Money, Dirt & Steel: 2014-2015 NC Real Property Litigation Update

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A snapshot of noteworthy cases from the past year related to lending practices, property rights and construction in North Carolina

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Money

Lending:

Comprehensive waiver language in loan workout documentation may ?cure? prior ECOA violations.

In RL REGI North Carolina, LLC v. Lighthouse Cove, LLC, 762 S.E.2d 188 (N.C. 2014), the North Carolina Supreme Court held that a woman who guaranteed a loan obtained by her husband?s company waived her right to assert an Equal Credit Opportunity Act (?ECOA?) violation as a defense in the commercial lender?s collection action by subsequently executing a forbearance agreement that contained broad, comprehensive language waiving and releasing any and all claims against the lender that would dispute its ?good faith? or ?commercially reasonable? conduct. This ruling is consistent with the Fourth Circuit?s opinion in Ballard v. Bank of America, N.A., 734 F.3d 308 (4th Cir. 2013), which held that a spouse-guarantor effectively waived any ECOA claim she may have had against a commercial lender by executing multiple debt restructuring agreements that contained comprehensive language waiving ?any and all? claims against the lender.

A mortgage/deed of trust becomes unenforceable against subsequent creditors 15 years after maturity, unless extended by affidavit, even if such creditors have acquired their interests before that time.

In Falk v. Fannie Mae, 766 S.E.2d 271 (N.C. 2014), the North Carolina Supreme Court applied the ?life of lien? statute, N.C. Gen. Stat. § 45-37(b) (2011) in ruling that, where at least fifteen years had passed since the first mortgage encumbering certain property matured in 1994 and no affidavit extending the life of the lien had been filed, a subsequent secured creditor (Fannie Mae) was entitled to the conclusive presumption that the prior lien had been satisfied and could foreclose on the property in 2011, even though its security interest was acquired in 2001?*less than seven years after the prior mortgage debt matured*. Although the statute no longer explicitly states that it applies ?irrespective of whether the credit was extended or the purchase was made before or after the expiration of [the fifteen year period]? as it did prior to 1969, the Court held that the current statute retains that meaning, since it ?imposes no limitation on when a creditor must obtain its interest in the property to be able to avail itself of the statute?s protection after the expiration of the fifteen year period.? Id. at 279.

Lender?s mere breach of promise to refinance a loan, without more, did not constitute an unfair or deceptive trade practice or violate the NC Debt Collection Act.

In Wells Fargo Bank, N.A. v. Corneal, No. COA14-660, 2014 WL 7124223 (N.C. Ct. App. Dec. 16, 2014), a secured lender filed an action against defaulting debtors for breach of contract and foreclosure. The debtors filed two counterclaims alleging that the lender violated the Unfair and Deceptive Trade Practices Act (?UDTPA?) and the North Carolina Debt Collection Act (?NCDCA?) by breaking its promise to allow the debtors to refinance their loan upon maturity, both of which were dismissed by the trial court. See N.C. Gen. Stat., ch. 75 (2013). The North Carolina Court of Appeals affirmed the dismissals, ruling that the lender?s alleged broken promise, standing alone, was not enough to state a UDTPA claim , and, since the debtors did not allege they incurred the debt for ?personal, family, household or agricultural purposes,? they also failed to state a claim under NCDCA.

A bank whose customer used its account with that bank in committing fraud is not liable to the defrauded third party based on negligence or aiding and abetting a breach of fiduciary duty or under the Bank Secrecy Act.

In Bottom v. Bailey, et al., No. COA14?564, 2014 WL 7473107 (N.C. Ct. App. Dec. 31, 2014), plaintiffs owned certain real property in Buncombe County and contracted with 1030 Exchange Services, LLC (?1031?) to provide intermediary services for a tax-deferred exchange. Shortly thereafter when the property was sold, 1031 deposited the proceeds into a fiduciary account at HomeTrust Bank (?HomeTrust?), where a majority thereof was deposited into a separate sweep account in the name of

1031 and commingled with other funds belonging to HomeTrust?s owner, defendant Bailey. Portions of these funds were then transferred back and forth between HomeTrust and Morgan Stanley Smith Barney (?Morgan Stanley?). Plaintiffs filed an action against 1031, HomeTrust and Morgan Stanley on various grounds, including breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, unfair and deceptive practices and civil conspiracy.

Morgan Stanley moved to dismiss the complaint on the grounds that plaintiffs had failed to state a claim upon which relief could be granted, since they were not customers of Morgan Stanley, and Morgan Stanley owed no duty to plaintiffs. The trial court granted Morgan Stanley?s motion, and the Court of Appeals affirmed the dismissal on appeal.

The opinion issued by the Court of Appeals is significant in a few key respects. First, the Court held that Morgan Stanley owed no duty to plaintiffs, who were not customers of the bank, to ensure that Morgan Stanley?s customers did not use their accounts to commit fraud. This opinion confirms that banks in North Carolina owe a duty only to their customers?not third parties. Second, the Court held that the federal Bank Secrecy Act, which was created to assist law enforcement by requiring banks to report ?suspicious activity? by their customers, does not create a civil cause of action for private non-customers against banks. Finally, the Court clarified the previously unsettled question of whether North Carolina recognizes a cause of action for aiding and abetting breach of fiduciary duty, holding that no such claim exists in this State.

Dirt

Easement/Covenants:

> ***Under the state?s current private condemnation laws, a company seeking an easement across multi-county property must file a separate petition in each such county.***

In Rutherford Electric Membership Corporation v. 130 of Chatham, LLC, 763 S.E.2d 296 (N.C. Ct. App. 2014), a private condemnation action involving property spanning more than one county, the North Carolina Court of Appeals held that the trial court erred by dismissing the entire action for lack of subject matter jurisdiction. Instead, the trial court should have simply limited its consideration to the portion of the property located within its county lines. The Court?s opinion recognized that Chapter 40A does not clearly provide for multi-county private condemnation actions and urged the General Assembly to clarify this issue and establish appropriate procedures if such actions are to be permitted.

A restrictive covenant prohibiting the location of a specific type of store on a tract of land does not prohibit its use as a parking lot for the customers of such a store, located on an adjacent tract.

In Charlotte Pavilion Road Retail Investment, L.L.C. v. North Carolina CVS Pharmacy, LLC, No. COA14-658, 2014 WL 7123842 (N.C. Ct. App. Dec. 16, 2014), the North Carolina Court of Appeals held that a restrictive covenant prohibiting the location of ?a health and beauty aids store, a drug store, a vitamin store, and/or a pharmacy? on a particular tract was not worded broadly enough to also prohibit a parking lot and access easement for customers of such a store that was built on an adjacent tract (a Walmart). The Court noted that the parking lot likely *would* have violated a more comprehensive restrictive covenant that prohibited, for example, the ?business activity of operating? the specified type of store.

Actions to remove certain infringements on easements must be filed within six years after the infringement began, as opposed to the generally recognized twenty-year limitations period.

In Duke Energy Carolinas, LLC v. Gray, 766 S.E.2d 354 (N.C. Ct. App. Dec. 2, 2014), the North Carolina Court of Appeals held that Duke Energy?s claim asserting an encroachment upon its easement was time-barred under N.C. Gen. Stat. § 1-50(a)(3), which the Court determined sets a six-year limitations period that begins to run at the time that any such injury to an *incorporeal hereditament* ? such as an easement ? occurs, ?even when the injured party is unaware that the injury exists.? This is contrary to the generally understood rule that the 20 year time period applicable to adverse possession should apply. Duke Energy has petitioned the North Carolina Supreme Court for review of this decision.

Subdivisions:

A town that annexes an existing subdivision may bring an action to enforce the developer?s performance bond after accepting assignment thereof from the county, and statutory time limitations do not apply.

In Town of Black Mountain v. Lexon Insurance Co., No. COA14-740, 2014 WL 7124838 (N.C. Ct. App. Dec. 16, 2014), the North Carolina Court of Appeals ruled that the Town of Black Mountain could enforce subdivision performance bonds originally in the name of Buncombe County after the property covered by those bonds was annexed by and the bonds were assigned to the Town.

The Court also held that the three-year statute of limitations in N.C. Gen. Stat. § 1-52 did not apply to bar the Town?s action to enforce the bonds. Applying the framework established by the North Carolina Supreme Court in Rowan County Board of Education v. United States Gypsum Co., 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992) (?Rowan II?), the Court explained that an action by the State or one of its subdivisions to enforce subdivision bonds under N.C. Gen. Stat. § 153A-331 constitutes a governmental

rather than proprietary function and, as such, is not subject to such time limitations *unless* the particular statute expressly includes the State. N.C. Gen. Stat. § 1-52 does not expressly include the State and, therefore, did not bar the Town?s action in this case.

A developer?s deed intended to convey a subdivision?s common areas to its HOA must specifically depict and/or describe every inch of land to be conveyed, even if the intent seems clear.

In LE Oceanfront, Inc. v. Lands End of Emerald Isle Ass?n, Inc., No. COA14-287, 2014 WL 7463236 (N.C. Ct. App. Dec. 31, 2014), the North Carolina Court of Appeals held that a 14+-acre strip of land lying between a subdivision and the Atlantic Ocean (the ?Oceanfront Strip?) was not included in the subdivision developers? 1988 conveyance to the HOA of streets and other common areas because the deeds (and the maps referenced therein) did not depict *the entire* Oceanfront Strip. While the Court did not rule on the possibility of an easement or other rights the HOA may have in the Oceanfront Strip, Plaintiff (a corporation formed by individual owners of lots adjacent to the Oceanfront Strip) acquired whatever interest the subdivision developers still had in the Oceanfront Strip by quitclaim deeds delivered in 2011 and 2013.

Construction:

The six-year statute of repose limiting the time for filing actions arising from real property improvements can be superseded by a supplier?s express extended warranty.

In Christie v. Hartley Construction, Inc., et al., 766 S.E.2d 283 (N.C. 2014), the North Carolina Supreme Court held that a supplier of improvements to real property may, without offending public policy, bargain away or even waive the six-year statute of repose in N.C. Gen. Stat. § 1-50(a)(5)(a), which is otherwise applicable to most damages claims arising out of such improvements, by warranting its product for a longer period of time. The Court noted that the homeowner-plaintiffs relied upon the marketing materials on the supplier-defendants? website, which expressly included a full twenty-year warranty on its stucco-like external cladding system, SuperFlex. By choosing to advertise this extended warranty, the Court held that the supplier-defendants waived the protections provided by the statute of repose and were bound by their agreement with plaintiff-homeowners for the warranted twenty-year period.

Coastal Development:

Based largely on the definitions contained in one marina?s governing documents, the land under each boat slip belongs to the marina?s owners association, not the individual owners of the slips.

In Carolina Marlin Club Marina Association, Inc. v. Preddy, No. COA14-377, 2014 WL 746379) (N.C. Ct.

App. Dec. 31, 2014), the defendants owned one of 73 boat slips at plaintiff?s marina, which had become shallow in certain areas over the years and needed dredging. The marina?s association, which is subject to the North Carolina Condominium Act and also governed by its own restrictions and bylaws, published notice of a meeting to propose an assessment for dredging in the marina, and the assessment ultimately passed, despite objections made by defendants and several other owners. The objecting owners also contacted the N.C. Department of Environment and Natural Resources, Division of Coastal Management, challenging the association?s right to dredge the ground under each slip based on their assertion that such ground belonged to the slips? individual owners?not the association. However, the necessary permits were issued, and dredging occurred throughout the marina, except in the areas beneath the objecting owners? slips. When another assessment passed thereafter that authorized collection of an additional $500.00 per slip to complete the dredging project, the defendants and five other owners again objected and refused to pay. The association responded by filing suit against the defendants.

The Court of Appeals addressed and ultimately rejected the defendants? public trust doctrine argument, determining that the doctrine had little impact because this case did not involve allegations of trespass or related claims. Instead, the issue in the case was whether the submerged land beneath each slip was included in individual unit ownership or, instead, was common property subject to the control of the association. The Court ultimately affirmed the trial court?s finding that ownership of each slip in the marina was ?two-dimensional,? such that it included only the area between the pilings and the dock and not the submerged ground below. The findings on this issue were based largely on the terms of the marina?s declaration of unit ownership and other evidence. Specifically, although the declaration did not explicitly *exclude* the underwater ground from the definition of slip or unit, the Court noted that no testimony was given or evidence presented that the declaration?s description or definition of each slip *included* that ground.

> ***Where a HOA demonstrated that strict application of the law requiring removal of temporary sandbags would destroy its beachfront condominiums, the CRC should have balanced the competing interests of the property owners and the public and granted the HOA?s variance request.***

Riggings Homeowners, Inc. v. Coastal Resources Commission of the State of North Carolina, 47 S.E.2d 301 (N.C. Ct. App. Aug. 6, 2013), arose out of an escalating battle between The Riggings, an oceanfront condominium community in Kure Beach, and the Coastal Resources Commission (?CRC?) regarding The Riggings? continued use of sandbags as a temporary erosion control method on its beach. Permits obtained when The Riggings was built in 1985 allowed the use of sandbags until 1995. Thereafter, The Riggings homeowners? association (?HOA?) obtained several variances from the CRC to keep the sandbags in place while pursuing long-term erosion solutions. But when the HOA rejected a Federal Emergency Management Agency (?FEMA?) grant that would have funded relocation of The Riggings across the highway from the ocean to another site owned by the HOA, the CRC ordered the sandbags removed and denied all variance requests submitted by the HOA after 2005.

This lawsuit ultimately arose in 2009 when the HOA appealed the CRC?s last variance denial to New

Hanover County Superior Court. The trial court judge found a number of errors in the CRC?s application of the statutory factors regarding variances under N.C. Gen. Stat. § 113A-120.1. Among other things, the trial court found the HOA had presented evidence sufficient to establish that unnecessary hardships would result from strict application of the law in this case, since The Riggings would be destroyed by removal of the sandbags. Further, the trial court found that the CRC relied on improper considerations in denying the variance request, such as the HOA?s rejection of the FEMA grant and the availability of other property owned by The Riggings where it could relocate. The trial court ultimately reversed the CRC?s variance denial, and the CRC appealed.

On appeal, the North Carolina Court of Appeals determined that the variance sought was in accordance with the CRC?s rules and upheld the trial court?s reversal. The Court of Appeals essentially determined that the regulatory scheme applicable to these variances requires a balancing of the competing interests of the applicant and the public, and, in this case, the HOA?s need to protect its property outweighed the asserted public interest in aesthetics and inconvenience of having to walk around sandbags on the beach. The Court also emphasized the importance of expert testimony establishing that the sandbags were not harmful to surrounding property or the ocean. The State thereafter petitioned the North Carolina Supreme Court for review.

On review by the Supreme Court, Riggings Homeowners, Inc. v. Coastal Resources Commission of the State of North Carolina, No. 401A13, 2014 WL 7270469 (N.C. Dec. 19, 2014), Justice Hunter did not participate and all of the remaining justices were equally divided. As a result, the Court of Appeals decision stands, but does not create binding precedent that must be followed in future cases.

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