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MEMORANDUM

TO: Clerks of Superior Court
FROM: Pamela Weaver Best, Associate Counsel
DATE: February 10, 2005

RE: Foreclosures and the Unauthorized Practice of Law

The North Carolina State Bar (Bar) has issued a number of Cease and Desist orders to trustees and substitute trustees in foreclosure actions. As you all are aware, most recently the Bar addressed the issue of corporate trustees (i.e., Priority Trustee Services) filing actions and appearing at foreclosure hearings before you without the benefit of counsel. Additionally, the Bar in a separate action has ruled on the common practice of paralegals meeting with clerks to "hand over the paperwork" on behalf of trustees or substitute trustees.

Based on the Bar's recent rulings, and my discussions with Bar Counsel, what follows is a summary of the rulings and our suggestions for handling foreclosure actions in the future.

Summary of Bar Rulings—Representation by an Attorney

1. A corporation cannot represent itself in court, and may only appear through an attorney. G.S. §84-5; *Lexis Nexis v. Travishan Corp*., 155 N.C. App. 205 (2002).

2. If a trustee or substitute trustee (Trustee) is a corporate or other entity (e.g., Corp., Inc., L.L.P., L.L.C., P.A.) the Trustee must be represented by an attorney at all stages of the "litigation" which includes everything from signing the pleadings to appearing at the foreclosure hearing before the Clerk.

3. A paralegal may not appear at the hearing on behalf of a party, even to simply present documents to you, since the Bar considers appearing at the hearing litigation. Hence, if the Trustee is a corporate or other entity, either an attorney must appear at the hearing or the lender can take its chances and proceed without anyone appearing at the hearing.

4. If the Trustee is an individual, the Trustee can appear personally and represent him or herself or an attorney can appear for the Trustee.

Filing the Notice of Hearing

Clerks have asked whether they should review the notice of hearing before it is filed to determine whether it should be rejected because the trustee is a corporation. As you know, Clerks do not have authority to deny filings with the court except in very limited circumstances, such as fraudulent liens. In addition, we recognize that clerks do not have the staff to allow a comprehensive review of every pleading before it is filed. Therefore, we recommend you not reject a filing, and instead make your determination of appropriateness of representation at the hearing.

However, if you can determine immediately upon filing that the person filing the notice is engaging in the unauthorized practice of law you may choose to inform the person that you will likely dismiss the action because it was not signed by an attorney.

Conducting Hearings in the Future

The following questions and answers assume a notice of hearing has been filed and you are at the stage of conducting the hearing.

1. Corporate Trustee files a notice for hearing with your office.
    a. If an officer for the corporate trustee signs the documents, can you proceed?

        No, because the corporation would be practicing law without a license. It is within your discretion to either continue the action to give an attorney time to appear or dismiss the action.

    b. If a paralegal delivers the documents to you at the hearing, can you proceed?

        No, because the paralegal would be practicing law without a license. It is within your discretion to either continue the action to give an attorney time to appear or dismiss the action.

    c. If the Trustee or a paralegal simply mails the necessary documents to you (or otherwise has them delivered to your office), but does not appear at the hearing, can you proceed?

        If counsel represents the Trustee, as evidenced on the documents (e.g., the notice of hearing is signed by a lawyer) you can proceed. Of course, you will need to determine if the documents in the file are sufficient for you to make the necessary four findings.

2. What if a corporate trustee signed the pleadings, but now an attorney appears at the hearing, can you proceed?

    It is within your discretion to strike the pleadings, dismiss the case or let the case proceed now that an attorney is present. Should you decide to proceed you should insist that an attorney provide representation to the trustee as the case moves forward. At a minimum, the attorney should file a notice of appearance in the case. Some attorneys may also choose to amend the notice or sign the existing notice.

3. What if the Corporate Trustee (e.g., H. Terry Hutchens, P.A.) is really a law firm, can you proceed?

If an attorney signs the necessary documents in his or her role as attorney representing the corporation, the action can proceed. If the attorney signs as officer, agent, or employee of the corporation, this is still a corporate trustee attempting to litigate *pro se* and is not permissible.

4. Can a non-lawyer sign the affidavit concerning service of the notice?

   The Bar's order did not address this issue. However since proper service goes directly to your finding whether notice has been given to those entitled to such notice, as required in GS 45-21.16(d) and your finding is considered a judicial act [GS 45-21.16(d1)] the affidavit would be in furtherance of litigation and should be signed by an attorney.

5. Can someone other than an attorney conduct the sale of the property?

   The Bar's orders do not address this, but it would seem permissible since the sale is not litigation.

6. Can a non-attorney who held the sale sign the report of sale?

   The Bar's orders did not address this issue, however G.S. 45-21.26(b) states that the "…report shall be signed by the person authorized to hold the sale, or by his agent or attorney…." Based on that language someone other than the attorney can sign the report of sale as "agent" of the trustee.

7. Can a non-lawyer sign the final report?

   The Bar's orders do not address this issue and the statutes do not have language similar to the language quoted above for the report of sale. It appears that the final report could be considered in furtherance of litigation and therefore, should be signed by the attorney or individual trustee not an agent or corporate entity.

Out of State Attorneys

If the attorney who represents the trustee is not licensed to practice law in North Carolina, he or she may not proceed with the foreclosure until the procedures in G.S. 84-4.1 have been followed. Those procedures require that in each case a motion for admission signed by the out of state attorney accompanied by an admission fee of $100.00. The motion should include or be accompanied by a statement setting forth all the information set out in G.S. 84-4.1. If the motion satisfies the requirements and is accompanied by the $100 fee you can enter an order allowing the attorney to appear in the matter before you.

For your information, G.S. 84-4.1 is quoted below in its entirety. If you have any questions or need further information please contact Pete Powell or Pamela Best.

C: Jennifer Porter, NC State Bar; Prof. Joan Brannon; Mark Baker, Esq.; Jim Bonner, Esq.; Terry Hutchens, Esq.

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of that state and in good standing therein, having been retained as attorney for a party to

any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the litigation. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

(1) The attorney's full name, post-office address, bar membership number, and status as a practicing attorney in another state.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until the final determination thereof, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

(6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.

(7) A fee in the amount of one hundred dollars ($100.00) for support of the General Court of Justice to be remitted to the State Treasurer.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application.