Meredith Smith
UNC School of Government
Prepared for Instructional Purposes

G.S. Chapter 45 Power of Sale Foreclosure
Role of Trustee –NC Appellate Cases and State Bar Ethics Opinions

KEY NC APPELLATE DECISIONS

Lynn v. Federal National Mortgage Association, 235 NC App 77 (2014)

- Trustees have fiduciary duty to both debtor and creditor in a typical foreclosure proceeding
- Trustee vested in a position of power; bound to act in the interests of the parties and exercise its powers accordingly

In re Foreclosure of Real Property for $143,600.00, 156 NC App 477 (2003)

- Trustee is disinterested third party acting as the agent of both the debtor and creditor
- Trustee charged with duty to effect service of notice of hearing
- Holding – trustee called by lender to testify and did testify as to efforts to serve borrower; not improper for substitute trustee to testify as to efforts to serve where borrower contested service and direct examination by lender limited to means employed to obtain service (judge's inquiry broadened to other factors which borrower's counsel further expanded in cross); duty of trustee to serve inures to benefit of borrower and lender

In re Foreclosure of McDuffie, 114 NC App 86 (1994)

- Establishes principal that trustee is disinterested third party acting as agent of both debtor and creditor

In re Foreclosure of Vogler Realty, Inc., 365 NC 389 (2012)

- Trustee stands in a fiduciary relationship with both debtor and creditor
- Trustee must be impartial in performance of duties; can't give unfair advantage to one party to the detriment of the other
- Re: fiduciary relationship: special confidence reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence
- Duty is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale
- Duty of fidelity and impartiality, good faith and every requisite degree of diligence; making due advertisement and giving due notice
- Upon default – trustee's duties are rendered responsible, critical, and active and he is required to act discreetly as well as judiciously in making the best use of the security for the protection of the beneficiaries

In re Foreclosure by Goddard & Peterson, PLLC, 789 S.E.2d 835 (2016)

- Goddard & Peterson (G&P) substituted as trustee for RTT (G&P successor) then RTT began representing lender in foreclosure

- Respondent objects to appearance of RTT as petitioner's counsel and advocate against respondent in the foreclosure hearing; argues RTT had a fiduciary duty to borrower and representation of lender constituted breach
- RTT removed as trustee before the hearing in superior court; borrower fails to show how representation violated a specific principal of law or was undertaken in **bad faith** or how borrower sustained some **specific injury** that was proximately caused by RTT's conduct; when parties appeared before superior court RTT had no duty to act as a disinterested party, and therefore the court discerns **no prejudice to R's rights** or interests as a result of RTT's representation of lender or how it allowed **lender to gain unfair advantage** in the FC proceeding – no evidence that borrower was unrepresented, unsophisticated legal consumer or that she disclosed material confidential information to RTT when RTT was acting as ST – instead borrower was represented throughout the foreclosure proceedings; record replete with evidence that RTT notified borrower of the hearing in superior court
- No legal or ethical violation in connection with RTT representation of petitioner

NC STATE BAR ETHICS OPINIONS

When an attorney is required to withdraw from representation or from a fiduciary role, it may be due to either

1. Concerns of **confidences** of the client under Rule 4 and its predecessors or
2. **Conflicts of interest** under Rule 5.1 or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding.

Key ethics opinions from the NC State Bar related to the role of the trustee are available at https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/ and include:

1. CPR 94 – October 21, 1976
2. CPR 166 – July 14, 1978
3. CPR 201 – October 19, 1978
4. CPR 220 – April 13, 1979
5. CPR 297 – July 15, 1981
6. CPR 305 – October 14, 1981
7. RPC 46 – October 28, 1988
8. RPC 3 – April 18, 1986
9. RPC 64 – July 14, 1989
10. RPC 82 – January 12, 1990
11. RPC 90 - October 17, 1990
12. 2004 FEO 3 – April 23, 2004
13. 2008 FEO 11 – January 15, 2010
14. 2011 FEO 5 - July 15, 2011
15. 2013 FEO 5 – July 19, 2013
16. 2014 FEO 2 – April 25, 2014