

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 2529

SUPERIOR CONSTRUCTION
CORPORATION, and MILLER & LONG
COMPANY, INC.,

Plaintiffs,

v.

WACHOVIA BANK, N.A., and TRSTE, INC.,

Defendants.

**ORDER DENYING TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

THIS MATTER, designated a complex business case and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by Order of the Chief Justice of the Supreme Court of North Carolina, pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts, came to be heard upon the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (the "Plaintiffs' Motion") first on November 30, 2007, and again, pursuant to continuances entered upon agreement of the parties, on January 15, 2008; and

THE COURT, having considered the Plaintiffs' Motion, the submissions and arguments of counsel, appropriate matters of record, and the ends of justice, FINDS:

1. The Plaintiffs filed their Verified Complaint to Seek Foreclosure Proceedings on November, 14, 2007, seeking an injunction as the sole grounds for relief.
2. This civil action concerns the construction and financing of that Brunswick County condominium development known as the Preserve at Oak Island (the "Project").

The Project is under the jurisdiction and control of this court, pursuant to the July 26, 2007 Order Appointing Receiver entered by the undersigned in the Brunswick County Civil Action captioned Cape Fear Realty, LLC v. Cape Fear Trading Group, LLC et al. (07 CVS 1310) (the "Receivership").

3. Defendant Wachovia Bank, N.A. ("Wachovia") has financed the construction of the Project, via loans to non-party Intracoastal Living, LLC ("Intracoastal"). On May 19, 2005, Wachovia and Intracoastal entered into a Construction Loan Agreement in the amount of \$22,835,000.00, which was secured by a promissory note and a Deed of Trust and Assignment of Rents regarding the Project. On September 22, 2006, Wachovia and Intracoastal entered a Modification of Loan Agreement, whereby Wachovia increased its construction loan to \$29,716,916.00. The current debt to Wachovia relative to the Project is approximately \$20,000,000.00. No dispute has arisen as to the validity or enforceability of the debt owed to Wachovia, though some dispute exists as to the seniority of certain liens.

4. Plaintiff Superior Construction Corporation ("Superior") entered into several contracts with Intracoastal to provide materials and labor for the construction of the Project. On January 21, 2005, Intracoastal and Superior entered into a contract whereby Superior would construct Buildings 2 and 3 of the Project, and the Project Clubhouse. On October 14, 2005, Intracoastal and Superior entered into a contract whereby Superior would construct Building 4 of the Project. Superior also undertook construction of Building 5 of the Project though it never entered into a written agreement with Intracoastal as to that building.

5. Superior performed work on the Project. Buildings 2 and 3 have been completed. Building 4 and the Clubhouse are approximately 90% complete. Building 5 is approximately 50% complete.

6. Superior is owed in excess of \$8,000,000.00 by Intracoastal for work done on the Project, which is secured in part by liens on the Project.

7. Intracoastal defaulted on the Wachovia loans. Defendant TRSTE, Inc. the Trustee on Wachovia's Deed of Trust, intends to offer the Project for sale, under a Power of Sale, at public auction on January 16, 2008. The Power of Sale is pursuant to a September 24, 2007 Notice of Sale filed before the Clerk of Superior Court in the Brunswick County Special Proceeding captioned Intracoastal Living, LLC v. TRSTE, Inc. (07 SP 518), which was heard and authorized by the Clerk on October 17, 2007 (the "Foreclosure Sale"). It is by Wachovia's consent that the Foreclosure Sale was postponed from its originally calendared date of November 14, 2007.

8. The General Statutes of North Carolina provide that:

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale become fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefore is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient . . . Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership. . . .

N.C.G.S. § 45-21.34 (2007). Pursuantly, Plaintiffs' Motion seeks to have the Foreclosure Sale enjoined.

9. Pursuant to the Receivership, the Receiver has expended significant, albeit unsuccessful, efforts to secure a private buyer for the Project and ward off

foreclosure. Such efforts have included marketing the Project and dealing with numerous potential buyers. However, there is no foreseeable buyer for the Project.

BASED ON the foregoing FINDINGS, the court CONCLUDES that:

1. A preliminary injunction is an extraordinary measure, and will only be issued (a) if a plaintiff is able to show a likelihood of success on the merits of his case, and (b) that he is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983). The burden is on the Plaintiff to establish his right to a preliminary injunction. *Pruitt v. Williams*, 25 N.C. App. 376, 379 SE (1975)(citing to N.C.G.S. § 1A-1, Rule 65(b)).

2. Plaintiffs' Verified Complaint seeks no relief beyond an injunction. Accordingly, to the extent Plaintiffs' Motion should be decided under North Carolina Rule of Civil Procedure 65, the court is unable to determine a likelihood of the success on the merits.

3. Section 45-21.16(b) of the General Statutes of North Carolina provides a list of those parties to whom a mortgagee or trustee granted power of sale under a mortgage or deed of trust must provide notice of a foreclosure hearing before the Clerk of Court. Lien holders are explicitly exempted from such notice requirements. N.C.G.S. § 45-21.16(b)(3). Accordingly, to the extent Plaintiffs' Motion should be decided under Chapter 45, a serious standing issue exists. However, standing aside, Plaintiffs have not persuaded the court that they are entitled to an injunction under Chapter 45.

4. Chapter 45-21.34 of the General Statutes of North Carolina provides two grounds upon which a court may enjoin a foreclosure sale.

5. The first is that “the amount bid or price offered . . . is inadequate and inequitable” N.C.G.S. § 45-21.34. As no bid on the Project has yet been solicited or submitted, the Plaintiffs’ Motion cannot succeed on this first provision.

6. The second is “upon any other legal or equitable ground which the court may deem sufficient.” N.C.G.S. § 45-21.34. The Plaintiffs equity arguments are premised on the fear that, at the Foreclosure Sale, the Project will sell for an amount less than its actual value and insufficient to pay the contended obligations owed to Plaintiffs pursuant to their work on the Project. Though Plaintiffs’ fear may well prove founded, the court cannot further delay Defendants’ rights to foreclose on the Project upon such grounds. Wachovia has twice consented to stay the Foreclosure Sale while the Receiver, Superior, and other parties attempted to coordinate a sale to a private buyer. However, despite such cooperation and effort, no reliable buyer of the Project has come forth and there is no evidence that further delay will produce such a buyer.

7. On the facts of this matter, it is inequitable to stay perpetually the Foreclosure Sale at the expense of Wachovia’s interest in the Project.

8. The Plaintiffs therefore have not met their burden of establishing a right to a preliminary injunction, and such relief should be denied.

NOW, THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, the court hereby ORDERS that Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction should be, and hereby is, DENIED.

This the 15th day of January, 2008.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.,
Special Superior Court Judge for
Complex Business Cases