicating (i) personal service by the sheriff on Mrs. George and (ii) substituted

service by the sheriff on Mr. George by leaving notice with "Mrs. Jennifer George" at their residence. The trustee also filed an affidavit showing attempts at service by certified mail, return receipt requested and by first class mail at the property and the record owners' other address in the Virgin Islands. The clerk entered an order allowing the foreclosure to proceed. The trustee completed the foreclosure sale and KPC Holdings purchased the property out of foreclosure. KPC then conveyed the property to National Indemnity in consideration for a promise to pay $150,000.00, evidenced by a note and deed of trust. The Georges then filed a motion to set aside the foreclosure sale under Rule 60(c) of the NC Rules of Civil Procedure alleging invalid service in the foreclosure. The superior court ordered KPC and National Indemnity joined as necessary parties to the proceeding, but entered an order that the trustee to the deed of trust between KPC and NI was not a necessary party. The superior court entered an order setting aside the foreclosure, cancelling the trustee's foreclosure deed to KPC, and cancelling the deed from KPC to NI. Both KPC and NI appealed. The COA affirmed the superior court on two grounds: (i) the trustee under the deed of trust from NI to KPC was not a necessary party to the Rule 60 proceeding and (ii) notice given to Mr. George was insufficient. However, the COA reversed the superior court's decision to set aside the foreclosure and void the deeds. The COA held:

1. The trustee of the deed of trust from NI to KPC was not a necessary party to the Rule 60 proceeding. Pursuant to G.S. 45-45.3, the trustee is not a necessary party to a civil action or proceeding involving (i) title to real property encumbered by a lien or (ii) foreclosure of a lien other than the lien of the deed of trust. Here the deed of trust from NI to KPC was not the lien that was the subject of the foreclosure and therefore the trustee of that deed of trust was not a necessary party to the proceeding.
2. Notice in the original foreclosure proceeding was insufficient to Mr. George. Service by personal delivery may be accomplished by delivery of the notice of hearing to (i) the natural person named in the NOH or (ii) by leaving a copy at the party's dwelling house or usual place of abode with someone of suitable age and discretion residing therein. There is no hard and fast rule for what constitutes a person's dwelling house or usual place of abode and a person may have more than one. Here the evidenced showed that the Mecklenburg County property was not the Georges' dwelling house or usual place of abode. The Georges owned the property in Mecklenburg County but lived in the Virgin Islands. Their three daughters lived at the property to attend college. The Georges visited the property a few times a year for holidays and maintenance issues and stayed on an inflatable bed in the study when they visited. The sheriff had actually served a daughter of Mr. George, Janine, who said she was Mrs. Jennifer George, the name of her mother. The superior court correctly held that the trustee thus failed to serve all record owners of the property as the property was not Mr. George's dwelling house or usual place of abode.
3. KPC was a good faith purchaser for value and the Georges' received constitutionally sufficient notice. Therefore, the deed from the foreclosure trustee to KPC and the deed from KPC to NI were not void and the foreclosure would not be set aside. Title to property sold to a good faith purchaser for value cannot be set aside. Here no record evidence exists that KPC or NI had actual or constructive notice of the improper service. Nothing existed in the foreclosure record that would reasonably put any prospective purchaser on notice that service was improper as the sheriff's return

indicated that personal service was made on Mr. George by leaving copies at his residence with Mrs. Jennifer George. KPC was entitled to rely on that record. The low price KPC paid ($2,650.22) comparative to the value of the property and the subsequent consideration NI paid ($150,000.00) was not enough to set aside a foreclosure sale where there were no other material irregularities in the sale. Here the failure to effectuate service was not a material irregularity. Finally, although notice was not sufficient for purposes of Rule 4 as required in the foreclosure proceeding, Mr. George did receive constitutionally sufficient notice required before the property was sold in the foreclosure – the homeowners' association attempted personal service on Mr. and Mrs. George, sent certified and regular mail to both the Mecklenburg and Virgin Islands properties, and sent an email to a "Jennifer George" before the expiration of the upset bid period who responded requesting a reinstatement quote. The court also noted that the property had previously twice been subject to foreclosure proceedings and the Georges' were familiar with the procedure.

Concurrence: The concurring judge notes this is a harsh result as the record owners lost significant wealth due to the low purchase price out of the foreclosure, but the court is compelled to follow the law. There is nothing in G.S. 1-108 that requires the consideration paid by a good faith purchaser be substantial. Unlike other statutes that require a good faith purchaser to pay a valuable consideration, G.S. 1-108 only requires that the purchaser at the judicial sale believe in good faith the sale was proper. Here KPC believed the foreclosure sale was proper and therefore is protected as a good faith purchaser.

Dissent: The dissenting judge would have affirmed the superior court's order setting aside the foreclosure sale and voiding the deeds. The record does not establish that KPC was a good faith purchaser under G.S. 1-108 because of the gross inadequacy of the consideration paid for the property coupled with the other inequitable element of improper service on Mr. George.

In re Foreclosure of Garrett (COA15-1083; COA15-1118; Nov. 15, 2016)

Facts: This case involved three separate foreclosures.

1. First, the homeowner association foreclosed based on a claim of lien for unpaid assessments (Foreclosure #1). The HOA took title to the property out of the foreclosure and later conveyed the property to the first-lien mortgagee, Household Realty Corporation.
2. The HOA filed a second foreclosure as a result of Household's failure to pay assessments and conveyed the property to Select Transportation Services LLC out of the foreclosure (Foreclosure #2). The HOA did not serve Household, the record owner, at its registered agent address in NC or principal office in IL. Instead, the HOA served Household's "officer, director, or managing agent" at the NY address shown on the deed conveying the property from the HOA to Household recorded between Foreclosure #1 and #2.
3. Prior to the conveyance of the property by the trustee to Select from Foreclosure #2, Household filed a notice of hearing and amended notice of hearing initiating a foreclosure of the first-priority deed of trust (Foreclosure #3). Select was not served with the notice of hearing or amended notice of hearing for Foreclosure #3. Select was not the record

owner or the borrower at the time of the filing of either notice of hearing. The trustee conveyed the property via trustee's deed to Household out of Foreclosure #3.

Procedural History: After the recordation of the trustee's deed from Foreclosure #3, Select filed a motion under GS 1A-1, Rule 60(b) to set aside Foreclosure #3 due to, in part, to the failure of the trustee to notice Select. Household also filed a Rule 60(b) motion to set aside Foreclosure #2 due to insufficient notice, given that the HOA did not serve Household at its registered agent or principal office address. At a consolidated Rule 60 hearing, the trial court entered an order granting the motion to set aside Foreclosure #3 and denying the motion to set aside Foreclosure #2. Select later filed a third motion for attorneys' fees, which was granted. Household appealed from both orders.

Disposition: The NC Court of Appeals affirmed the trial court's order on the Rule 60(b) motions and reversed the attorneys' fees order.

1. With regard to Foreclosure #2, the court held that the HOA properly served Household in the second foreclosure. This was based on the fact that (i) service was by certified mail, return receipt requested, (ii) service was addressed to Household by "its officer, director, or managing agent," (iii) the return receipt was signed as received, (iv) the address was the same as the used by Household on the deed from Foreclosure #1, and (v) the address was the one used to by the HOA to serve Household on prior occasions. The failure to serve Household at the registered agent or principal office address did not alone result in improper service.
2. With regard to Foreclosure #3, the court held that Household's failure to notice Select supported the trial court's order setting aside Foreclosure #3. The court did not provide analysis as to why Select was entitled to notice of Foreclosure #3.
3. Finally, with regard to the attorneys' fees order, the court held that the trial court's order did not identify the grounds on which the trial court awarded fees and therefore vacated and remanded the order to trial court for a new hearing.

Author's Note: This opinion does not address GS 45-21.16(b), which governs who is entitled to notice of the foreclosure hearing, as it does not appear that either party raised the issue on appeal or challenged the trial court's order related to Foreclosure #3 on that basis. In addition, Rule 60 no longer applies to non-judicial foreclosure proceedings given the NC Supreme Court's decision in In re Foreclosure of Lucks. That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

In re Foreclosure of Ackah (COA16-829; Sept. 5, 2017), with dissent

Homeowners' association (HOA) foreclosed on real property under GS Chapter 47F. After the foreclosure sale, the homeowner filed a motion to set aside the foreclosure order due to insufficient notice. The superior court entered an order setting aside the foreclosure and restoring title to the homeowner. The clerk then entered an order returning possession of the property to the homeowner. The high bidder at the foreclosure sale appealed. On appeal, the NC Court of Appeals affirmed in part and reversed in part. The court held the superior court had the authority to set aside the sale under Rule 60 of the NC Rules of Civil Procedure. The court affirmed the trial court's finding that the HOA failed to use due diligence before relying on posting to notify the homeowner of the proceeding as required under Rule 4 of the Rules of Civil Procedure. Although the HOA attempted service by certified mail, which was unclaimed,

and regular mail, the HOA had the homeowner's email address and failed to email her notice and thus failed to meet the standard of due diligence under Rule 4. However, the relief ordered by the court, that the homeowner was entitled to a return of the property, was improper. The homeowner was limited under GS 1-108 to restitution from the HOA because the property had been conveyed to a good faith purchaser for value. The inadequacies of notice, although improper under Rule 4, did not violate constitutional due process and therefore the homeowner was not entitled to the return of the property.
Dissent: The dissenting judge would have found that the trial court had the authority to set aside the sale under Rule 60 and to restore title to the homeowner as a result of the order to set aside the sale. The dissenting judge would have found that GS 1-108 affords the trial court discretion to affect title to the property if the trial court deems it necessary in the interest of justice despite a conveyance to a good faith purchaser.

***Watauga County v. Beal* (COA16-1226; Oct. 3, 2017)**
Prior to filing this *tax foreclosure*, the County attempted several times unsuccessfully to deliver tax bills, payment plans, and collection notices to defendant's address of record, and during that time could find no other contact information for her. When the County filed this foreclosure action, the County served it by publication (and shortly thereafter also attempted service by certified mail, again unsuccessfully). After the court entered default judgment against defendant and the property was sold, she moved to set aside the sale based on the County's lack of due diligence in locating her before attempting service by publication. The trial court (district court) denied the motion to set it aside. The Court of Appeals affirmed, holding that under the facts of this case, the "due diligence" requirement for service by publication had been met *prior to* the filing of the complaint itself. The court stated that "where plaintiff already knew from extensive prior experience with defendant that it could not with due diligence effect service of process on defendant by personal delivery or by registered or certified mail…plaintiff's actions satisfied the 'due diligence' necessary to justify the use of service of process by publication." [*Summary by Ann Anderson.]*

Right to Foreclose (Reverse Mortgage)
In re: Foreclosure of Clayton (COA16-960; Aug. 1, 2017)
Respondent's husband entered into a reverse mortgage with Wells Fargo (WF). Respondent and her husband signed a deed of trust (DOT) as borrowers. Only the husband signed the note as borrower. The DOT provided that the lender could accelerate the debt upon the borrower's death and foreclose the lien, provided that the property did not remain the principal residence of a "surviving borrower." After respondent's husband died, WF accelerated the debt and initiated foreclosure proceedings. The clerk of superior court dismissed the action finding that lender did not have the right to foreclose because the respondent was a surviving borrower under the DOT and the house was respondent's principal residence. WF appealed to superior court. The superior court held that the husband was the only borrower and entered an order authorizing foreclosure. The respondent appealed asserting that (i) the order was not supported by competent evidence because WF failed to formally offer any evidence at the hearing, and (ii) the lender had no right to foreclose for the same reasons found by the clerk of

superior court. The NC Court of Appeals affirmed the order of the superior court authorizing the foreclosure and held:

1. Evidentiary rules are relaxed in foreclosure proceedings. The documents handed to the court in a binder and not formally offered and admitted into evidence by WF, along with stipulations by the parties, constituted sufficient competent evidence of the requisite statutory criteria for a power-of-sale foreclosure.
2. WF had a right to foreclose based on a reading of the terms of the loan documents and relevant statutory provisions. The court noted that the deed of trust, note, and loan agreement were executed simultaneously and therefore must be considered as one instrument. Reading the documents together, the husband was the only contemplated borrower and the only person obligated to repay the loan. In addition, the respondent was not old enough to qualify for a reverse mortgage as a "borrower" under G.S. 53-257(2). Therefore, the husband was the only borrower, the respondent was not a "surviving borrower," and WF had a right to foreclose under the DOT.

Role of the Substitute Trustee

In re Foreclosure by Goddard & Peterson, PLLC (COA15-591; July 5, 2016)

Trustee filed power of sale foreclosure, the clerk entered an order authorizing sale, and the debtor appealed. After the hearing before the clerk, but before the appeal hearing in superior court, the trustee was removed and replaced with a new trustee. The former trustee appeared at the superior court hearing as counsel for the lender. Debtor objected to former trustee appearing as lender's counsel, the superior court overruled the objection, and entered the order authorizing sale. The debtor argued on appeal that the superior court erred in allowing the former trustee to appear on behalf of the lender because the change in representation constituted a breach of the trustee's fiduciary duty. The NC Court of Appeals affirmed the superior court. The court noted the trustee has a fiduciary duty to both the debtor and the lender and must maintain the strictest impartiality while serving in the role as trustee. However, the court held that the former trustee was not precluded from withdrawing as trustee and later appearing as lender's counsel, particularly where the former trustee gave notice to the debtor of the change in representation and there was no evidence that (i) the trustee acted in bad faith or (ii) the debtor was injured by the trustee's actions. In addition, the court found no evidence of an ethical violation by the attorney/trustee based on a review of NC State Bar ethics opinions and a determination that the change in representation did not create an unfair advantage in favor of the lender.

Error in Deed of Trust

In re Foreclosure of Thompson (COA16-1014; Apr. 18, 2017)

Mortgage debtors appealed from the trial court's order allowing foreclosure of their home to proceed. The only issue raised on appeal was whether an error in the property description in the deed of trust rendered the bank's legal title invalid such that it had no right to pursue foreclosure. The Court of Appeals affirmed the trial court's order after discussing the

requirements of G.S. 22-2, the statute of frauds, with regard to the level of specificity needed to convey proper legal title. The Court cited to case law discussing the difference between a patent and a latent ambiguity, and noted that in general, appellate courts of this state have affirmed the validity of deeds and similar documents "when it is possible to ascertain the identity of the subject property," and have upheld a trial court's decision to allow extrinsic evidence in order to identify a property with greater certainty. In the instant case, the error in the deed of trust amounted to no more than a scrivener's error which did not affect the right of the bank to foreclose on the property.
Summary by Aly Chen

Evidence

- **Business Records Exception**

In re Foreclosure by Goddard & Peterson, PLLC (COA15-591; July 5, 2016)
Clerk entered an order authorizing foreclosure sale and the debtor appealed to superior court. On appeal, the debtor objected to the admission of records of the debtor's loan account into evidence. The superior court overruled the debtor and the debtor appealed. The NC Court of Appeals affirmed the superior court and held the records were properly admitted under the business records exception to the hearsay rule. The court found that the "authorized signor" of the lender's affidavit of indebtedness constituted a qualified witness with personal knowledge able to authenticate the records through the affidavit. The court found that the records were properly authenticated based on statements in the affidavit that (i) the records were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts recorded, (ii) the signor had reviewed the records, and (iii) the signor had personal knowledge as to how the records were kept and maintained. The court noted that there is no requirement that the records be authenticated by the person who made them.

- **Hearsay**

In re Foreclosure by Goddard & Peterson (COA15-591; July 5, 2016)
Clerk entered an order authorizing foreclosure sale and the debtor appealed to superior court. On appeal, the debtor objected to the admission of certain statements in the lender's affidavit of indebtedness into evidence as hearsay. The superior court overruled the objection and the debtor appealed on this basis as well. The NC Court of Appeals affirmed the superior court and held that the court properly considered the affidavit as competent evidence given (i) the specific provision in G.S. 45-21.16(d) allowing the court to consider affidavits and certified copies of documents and (ii) the necessity for expeditious procedure in a power of sale foreclosure. The court found that the debtor provided no reason to require the lender's out-of-state employee to appear at the foreclosure hearing and present live witness testimony. The court also noted that any legal conclusions contained in the affidavit, such as statements that the lender is the holder of the loan, are to be disregarded by the court, but do not otherwise invalidate the affidavit as evidence.

Rule 41 Two-Dismissal Rule

In re Foreclosure by Rogers Townsend & Thomas (In re Foreclosure of Beasley) (COA14-387; June 2, 2015)

Trustee on behalf of lender filed power of sale foreclosure. Trustee then filed a notice of voluntary dismissal of the foreclosure proceeding. Fifteen months after the dismissal, the trustee filed a second power of sale foreclosure. Prior to the foreclosure hearing before the clerk, the borrower filed a motion to dismiss the action with prejudice and the trustee filed a second voluntary dismissal of the foreclosure. At the hearing, the clerk entered an order finding that the second voluntary dismissal filed by the trustee operated as an adjudication on the merits pursuant to Rule 41(a) and granted the borrower's motion to dismiss with prejudice. Lender appealed. In its opinion, the NC Court of Appeals addressed two issues raised by the application of Rule 41 to a power of sale foreclosure.

- First, the court noted that Rule 41 allows a plaintiff to dismiss the action any time prior to resting the plaintiff's case and file a new action on the same claim within one year after the dismissal. The court held that this one year time period is a "savings provision" that constitutes an extension beyond the general statute of limitations. It does not limit the statute of limitations if it has not yet expired. In the case of a foreclosure, there is a 10 year statute of limitations. Therefore, Rule 41 did not preclude the second power of sale foreclosure in the instant case even though it was filed more than one year after the first dismissal because the 10 year statute of limitations had not yet expired.
- After determining that Rule 41 did not preclude the second foreclosure filing by the trustee, the court then analyzed the effect of the second voluntary dismissal under Rule 41(a). The court held that the trustee's two prior voluntary dismissals of the Chapter 45 foreclosure proceeding on the same note did not operate as an adjudication on the merits that would prevent a third Chapter 45 foreclosure proceeding under Rule 41(a). Notwithstanding that the lender accelerated the debt prior to the first action, if the second action is based on different defaults or new period of defaults from the first action, then a third action is not barred because the first two actions did not arise out of the same claim of default. The court noted that the lender's election to accelerate the amount due under a note does not necessarily place future payments at issue such that the lender is barred from filing subsequent foreclosure actions based on subsequent defaults.

Author's Note: This opinion was vacated by the NC Supreme Court in **In re Foreclosure of Beasley (NC276PA15; Dec. 21, 2016)**. Citing **In re Foreclosure of Lucks**, the NC Supreme Court held that the trustee did not take a dismissal of the second foreclosure proceeding. Instead, the trustee "effectively withdrew its notice of the non-judicial foreclosure hearing" and thus terminated the proceeding.

In re Foreclosure of Herndon (COA15-488; Jan. 19, 2016)

Applying a holding from In re Foreclosure of Beasley to a similar set of facts, the NC Court of Appeals held that a third Chapter 45 foreclosure proceeding filed after the trustee voluntarily dismissed two previous actions under Chapter 45 on the same note was not barred by the Rule 41(a) "two-dismissal rule." The court found that each action was based on a different period of defaults and therefore the second voluntary dismissal did not operate as an adjudication on the merits and did not preclude the trustee from filing a third Chapter 45 foreclosure. The court

reiterated from Beasley that the prior acceleration of the loan by the lender did not preclude the filing of future foreclosure actions based on subsequent defaults.
Author's Note: Rule 41 is no longer applicable to non-judicial foreclosure proceedings given the NC Supreme Court's decision in In re Foreclosure of Lucks. That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

Application of Rule 52(a): Findings of Fact and Conclusions of Law; De Novo review
In re Foreclosure of Garvey (COA14-570; June 2, 2015)
The court restated language from earlier decisions that the N.C. Rules of Civil Procedure apply to power of sale foreclosures. Specifically, the court held that Rule 52(a), which requires the trial judge to make written findings of fact and conclusions of law, applies when a superior court judge conducts a hearing *de novo* on appeal from an order of the clerk. The order of the judge must include more than a summary conclusion that the party seeking to foreclose satisfied the statutory requirements. The judge must make findings as to each of the six factors required to foreclose under Chapter 45 and do so by conducting a *de novo* hearing on appeal, which is more than a *de novo* review of the clerk's order. After the *de novo* hearing, the judge must make the judge's own findings of fact and conclusions of law before entering an order as to whether the trustee may proceed with the foreclosure.
Author's Note: Rule 52(a) is no longer applicable to non-judicial foreclosure proceedings given the NC Supreme Court's decision in In re Foreclosure of Lucks. That opinion states that the N.C. Rules of Civil Procedure do not apply to non-judicial foreclosures.

Authority to Cancel a Note
In re Dispute over the sum of $375,757.47 (COA14-1239; April 21, 2015)
The NC Court of Appeals applied G.S. 25-3-604 to determine whether the original lender had the authority to cancel a note where the original lender recorded a Certificate of Satisfaction with the Register of Deeds. The NC Court of Appeals determined, based on a review of the allonge to the note and the original note submitted into evidence by the current holder of the note, that the original lender did not have the authority to cancel the note because at the time of the recording of the satisfaction, the lender had previously assigned the note, no longer owned the loan, and was not a "person entitled to enforce the instrument" under G.S. 25-3-604.

Holder of the Note
***In re Foreclosure of Deed of Collins* (COA16-655; Feb. 7, 2017).**
In a *de novo* Chapter 45 foreclosure hearing, the trial court did not err in accepting into evidence the affidavit of lender's administrative services employee averring the lender's possession of the original note. The fact that the affidavit was executed more than two years prior to the hearing did not invalidate it, and the affidavit sufficiently revealed that the averments as to the existence and status of the note and the merger of the holder were made

on the affiant's personal knowledge. In addition, the evidence before the trial court amply demonstrated that the lender was holder of the note, so the trial court's failure to make an explicit finding of fact regarding physical possession did not require a remand. *(Summary by Ann Anderson)*

In re Dispute over the sum of $375,757.47 (COA14-1239; April 21, 2015)

The NC Court of Appeals summarized the law under G.S. Chapter 25 applicable to indorsements and the assignment of notes. The court then applied the holding of In re Bass, 366 N.C. 464 (2013) to the indorsements challenged by the borrower. Under Bass, there is a presumption that an indorsement to a note is valid. The court held that where a purported holder appears in court with the original note and the note is the subject of a clear chain of indorsements ending with a blank indorsement, the court could find sufficient competent evidence that purported holder was in fact the holder of the note. The burden then shifts to the borrower to provide evidence that the purported holder is not in fact the holder. The court determined that both arguments made by the borrower failed to overcome the legal presumption and physical fact that the purported holder was the actual holder of the note. The first argument made by the borrower was that the version of the note presented in court did not match an earlier version faxed to the borrower's counsel. The court did not find this argument persuasive because the only substantive difference the court found between the copy and the original presented in court was the addition of the most recent indorsement, which was dated after the date the copy of the note was faxed to the borrower's counsel. Second, the court held that the borrower's arguments that MERS improperly assigned the note were without merit. The court held that MERS was merely the nominee under the deed of trust and had no authority to assign the note as MERS was never the holder of the note. The court held that the deed of trust followed the note and therefore any assignment of the note resulted in an assignment of the deed of trust.

In re Foreclosure of Rawls (COA15-248; Oct. 6, 2015)

The clerk of superior court entered an order authorizing sale in a power of sale foreclosure proceeding. The owner of the real property appealed. At the *de novo* hearing before the superior court judge, the party seeking the order of foreclosure produced the original promissory note indorsed in blank. The owner of the real property disputed whether the party seeking the order of foreclosure produced sufficient competent evidence that it was the holder of the note. The NC Court of Appeals held that production of the original note indorsed in blank by the party seeking the order of foreclosure is alone enough to establish that the party is the holder.

Greene v. Trustee Services Of Carolina, LLC (In re Foreclosure of Kenley) (COA15-97; Jan. 5, 2016)

Production of the original note indorsed in blank at the Chapter 45 foreclosure hearing by the party seeking to foreclose constitutes sufficient evidence for the court to determine that the party is the holder of the note.

Holder of a lost note

In re Foreclosure of Frucella (COA18-212; Oct. 2, 2018)

Respondents executed a note and deed of trust on their real property to secure the note. After closing on the loan, the original holder of the note transferred it to CitiMortgage and sometime thereafter the note was lost. Respondents defaulted and CitiMortgage then initiated a Chapter 45 foreclosure proceeding against respondents. The clerk and the superior court on appeal issued an order allowing the foreclosure sale. Respondents appealed to the NC Court of Appeals, asserting that CitiMortgage was not entitled to seek a non-judicial foreclosure because CitiMortgage was not the holder of the note due to the loss of the note. The court disagreed, concluding that the two lost note affidavits of filed by a CitiMortgage employee satisfied the requirements of G.S. 25-3-309, the NC Uniform Commercial Code provision governing entitlement to enforce a lost instrument. Because the evidence was sufficient to support the superior court's findings of fact, the superior court did not err in determining that CitiMortgage was the holder of the Note and allowing a sale. The court noted the purpose of non-judicial foreclosures, which is to avoid lengthy and costly judicial foreclosures and to allow the parties to expeditiously resolve mortgage defaults. Here there was no evidence showing that any other entity was the holder of the debt or an actual controversy existed regarding CitiMortgage's status as holder.

Rights of High Bidder upon Expiration of the Upset Bid Period

In re Foreclosure of Menendez (COA17-1341; May 15, 2018).

Trustee filed power of sale foreclosure before the clerk. Trustee held the sale and a third-party was the high bidder at the sale. Between the sale and the expiration of the upset bid period, the lender reinstated the loan upon receipt of a payment from the borrower. After the expiration of the upset bid period, the trustee filed, and the clerk granted, a motion to set aside the foreclosure sale and the report of sale. The trustee returned the respondent's deposit and filed a termination of the foreclosure. The bidder appealed the clerk's order setting aside the sale. The superior court denied the appeal and the bidder appealed to the NC Court of Appeals. The bidder argued on appeal that the rights of the parties were "fixed" upon expiration of the 10-day upset bid period; the clerk was required to confirm the sale; and the trustee was required to convey title to the property to the bidder. The court rejected this argument and dismissed the appeal. The court held the bidder had no interest in the underlying property or the deed of trust. The bidder was not a real party in interest and did not have standing to force a forfeiture in satisfaction of the deed of trust. The rights "fixed" upon expiration of the upset bid period were that the bidder was obligated to tender the purchase price and the trustee could hold the bidder liable for that price. Furthermore, where the bidder had actual and constructive notice of a provision in the notice of sale that the only remedy was return of the deposit if the trustee was unable to convey the property, the trustee owed no further duty to the bidder once the lender reinstated the loan except to return the deposit.

Court's authority to safeguard interests of parties and to fix procedural details of upset bids under G.S. 45-21.27

In re Foreclosure of Radcliff (COA18-419; Dec. 18, 2018)

Wells Fargo (WF), a junior lienholder on real property, enters an upset bid in a power of sale foreclosure. Mr. Johnson enters a second, subsequent upset bid. Upon entry of each upset bid, the clerk emailed the trustee notice of the upset bid and the trustee mailed notice via first class mail to the prior bidder in accordance with G.S. 45-21.27(e1). However, in the case of Mr. Johnson's upset bid, the trustee did not mail the notice to WF, the last prior bidder, until 5 days after the upset bid was placed. The upset bid period expired and three days later WF filed a motion requesting the court reopen and extend the upset bid period for an additional 10 days. The clerk of superior court denied the motion and WF appealed to superior court. The superior court judge granted the motion and reopened the upset bid period for an additional 10 days. Mr. Johnson then appealed to the NC Court of Appeals.

The COA affirmed the superior court and held that the court has the authority under G.S. 45-21.27(h) to make orders necessary to safeguard the interests of the parties and determine procedural details with respect to upset bids. Here the last prior bidder, WF, had an interest in the collateral real property and stood to be eliminated by the foreclosure proceeding. The statute does not specify when the trustee must send notice to the last prior bidder of an upset bid. Although the trustee technically complied with the notice requirements in the statute, the COA found that the superior court did not abuse its discretion in finding WF did not receive notice of Mr. Johnson's bid in sufficient time to protect its interests. Therefore, the trial court properly reopened and extended the upset bid period for an additional 10 days based on the authority granted under G.S. 45-21.27(h). The court distinguished this case from prior cases where the court refused to reopen the foreclosure on the grounds that the parties rights were fixed by the expiration of the 10 day upset bid period. In the prior cases, the *borrower*, rather than an upset bidder, sought to reopen the upset bid period to delay or halt a foreclosure sale. In this case, WF, a junior lienholder and bidder, sought to enhance the rights of the parties to the foreclosure by curing a procedural defect and entering a higher bid.

Liability of a Default Bidder

Glass v. Zaftrin, LLC (COA14-907; Feb. 3, 2015)

Bidder entered a high bid of $315,000.00 during the upset bid period of a foreclosure proceeding. In connection with the bid, the bidder paid a deposit of $15,750.00. After expiration of the upset bid period, the bidder notified the substitute trustee that it would be unable to complete purchase of the property and thus defaulted on its bid. The substitute trustee moved the court for an order to resell the property and at the second sale the high bid was $350,000.00. The original defaulting bidder sought the return of the full amount of its deposit from the first sale. Question before the Court of Appeals was whether G.S. 45-21.30(d) allows the costs of the resale to be deducted from the deposit refund where the resale price was more than the defaulting bid plus the costs of resale. The court held that a defaulting bidder is only liable on its deposit to the extent that the final sale price is less than the bid plus the costs of resale. In this case, the final sale price from the resale ($350,000.00) exceed the total of the defaulting bid ($315,000.00) plus the costs of resale ($1,469.80), therefore the defaulting bidder was entitled to the return of its entire deposit ($15,750.00).

In re Foreclosure of Ballard (COA15-475; March 15, 2016)

Holder of a note, U.S. Bank, as trustee for J.P. Morgan Mortgage Trust 2006-A2, submitted an opening bid at the foreclosure sale. A third party, Abtos LLC, filed a winning upset bid and bid deposit with the clerk of superior court. Abtos then defaulted on the bid and the clerk ordered a resale of the property pursuant to G.S. 45-21.30(c). At the resale, U.S. Bank was the only bidder and bid an amount lower than the bank's opening bid at the original sale. Upon a motion of Abtos to release the original bid deposit, the clerk ordered the bid deposit disbursed to U.S. Bank pursuant to G.S. 45-21.30(d), which provides a defaulting bidder at any sale or resale is liable on the bid to the extent the final sale price is less than the bid plus the costs of the resale. Abtos appealed the clerk's order and argued that the procedure for resale was not the same in every respect as the original sale as is required under G.S. 45-21.30(c) due to the fact that the trustee accepted an opening bid at resale that was less than the opening bid at the original sale. The superior court and the NC Court of Appeals affirmed the order of the clerk. The NC Court of Appeals held that a party's choice to lower its opening bid in a resale does not violate G.S. 45-21.30(c). The court noted that given the "vagaries of the real estate market" it would "seem strange to bind a party to the amount of its opening bid in a previous sale." Abtos made no other argument that the actual procedure for resale was different than the original sale.

Judicial Foreclosure, Equitable Action to Enjoin, and Civil Deficiency Actions
NC Supreme Court and NC Court of Appeals Published Case Summaries
Meredith Smith, UNC School of Government
January 1, 2015 – February 21, 2019

Reformation of deed of trust; statute of limitations in G.S. 1-47.2; unclean hands
Nationstar Mortgage LLC v. Dean (COA18-132; Sept. 18, 2018)
In 2004, the Deans used their beach cottage as collateral for a $1.8 million loan from First South Bank. When recording the deed of trust, the Deans' attorney failed to include the exhibit that contained the full legal description of the property (although the note itself did include the property's address, and there was no confusion about the property's identity). The attorney soon filed an amended deed of trust to include the description. By then the Deans had also conveyed an interest in the property to another bank, although there seems to be no dispute that it was intended to be a second-position lien. Years later, after the Deans fell behind on the payments on the first note, Aurora Bank (a successor in interest to First South Bank) eventually began foreclosure proceedings. Plaintiff Nationstar soon thereafter took over servicing of the loan and filed this action seeking a declaration that the First South Deed of Trust was a valid encumbrance on the property and, in the alternative, seeking reformation of the Deed of Trust to include the full legal description. The Deans countered that these claims were barred by the doctrine of unclean hands and by the statute of limitations. The trial court found in Nationstar's favor.

The Court of Appeals affirmed as follows: (1) The equitable remedy of deed reformation was appropriate in this case because there was no dispute that both the Deans and First South Bank intended that the property description be included in the recording and that it was only omitted by the inadvertence of the Dean's attorney; (2) Nationstar had standing to bring the reformation claim as the real party in interest because it was the holder of the original note, regardless of whether it was also the note's owner; (3) the ten-year statute of limitations in G.S. 1-47.2 (upon a sealed instrument or conveyance of real property) applied to the reformation claim, so the claim was timely; and (4) the Dean's assertions of unclean hands by Aurora Bank—which they claim persuaded them in 2011 to miss payments in order to trigger a modification process—related to conduct collateral to the 2004 recordation of the First South deed of trust. It therefore did not operate to bar that claim.
Summary by Ann Anderson.

Contractual claims under GS 45-21.34 to enjoin foreclosure; 12(b)(6) dismissal
McDonald v. The Bank of New York Mellon Trust Co. (COA17-1310; May 15, 2018). Plaintiff filed a claim under G.S. 45-21.34 to enjoin the foreclosure sale of her home. In the complaint she alleged that the bank had breached the loan agreement (a loan modification), breached the duty of good faith and fair dealing, and violated the Unfair and Deceptive Trade Practices Act. The trial court dismissed her claims under Rule 12(b)(6). The Court of Appeals affirmed. Each of Plaintiff's claims was premised on the existence of a loan modification agreement. The complaint itself (through incorporated attachments) revealed that Plaintiff had failed to meet

the first condition for existence of that agreement—making a time-is-of-the-essence first payment of the modified loan amount. Thus there was no agreement to which the Bank was bound.

Action to Enjoin the Sale under G.S. 45-21.34

Howse v. Bank of America, N.A. (COA16-979; Aug. 15, 2017) (with partial dissent)

Borrower filed a civil action seeking (i) a declaratory judgment under the Uniform Declaratory Judgment Act that the lender had no legal or equitable rights in the note and deed of trust, including the right to foreclose, and (ii) an injunction pursuant to G.S. 45-21.34. As part of the litigation, borrower filed discovery and a motion to compel discovery. Lender's counsel filed a motion for summary judgment. Trial court granted the lender's counsel motion on the ground that both claims constituted an impermissible collateral attack on the order entered in a separate power of sale foreclosure and denied the borrower's motion to compel. On appeal, the NC Court of Appeals affirmed in part and reversed in part. The court held that the portion of the action seeking declaratory relief under the UDJA constituted an impermissible collateral attack, but the borrower's action under GS 45-21.34 was not as the power of sale foreclosure statute creates a method by which a borrower can raise equitable and certain legal defenses to a foreclosure in a separate action. Because the trial court based the decision to grant summary judgment and deny the motion to compel entirely on the ground that both claims constituted impermissible collateral attacks, the court reversed the trial court's decision with regard to GS 45-21.34, provided that the parties rights has not become fixed in the foreclosure, and with regard to the motion to compel.

Dissent: The dissenting judge would have affirmed the trial court finding that the borrower failed to produce evidence supporting essential elements of the borrower's claims and thus there was no genuine issue of material fact and summary judgment was proper. The majority responded by noting that the parties had not argued the merits on appeal and the borrower had not been given the opportunity through discovery and at the summary judgment hearing to establish a prima facie case before the trial court.

Deficiency Action filed in connection with a Foreclosure

Branch Banking and Trust Co. v. Smith (COA14-554; Feb. 17, 2015)

Lender loaned $1,675,000 to borrower, secured by real estate. In connection with the loan, the lender entered into guaranty agreements with eight different individuals. Borrower defaulted, lender foreclosed on the property, and lender entered a credit bid at the sale in the amount of $800,000. Lender was the high bidder, leaving a deficiency in the amount of approximately $700,000 based on the balance remaining on the loan. Lender filed a civil deficiency action in superior court against each of the eight individual guarantors, which included one guarantor who had executed a limited guaranty agreement capping his liability at $418,750. As a defense, the limited guarantor raised G.S. 45-21.36, arguing that the amount bid was substantially less than the true value of the property, and therefore he was entitled to defeat or offset any deficiency judgment against him. Lender objected and argued that defense/offset provisions under G.S. 45-21.36 do not extend to guarantors. The Court of Appeals held the defense/offset set forth in G.S. 45-21.36 is available to guarantors, even if the

mortgagor is dismissed from the case. The court remanded the case to allow the guarantor the opportunity to present evidence regarding the true value of the property.

United Community Bank v. Wolfe (COA14-1309; July 7, 2015) **{REVERSED: See below.}**
Lender foreclosed and was the high bidder at the foreclosure sale. Lender's bid was less than the total value of the debt. Lender filed a deficiency action against the borrowers for the remaining amount due on the loan. Superior court granted summary judgment in favor of the lender and borrowers appealed. NC Court of Appeals reversed and remanded. The court's analysis included a discussion of the defenses available to a borrower under GS 45-21.36 in a deficiency action: (1) the property was worth more than the outstanding debt, or (2) the amount of the lender's bid was substantially less than the true value of the property. The court held that an affidavit from the owner of the property setting forth the specific value of the property is sufficient to raise a genuine issue of material fact whether the value of the property was fairly worth the amount of the debt and thus defeat a summary judgment motion. The court noted prior case law from the NC Supreme Court that the owner's opinion of value is competent to prove the property's value.

United Community Bank v. Wolfe (NC289PA15; May 5, 2017). Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 775 S.E.2d 677 (2015). The anti-deficiency statute, GS 45-21.36, allows a homeowner whose foreclosed property was purchased by the creditor for less than the debt amount to challenge a deficiency action by showing that the property was in fact "fairly worth the amount of the debt[.]" In the deficiency action at issue in this case, the homeowners submitted an affidavit stating that their foreclosed property was "fairly worth the amount of the debt." The trial court found this affidavit insufficient to create a genuine issue of material fact about the property value and granted summary judgment for the creditor bank. The Court of Appeals reversed, holding that the homeowner's opinion of value was competent and sufficient to survive summary judgment. Reversing, the Supreme Court concluded that an affidavit simply making a conclusory restatement of the statutory language and "asserting an unsubstantiated opinion" was not sufficient to "show" the property's value pursuant to the statute. The court stated: "Here the issue is not a landowner's competency to testify but whether the landowner's affidavit presented substantial competent evidence under Rule 56(c) regarding the 'true value' of the foreclosed property." Remanded to the Court of Appeals to reinstate the trial court's grant of summary judgment in favor of the lender bank.
Summary by Ann Anderson

High Point Bank and Trust Co. v. Highmark Props, LLC (NC No. 8PA14; Sept. 25, 2015)
In this case, the Supreme Court further resolved the question of whether a non-mortgagor guarantor to a loan may raise the anti-deficiency defense in order to reduce its outstanding debt to the lender. Here, Plaintiff bank issued two loans to Highmark—$4.7 million and $1.75 million. Guarantors, members of Highmark, guaranteed the loans. Highmark later defaulted, leaving balances of about $3.5 million and $1.3 million. The bank sued Highmark and the guarantors and also foreclosed on the properties, putting in the only bids: about $2.6 million

and $720,000. In the action to collect on the deficiency, the bank dismissed Highmark and sought to collect only against the guarantors. The guarantors raised the defense under G.S. 45-21.36, the anti-deficiency statute, which allows an offset where the amounts paid for the property at foreclosure are substantially less than their true value. The trial court allowed the guarantors' motion to add Highmark (back) as a party and submitted the anti-deficiency issue to the jury. The jury found that the fair market values of the properties were about $3.7 million and about $1 million, leaving guarantors with respective debts of $0 and $300,000.

The bank appealed, arguing that non-mortgagor guarantors are not permitted to take advantage of the anti-deficiency statute. The Court of Appeals affirmed, holding that the guarantors could indeed raise the defense; the majority and concurrence differed, however, as to whether the defense could be raised in an action in which the debtor itself was not a party. The Supreme Court looked closely at the language of G.S. 45-21.36 and concluded that a non-mortgagor guarantor may "stand in the shoes of the principal borrower" and raise the anti-deficiency defense whether or not the borrower is a party to the action. In addition, the court stated that conditioning a guarantee agreement on guarantor's waiver of anti-deficiency protection violates public policy. *(Summary by Ann Anderson)*

***TD Bank, N.A. v. Williams* (COA15-598; June 7, 2016).**
Summary judgment was properly granted against debtor/guarantor in creditor's action to collect the debt. Debtor/guarantor failed to create a genuine issue of material fact as to his defense under the anti-deficiency statute. His contention regarding the value of the property was contained in an unverified answer and thus could not be used as evidence, and the materials included in his verified motion for partial summary judgment did not actually include appraisals or opinions of the value of the property. *(Summary by Ann Anderson)*

Enforcement of a Lost, Stolen, or Destroyed Promissory Note in a Civil Suit on the Note
Emerald Portfolio LLC v. Outer Banks/Kinnakeet Associates, LLC (COA16-31; Sept. 6, 2016)
Lender made a loan to a limited liability company borrower and individual members of the LLC signed guaranty agreements guaranteeing the debt. Lender subsequently sold the loan to Lender #2. Borrower defaulted. Lender #2 filed complaint alleging the borrower and the guarantors were in default under the terms of the note and sought a judgment against both to recover the unpaid balance of the note. Trial court granted summary judgment in favor of Lender #2. Borrowers appealed. NC Court of Appeals held that Lender #2 did not have a right to enforce the lost note against the borrower LLC as Lender #2 was not in possession of the note when the loss of possession occurred, which is a requirement of GS 25-3-309. The court noted that North Carolina did not adopt the 2002 amendments to the UCC which provide that a person who acquires ownership from a person entitled to enforce the note when the loss of possession occurred may also enforce the lost, stolen or destroyed note. As a result, such relief was not available to the note purchaser under NC's version of the UCC. The court further held that the guaranty remained enforceable notwithstanding the unenforceability of the note against the borrower and therefore did not serve as a viable defense for the individual guarantors.

Preclusive effect of foreclosure on separate contract and tort claims action against lender.
Funderburk v. JPMorgan Chase Bank, N.A. (COA14-1258; June 16, 2015)
Plaintiffs filed this action against their former mortgage lender for breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with contracts and business expectancy, quantum meruit, and punitive damages—all in connection with an earlier series of foreclosures. The trial court properly dismissed these claims pursuant to Rule 12(b)(6). Each of the properties had already been foreclosed upon pursuant to Chapter 45 based on plaintiffs' payment default, and the foreclosure orders of the clerk had become final. Each of the claims in the present action was essentially premised upon an argument that there had been no default; because the issue of default had been conclusively determined in the earlier foreclosure proceedings, it could not be re-litigated in this separate civil action. *(Summary by Ann Anderson)*

Rescission of certificate of satisfaction under G.S. 45-36.6
***Wells Fargo Bank, NA v. American National Bank and Trust Co.* (COA15-689; Nov. 1, 2016) (with dissent).** After homeowners refinanced their mortgage in 2006 through Wells Fargo, Wells Fargo filed a certificate of satisfaction certifying that an earlier 2004 deed of trust had been satisfied and was accordingly cancelled. Wells Fargo neglected, however, to enter into a subordination agreement with Defendant American National regarding an earlier home equity line of credit on the property. The effect was to elevate American National's line of credit to first priority. Wells Fargo discovered the problem six years later and filed a document of rescission of the certificate of satisfaction in an attempt to restore Well Fargo's loan to first priority. In this declaratory judgment action, Wells Fargo argued that G.S. 45-36.6's provision allowing rescission "if a security instrument is erroneously satisfied of record" allows rescission for *any* erroneous satisfaction. Defendant, on the other hand, argued that the statute only permits rescission when a satisfaction is erroneously filed for an obligation *that was not actually satisfied*. The trial court granted summary judgment in favor of Wells Fargo. Analyzing the plain language of the statute, its legislative history, and its construction, the Court of Appeals agreed that Wells Fargo's interpretation was the right one. The court reversed the grant of summary judgment for Wells Fargo, however, holding that a genuine issue of material fact existed as to whether Wells Fargo actually filed the certificate of satisfaction erroneously or on purpose.
Dissent: The dissenting judge argued that Wells Fargo's "error" was not in filing the certificate of satisfaction, but in failing to enter into a subordination agreement with defendant by which it would have secured its first priority status. Thus it did not commit the kind of error that is correctable under G.S. 45-36.6. *(Summary by Ann Anderson)*

Declaratory judgment action related to loan obligation; 12(b)(6) dismissal; claim under G.S. 45-36.9 (Judicial Foreclosure)

***Perry v. Bank of America, N.A.* (COA16-234; Feb. 7, 2017).** The trial court improperly dismissed a declaratory judgment action brought by a borrower against a lender where the complaint articulated a controversy over whether plaintiffs were obligated to repay the loan balance when that balance had been procured through fraud of a third person. The trial court properly dismissed their claim brought pursuant to G.S. 45-36.9, however, because the complaint revealed that the plaintiffs never requested the bank cancel a security interest for which there was a zero balance. *(Summary by Ann Anderson)*

Minimum Pleading Requirements in Judicial Foreclosure
U.S. Bank v. Pinkney (229PA16; June 9, 2017)
Reversing the unanimous opinion of the Court of Appeals at __ N.C. App. __, 787 S.E.2d 464 (2016). The defendants (collectively, Borrowers) executed a promissory note (Note), with debt secured by a deed of trust (DOT). Several years later, plaintiff (Bank) filed a complaint seeking judicial foreclosure and judgment on the Note, alleging default by Borrowers. Borrowers filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, which the trial court allowed. In affirming the trial court's order dismissing the action, the Court of Appeals erroneously applied the requirements of G.S. 45-21.16(d), which applies to non-judicial foreclosures by power of sale. The Court of Appeals determined that the Bank failed to establish its status as holder of the Note, since it was not the original holder of the Note, and there was inadequate evidence of indorsements from one lender to the next each time the Note was transferred. The Supreme Court noted that in the instant case, the Bank was proceeding with a judicial foreclosure, which is an ordinary civil action commenced by filing a complaint and governed by the Rules of Civil Procedure. The statute cited by the Court of Appeals therefore did not apply. A complaint in a judicial foreclosure action must, at minimum, allege: (1) a debt; (2) default on the debt; (3) a deed of trust securing the debt; and (4) the plaintiff's right to enforce the deed of trust. As with other civil actions, a creditor is not required to prove the entire case at the pleading stage, but must provide sufficient facts and circumstances necessary to give a borrower adequate notice of the judicial foreclosure action. The Bank adequately pled its claim, and its inclusion of attached exhibits did not deprive Borrowers of notice. Any inadequacy of evidence or legal theory could be tested at trial by Borrowers.
Summary by Aly Chen.

Authority of Lender to Seek Specific Performance under a Note and Deed of Trust with Power of Sale
Banks v. Hunter (COA16-666; Jan. 17, 2017)
Defendant signed a promissory note (Note) and a deed of trust (DOT) as security for the Note. Both documents contained a power of sale clause. After defendant defaulted, plaintiff filed an action in district court seeking specific performance on the Note and for the court to convey defendant's property to him. Defendant failed to appear after being personally served and a default judgment was entered. Defendant failed to comply with the judgment requiring her to execute a deed and the trial court entered an order of divestiture and vesting pursuant to Rule 70 of the Rules of Civil Procedure. After the time for appeal expired, defendant filed a Rule 60(b) motion for relief. After that was denied, defendant appealed and asserted: (1) the trial court lacked subject matter jurisdiction; and (2) the court abused its discretion in denying relief. The

Court of Appeals determined it need not reach the second question after concluding the trial court did not have subject matter jurisdiction. Although the DOT gave plaintiff the power to seek a foreclosure by power of sale, plaintiff failed to utilize this procedure. Since plaintiff did not seek relief allowed for under the foreclosure statutes, which are the exclusive means of remedy available in this situation, he did not properly invoke the trial court's jurisdiction. The court discussed remedies for default of debt, the difference between a mortgage and an absolute deed, and the right of a debtor to redeem the property through repayment of the loan, called the equity of redemption. Public policy does not favor efforts to deprive debtors of this right, although a debtor may waive the right by executing an absolute deed. North Carolina no longer has a common law "strict foreclosure" procedure, by which a property may be conveyed to a creditor without a sale; the right to foreclose is exclusively governed by statute.
Summary by Aly Chen.