

No. COA 21-230

JUDICIAL DISTRICT 26

NORTH CAROLINA COURT OF APPEALS

Mary Leary, by and through her)
Power of Attorney William Leary,)
William Leary, And Robert)
McClinton,)

Plaintiffs-Appellants,)

vs.)

Rita Anderson, Gokam Properties)
LLC,)

Defendants- Appellees)

From Mecklenburg County

No. 19-CVS-19930

PLAINTIFFS-APPELLANTS' BRIEF

INDEX

	Page:
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF JURISDICTION.....	3
STATEMENT OF THE FACTS.....	3
A. Mary Leary’s Home.....	3
B. Mary Leary’s Incapacity to Execute a Power of Attorney Since at Least January 2017.....	4
C. Court Proceeding Declaring Mary Leary Incompetent to a Limited Extent.....	5
D. The Unlawful and Fraudulent Sale of Mary Leary’s Home.....	6
STANDARD OF REVIEW.....	8
ARGUMENT.....	10
I. SUMMARY JUSTMENT IS IMPROPER BECAUSE MARY LEARY’S HOME COULD ONLY BE SOLD BY HER COURT APPOINTED GUARDIAN.....	10
II. SUMMARY JUSTMENT IS IMPROPER BECAUSE THE SALE OF MARY LEARY'S HOME IS INVALID AND VOID AS A MATTER OF LAW BECAUSE A SPECIAL PROCEEDING WAS NOT HELD TO APPROVE THE SALE.....	11

Page:

III.	LOWER COURT ERRED IN FINDING THE JANUARY 2017 POWER OF ATTORNEY WAS SUFFICIENT TO SELL MARY LEARY’S HOME AS A MATTER OF LAW	13
A.	An Agent Established By a Power of Attorney is Required to Obtain Court Approval Prior to Selling the Home of an Individual Declared Incompetent by a Court.....	14
B.	There Was a Material Issue of Fact Regarding Whether a January 2017 Power of Attorney Existed.....	14
C.	Mary Leary did not have the capacity to execute a Power of Attorney on January 11, 2017.....	18
IV.	THE LOWER COURT ERRED IN CANCELLING THE LIS PENDENS THAT WAS FILED ON AUGUST 25, 2020.....	21
	CONCLUSION.....	21
	CERTIFICATE OF COMPLIANCE.....	22
	CERTIFICATE OF SERVICE.....	23

TABLE OF AUTHORITIES

Page(s):

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 249 (1986).....	9
<i>Buncombe County v. Cain</i> , 210 N.C. 766, 188 S.E. 399, 404 (1936).....	21
<i>Buncombe County v. Cain</i> , 210 N.C. 766, 775 188 S.E. 399, 404 (1936).....	10, 11, 13, 18
<i>Clay v. Monroe</i> , 189 N.C. App. 482, 486 (2008).....	12
<i>Davis v. Cumberland County Bd. of Educ.</i> , 217 N.C. App. 582, 585, 720 S.E.2d 418, 420 (2011)	8, 9
<i>DeWitt v. Eveready Battery Co.</i> , 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002).....	9, 10
<i>Jacobs v. N.C. Administrative Office of the Courts</i> , 780 F.3d 562, 568–69 (4th Cir. 2015).....	9
<i>LeRoy v. Jacobosky</i> , 136 N.C. 443, 456 (1904).....	12
<i>O’Neal by and through Small v. O’Neal</i> , 254 N.C.App. 309, 314 (2017).....	18
<i>O’Neal by and through Small v. O’Neal</i> , 254 N.C.App. 309, 314-15 (2017).....	16, 20
<i>Page v. Sloan</i> , 281 N.C. 697, 704, 190 S.E.2d 189, 193 (1972).....	9

Page(s):

CASES (cont.)

<i>Pike v. Wachovia Bank & Trust Co.,</i> 274 N.C. 1, 11 (1968).....	12
<i>Roumillat v. Simplistic Enterprises, Inc.,</i> 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).....	9
<i>Tolan v. Cotton,</i> 572 U.S. 650, 656 (2014).....	9
<i>Wallen v. Riverside Sports Center,</i> 173 N.C. App. 408, 410, 618 S.E.2d 858, 860 (2005).....	8, 9

STATUTES

N.C. Gen. Stat. § 1A-1, Rule 56(c).....	8
N.C. Gen. Stat. § 32C-1-108(b).....	14
N.C. Gen. Stat. § 35-A-1301(b).....	11, 12, 13, 18
N.C. Gen. Stat. § 35-A-1301(d).....	12

TREATISES

10A Charles Alan Wright & Arthur R. Miller, et al., <i>Federal Practice & Procedure</i> § 2728 (3d ed. 1998).....	9
--	---

NORTH CAROLINA COURT OF APPEALS

Mary Leary, by and through her)
Power of Attorney William Leary,)
William Leary, And Robert)
McClinton,)

Plaintiffs-Appellants,)

vs.)

Rita Anderson, Gokam Properties)
LLC,)

Defendants- Appellees)

From Mecklenburg County
No. 19-CVS-19930

PLAINTIFFS-APPELLANTS' BRIEF

STATEMENT OF THE ISSUES

1. Whether the trial court erroneously granted Defendant Gokam Properties, LLC's Motion for Summary Judgment.
2. Whether the trial court erroneously cancelled the Lis Pendens in this lawsuit that was filed on August 25, 2020.

STATEMENT OF THE CASE

On October 10, 2019, Plaintiffs-Appellants Mary Leary, *by and through her Power of Attorney William Leary*, William Leary, And Robert McClinton, filed their Complaint in the Superior Court of Mecklenburg County, raising various claims regarding the unlawful and fraudulent sale of Mary Leary's home, who is now a 93-year-old senior. (R pp. 4-35). On December 4, 2019, Defendant Rita Anderson ("Defendant Anderson") filed her answer. (R. pp. 56-65). On March 5, 2020, Defendant Gokam Properties, LLC ("Gokam Properties") filed an answer. (R pp. 66-79).

On August 5, 2020, Gokam Properties moved for summary judgment on all claims against it. (R pp. 80-81). On August 17, 2020, the parties appeared before the Honorable Carla Archie for a summary judgment hearing. (R p. 84; T pp. 1-66). At the hearing, Gokam Properties contended that it was entitled to summary judgment because it purchased Mary Leary's home based on a purported Power of Attorney dated January 11, 2017 given to Defendant Anderson to sell the home on Mary Leary's behalf as her agent. On October 7, 2020, Judge Archie granted summary judgment, dismissing all claims against Gokam Properties. (R p. 84). On October 12, 2020, Plaintiffs were served with the Order granting summary judgment to Gokam Properties. (R p. 86) On November 9, 2020, Plaintiffs timely filed their Notice of Appeal. (R pp. 86-88).

On April 1, 2021, the parties settled the Record on Appeal. (R p. 96). On April 15, 2021, Plaintiffs filed the Record on appeal with this Court. (R p. 1).

Plaintiffs now submit their Appellant Brief to this Court.

STATEMENT OF JURISDICTION

Judge Archie's Order granting summary judgment in favor of Gokam Properties constitutes a final judgment of a superior court. Therefore, this Court has appellate jurisdiction over this matter pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

A. Mary Leary's Home

The undisputed facts are as follows: On June 10, 1963, Mary Leary and Will Leary, a lawfully married husband and wife, purchased property located at 1418 Russell Avenue, Charlotte, North Carolina 28216 (the "home"). (R pp. 6, 20). Will Leary died in 2001. (R p. 6). Upon Will Leary's death, Mary Leary had a right to survivorship to the subject property. (R p. 6). Up until January 2017, Mary Leary continued to occupy the home as the sole owner after her husband's passing, until her oldest child, Defendant Rita Anderson, forced her to stay in her home (after a few months of staying in her home on and off). (R p. 6). According to Defendants, on January 11, 2017, Mary Leary purportedly executed a Durable Power of Attorney making Defendant Anderson her agent who could act on her behalf. (R pp. 75-78). The purported January 11, 2017 Power of Attorney was not filed with the

Mecklenburg County Register of Deeds until October 21, 2019, (R pp. 75-78), which was roughly one (1) month after Mary Leary's home was fraudulently sold to Defendant Gokam Properties on September 20, 2019 and only 11 days after this lawsuit was filed. (R pp. 4-35).

B. Mary Leary's Incapacity to Execute a Power of Attorney Since at Least January 2017

On January 12, 2017 Mary Leary had a doctor's visit with Michelle L. Foster, M.D. at CMC Myers Park Internal Medicine. (DE pp. 1-5). The medical records confirm that Rita Anderson was working to secure a power of attorney but had not done so as of that date. (DE pp. 1-5). The medical records specifically state, "her [Mary Leary's] daughter [Rita Anderson] is seeking power of attorney and guardianship asthma some areas no longer able to make informed decisions," (DE p. 1), and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." (DE p. 3). Dr. Foster specifically wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary." (DE p. 4). The medical records demonstrate that Mary Leary had not yet issued a Power of Attorney to Defendant Anderson as of January 12, 2017 and that Dr. Foster was requesting that Defendant Anderson obtain a guardianship or Power of Attorney. (DE pp. 1-5). The January 12, 2017 medical records further demonstrate that even if the purported Power of Attorney was executed on January 11, 2017, Mary Leary did not have the mental

capacity to execute that Power of Attorney. (DE pp. 1-5). Specifically, Dr. Foster stated the following: (1) . . . “past medical history significant for coronary artery disease, hypertension, hyperlipidemia, increase in memory loss and some mild dementia as well as worsening weakness and weight loss;” (2) “she has also had worsening vision and increasing memory loss and worsening dementia;” (3) “she still has limited judgment and insight secondary to her mild dementia;” (4) “Dementia: Appears to be worsening;” and (5) Mary Leary is under my care for multiple medical problems including dementia, anemia, hypertension and increasing cognitive difficulty secondary to dementia.” (DE pp. 1-5).

C. Court Proceeding Declaring Mary Leary Incompetent to a Limited Extent

On June 8, 2018, a hearing was held in *In the Matter of Mary Alice Wilson Leary*, 18-SP-1559, before Christopher M. Hicks to determine Mary Leary’s competency and her ability to function on her own. (DE pp. 14-18). On June 8, 2018 Mary Leary was declared incompetent to make legal decisions or execute legal documents. (DE pp. 14-18). At that hearing, the June 8, 2018 Guardian Ad Litem Report issued by Attorney Guardian ad Litem, Fatina Lorick, was considered. (DE pp. 10-12). Importantly, in the June 8, 2018 report, Attorney Lorick notes:

“I spoke with Respondent about her home, and the fact that her sons lived in the home. Respondent expressed a desire to allow them to remain in her home. She also emphasized th[at] she took pride in her home, and that she and her late husband worked hard to obtain and maintain her home.”

(DE pp. 10-12). Based on her investigation, Attorney Lorick recommended a limited guardian of the person be appointed for Mary Leary. (DE pp. 10-12). Accordingly, on June 8, 2018, the Court issued an order declaring Mary Leary incompetent to a limited extent. (DE pp. 14-18). The court specifically ordered that, as of that date, Mary Leary could not “communicate wishes regarding legal documents or services on her own.” (DE pp. 14-18). It was further ordered that “if M. Anderson [was] unable to be bonded and qualify within 90 days of this order, atty to be appointed G.O.E.” (DE pp. 14-18).

D. The Unlawful and Fraudulent Sale of Mary Leary’s Home

Despite the court’s clear orders in the June 8, 2018 Order that Defendant Anderson was well aware of, on September 6, 2019, based on a request from the closing attorney, Defendant Anderson fraudulently and unlawfully signed Mary Leary’s name on a Limited Power of Attorney to Sell Real Estate so Defendant Anderson could unlawfully sell her home. (R pp. 28-29, 53). Based on the unlawful, void and ineffective Limited Power of Attorney to Sell Real Estate, on September 20, 2019, Mary Leary’s home was fraudulently and unlawfully sold and deeded to Gokam Properties, LLC against her will. (R pp. 31-32). Although Defendant Anderson knew Plaintiffs William Leary and Robert McClinton were residing in their mothers’ home based on their mothers’ own wishes, she sold the property without telling Plaintiffs. (R p. 7). Not only did she not tell Plaintiffs the home was

being sold, but she specifically told an agent of Defendant Gokam Properties to not notify Plaintiffs of the sale until after the sale was complete. (R p. 7). And, after the home was sold, Defendant Anderson did not place the proceeds in an account for Mary Leary's benefit. (R p. 7). Instead, she contacted her brother to split the proceeds between them, offering him \$20,000.00 and she keep the remaining \$75,000.00. (R p. 7).

To obtain Mary Leary's home back that was unlawfully and fraudulently sold, Plaintiffs filed this instant lawsuit on October 10, 2019. (R pp. 3-35). Defendants subsequently answered. (R pp. 59-79). On December 9, 2019, a hearing was held to modify Mary Leary's Guardianship. (DE pp. 27-30). In the December 9, 2019 Guardian Ad Litem Report issued again by Attorney Lorick, it is reported that Mary Leary did not want to sell her home and wanted to know if Attorney Lorick could help her get her home back. (DE pp. 25-26). It is specifically noted by Attorney Lorick that:

"I was able to speak with Ward who is now at Mecklenburg County Rehabilitation Center ("Center"). Ward informed me that she was there at the Center because she has no other place to go due to her home being sold by Guardian. She also asked me if there were any way for me to try to get her house back. She let me know that she recently moved into the Center and that none of her family was aware that she was at the center." (DE pp. 25-26).

Accordingly, in an order dated December 9, 2019 in *In the Matter of Mary Alice Wilson Leary*, 18-sp-1559, the court specifically found that “Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of Ward’s property. Court shall appoint Guardian of Estate (GOE).” (DE pp. 27-30). Based on the orders in *In the Matter of Mary Alice Wilson Leary*, 18-sp-1559, Defendant Anderson did not have the authority to sale Mary Leary’s home. (DE pp. 27-30).

STANDARD OF REIVEW

This Court reviews a trial court’s summary judgment order de novo. *Wallen v. Riverside Sports Center*, 173 N.C. App. 408, 410, 618 S.E.2d 858, 860 (2005). Summary judgment is proper only when the “pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that no genuine issue of material fact exists between the parties with respect to the controversy being litigated and the moving party is entitled to judgment as a matter of law.” *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). The movant bears the burden of establishing that “there is no triable issue of material fact [by] proving that an essential element of the opposing party’s claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Davis v. Cumberland County Bd. of Educ.*, 217 N.C. App. 582, 585, 720 S.E.2d 418, 420

(2011) (quoting *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). If the movant can meet this burden, “then the nonmovant must produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.” *Davis*, 217 N.C. App. at 585, 720 S.E.2d at 420 (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)).

The Supreme Court of North Carolina has also acknowledged that Rule 56 “and its federal counterpart are practically the same.” *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E.2d 189, 193 (1972). Accordingly, the United States Supreme Court recently reinforced that a court’s function at summary judgment “is not ‘to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’” *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). And a court “may not resolve genuine disputes of fact in favor of the party seeking summary judgment.” *Tolan*, 572 U.S. at 656. See *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 568–69 (4th Cir. 2015) (explaining that summary judgment “cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits”) (citing 10A Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice & Procedure* § 2728 (3d ed. 1998)); see also *Wallen*, 173 N.C. App. at 410–11, 618 S.E.2d at 861 (“[A court] must view the evidence in

the light most favorable to the nonmovant.” (citing *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146)).

ARGUMENT

I. SUMMARY JUSTMENT IS IMPROPER BECAUSE MARY LEARY’S HOME COULD ONLY BE SOLD BY HER COURT APPOINTED GUARDIAN

The sale of Mary Leary’s property is void because Defendant Anderson was not authorized to sell the home because Defendant Anderson did not qualify to become Mary Leary’s Guardian. (DE pp. 27-30). The Supreme Court of North Carolina has held that the sale of an incompetent’s property by “one who is not his duly appointed and duly qualified guardian is void.” *Buncombe County v. Cain*, 210 N.C. 766, 775 188 S.E. 399, 404 (1936). Importantly, the court further held that the purchaser of the incompetent person’s property “has sustained no damages by reason of the sale and conveyance, and therefore cannot recover on the official bond of the clerk of the superior court.” *Id.*

Here, it is undisputed that on June 8, 2018 Mary Leary was declared incompetent to make legal decisions or execute legal documents. (DE pp. 14-18). The court specifically held Mary Leary was declared “incompetent to a limited extent” and that it was ordered that she could not “communicate wishes regarding legal documents or services on her own.” (DE pp. 14-18). It is also undisputed that Rita Anderson was not her “duly appointed and duly qualified guardian. (DE pp. 27-

30). In the June 8, 2018 Order in *In the Matter of Mary Alice Wilson Leary*, 18-sp-1559, it was specifically ordered that “if M. Anderson [was] unable to be bonded and qualify within 90 days of this order, atty to be appointed G.O.E.” (DE pp. 14-18). In an Order dated December 9, 2019 in the same matter, the court specifically found that “Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of Ward’s property. Court shall appoint Guardian of Estate (GOE).” (DE pp. 27-30). Based on the orders in *In the Matter of Mary Alice Wilson Leary*, 18-sp-1559, it is clear that Defendant Anderson was not Mary Leary’s duly appointed or duly qualified Guardian. (DE pp. 27-30). Accordingly, Defendant Anderson did not have the authority to sale Mary Leary’s home and, as such, the sale is void. *Buncombe County*, 210 N.C. at 775. Therefore, the sale of Mary Leary’s home is void and all claims against Gokam Properties should not have been dismissed. But, rather, summary judgment should have been awarded to Plaintiffs, which would have included a declaration that (1) the sale of Mary Leary’s home was void; and (2) Mary Leary is the lawful owner of her home. (R pp. 4-35).

II. SUMMARY JUDGMENT IS IMPROPER BECAUSE THE SALE OF MARY LEARY’S HOME IS INVALID AND VOID AS A MATTER OF LAW BECAUSE A SPECIAL PROCEEDING WAS NOT HELD TO APPROVE THE SALE

Article 14 of the North Carolina General Statutes governs the sale, mortgage, exchange, or lease of a ward’s estate in North Carolina. Pursuant to N.C.G.S § 35-A-1301(b):

“A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward’s real estate, and such proceeding shall be conducted as in other cases of special proceedings.” N.C.G.S § 35-A-1301(b).

N.C.G.S § 35-A-1301(b) further provides that:

“The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof” of one or more factors. *See* N.C.G.S § 35-A-1301(b). N.C.G.S § 35-A-1301(d) requires that all petitions for the sale of a ward’s home “shall be filed in the county in which all or any part of the real estate is situated.” N.C.G.S § 35-A-1301(d). “When an order for sale has been issued by the clerk and approved by the court, a presumption arises that the statutory requirements have been met.” *Clay v. Monroe*, 189 N.C. App. 482, 486 (2008).

North Carolina appellate courts have consistently held that a “ward’s estate is very carefully regulated, and the sale [of real property] is not allowed except by order of court . . .” *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11 (1968). The Supreme Court of North Carolina has long held that “a contract by a guardian to sell the ward’s real estate, in advance of any legal authority, is contrary to public policy, and void.” *LeRoy v. Jacobosky*, 136 N.C. 443, 456 (1904) [citations omitted].

Here, the sale of Mary Leary’s home is void and contrary to public policy because a petition was not filed, a special proceeding was not held, and there is no Order authorizing the sale of Mary Leary’s home. (DE pp. 6-8, 31-32, 42-43). As

such, the lower court erred when it did not find that Mary Leary is entitled to an order declaring the sale of her home void and unlawful and that Mary Leary is the lawful owner of the property located at 1418 Russell Avenue, Charlotte, NC 28216 as a matter of law.

III. THE LOWER COURT ERRED IN FINDING THE JANUARY 2017 POWER OF ATTORNEY WAS SUFFICIENT TO SELL MARY LEARY'S HOME AS A MATTER OF LAW

At the hearing on summary judgment, the lower court questioned whether a preexisting power of attorney survives an incompetency proceeding and allowed the parties to submit supplemental briefing on that narrow issue. (T pp. 49-52). However, that question is irrelevant because as soon as Mary Leary was declared incompetent by the court, the sale must be conducted by her court appointed Guardian and approved by the court prior to the sale. *Buncombe County*, 210 N.C. at 775; *see also* N.C.G.S § 35-A-1301(b). However, even if the question is relevant: (1) an agent established by a Power of Attorney is still required to obtain court approval prior to selling the home of an individual declared incompetent by a court; (2) there is a clear material issue of fact regarding whether a Power of Attorney prior to Mary Leary's declaration of incompetence even existed; and (3) even if the January 11, 2017 Power of Attorney existed, the undisputed evidence demonstrates that Mary Leary did not have the capacity to execute a Power of Attorney on January 11, 2017.

a. An Agent Established By a Power of Attorney is Required to Obtain Court Approval Prior to Selling the Home of an Individual Declared Incompetent by a Court

Pursuant to N.C.G.S. § 32C-1-108(b), “[i]f, after a principal executes a power of attorney, the clerk of superior court appoints a guardian . . . the agent is accountable to the guardian or the fiduciary as well as the principal. N.C.G.S. § 32C-1-108(b). On June 8, 2018, the court in *In the Matter of Mary Alice Wilson Leary*, 18-SP-1559 declared Mary Leary incompetent, ordered that a General Guardian be appointed, and gave Defendant Anderson the opportunity to be Mary Leary’s guardian if she qualified within 90 days. (DE pp. 14-18). On December 9, 2019, the court made it clear that “Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of Ward’s property.” (DE pp. 27-30). Because Defendant Anderson did not qualify as Mary Leary’s guardian, any alleged pre-existing agent acting pursuant to a Power of Attorney should not have sold Mary Leary’s home until a guardian was appointed by the court because Mary Leary had been declared incompetent and Powers of Attorney are accountable to court appointed guardians as well as the principal. N.C.G.S. § 32C-1-108(b).

b. There Is a Material Issue of Fact Regarding Whether a January 2017 Power of Attorney Existed

The lower court erred in granting Gokam Properties summary judgment because a material issue of fact exists regarding whether the purported January 2017

Power of Attorney truly existed or was fraudulently created. (R pp. 56-58). It is undisputed that the medical records from Mary Leary's January 12, 2017 visit with Michelle L. Foster, M.D. at CMC Myers Park Internal Medicine note that Rita Anderson was working to secure a power of attorney but had not done so as of that date. (DE pp. 1-5). The medical records specifically state, "her [Mary Leary's] daughter [Rita Anderson] is seeking power of attorney and guardianship asthma some areas no longer able to make informed decisions," (DE p. 1), and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." (DE p. 3). Dr. Foster specifically wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary." (DE p. 4). The medical records demonstrate that Mary Leary had not yet issued a Power of Attorney to Defendant Anderson as of January 12, 2017 and that Dr. Foster was requesting that Defendant Anderson obtain a guardianship or Power of Attorney. (DE pp. 1-5). Additionally, the undisputed evidence further demonstrates that the purported January 12, 2017 Power of Attorney was not filed with the Register of Deeds until October 21, 2019, (R pp. 56-58), which was not until after Mary Leary's home was sold on September 20, 2019, (R pp. 31-32), and 11 days after this lawsuit was filed on October 10, 2019. (R pp. 3-35). Further, Defendant Anderson herself stated under oath that she executed the Limited Power of Attorney to Sell Real Estate on September 6, 2019, well over a

year after Mary Leary had been declared incompetent by the court. (R p. 53, DE pp. 40-41). This demonstrates that Defendant Anderson, yet again, engaged in fraudulent behavior because she knew Mary Leary had been declared incompetent on June 8, 2018 and was incapable of executing a Power of Attorney more than a year later on September 6, 2019. *See O'Neal by and through Small v. O'Neal*, 254 N.C.App. 309, 314-15 (2017) (holding "a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that the person's mental capacity was restored prior to executing the instrument").

Based on the overwhelming undisputed facts that demonstrate the purported January 11, 2017 Power of Attorney did not exist and was fraudulent, the lower court should not have granted Gokam Properties summary judgment. Importantly, because the purported January 11, 2017 Power of Attorney was fraudulent and non-existent, Defendant Anderson did not have the authority to sell Mary Leary's home because Mary Leary had been subsequently declared incompetent and Defendant Anderson did not qualify to become Mary Leary's guardian. (DE pp. 27-30). Based on these facts, a reasonable jury could find that Mary Leary's doctor would not have had to suggest and advise that Defendant Anderson become Mary Leary's Power of Attorney on January 12, 2017 if Mary Leary had executed a Power of Attorney naming Defendant Anderson her agent only a day before they very same doctor's appointment. (DE pp. 1-5). Stated otherwise, a reasonable jury could find that

suggesting and advising Defendant Anderson to become Mary Leary's Power of Attorney would be unnecessary because had the purported January 11, 2017 Power of Attorney been executed the day before the doctor's appointment, that would have been communicated to Dr. Foster. A reasonable jury could also find that Defendant Anderson's failure to record the purported January 11, 2017 Power of Attorney until weeks after the home was sold and 11 days after this lawsuit was filed further demonstrates that the January 11, 2017 Power of Attorney was fraudulent and did not exist. A reasonable jury could also find that if the January 11, 2017 Power of Attorney existed, the subsequent Limited Power of Attorney to Sell Real Estate would not have been necessary. Based on the foregoing material facts, the lower court, at minimum, should have denied summary judgment on the basis that a genuine issue of material fact existed regarding the existence of the purported January 11, 2017 Power of Attorney. A reasonable jury could also find that Defendant Anderson executing the September 6, 2019 Limited Power of Attorney to Sell Real Estate is indicative of her fraudulent behavior, which further supports that the January 11, 2017 Power of Attorney that magically appeared after this lawsuit was filed was fraudulent. It is the role of the jury to decide the material issues of fact present in this case and a reasonable jury could conclude that the alleged January 11, 2017 Power of Attorney was fraudulent, which made the sale of Mary

Leary's home after she was declared incompetent void and against public policy. *Buncombe County*, 210 N.C. at 775; *see also* N.C.G.S § 35-A-1301(b).

c. Mary Leary did not have the Capacity to Execute a Power of Attorney on January 11, 2017

It is well-settled that a person who does not have full mental capacity cannot enter into a contract, including a Power of Attorney, even if that person had not yet been declared incompetent by a court. *See O'Neal by and through Small v. O'Neal*, 254 N.C.App. 309, 314 (2017) ("when a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable"). Dr. Foster's notes from the January 12, 2017 medical records clearly demonstrate that even if the purported Power of Attorney was executed on January 11, 2017, Mary Leary did not have the mental capacity to execute that Power of Attorney. (DE pp. 1-5). Specifically, Dr. Foster stated the following: (1) . . . "past medical history significant for coronary artery disease, hypertension, hyperlipidemia, increase in memory loss and some mild dementia as well as worsening weakness and weight loss;" (2) "she has also had worsening vision and increasing memory loss and worsening dementia;" (3) "she still has limited judgment and insight secondary to her mild dementia;" (4) "Dementia: Appears to be worsening;" (5) Mary Leary is under my care for multiple medical problems including dementia, anemia, hypertension and increasing cognitive difficulty secondary to dementia." (DE pp. 1-5). The mental incompetence noted in the

January 12, 2017 medical records also make the purported January 11, 2017 Power of Attorney voidable.

If this court does not find that the undisputed medical records demonstrate that the purported January 2017 Power of Attorney did not exist as a matter of law, the lower court should have held that- based on the undisputed medical records- the evidence demonstrates that Mary Leary lacked the mental capacity to execute a Power of Attorney on January 11, 2017. At minimum, the lower court should have found there was is material issue of fact regarding the validity of the 2017 Power of Attorney due Mary Leary's lack of capacity to execute a Power of Attorney on January 11, 2017, a day before her doctor noted mild dementia and increased memory loss. (DE pp. 1-5).

Additionally, the lower court overlooked the undisputed fact that the sale of the home occurred because of the 2019 Limited Power of Attorney to Sell Real Estate that was executed by Defendant Anderson, not Mary Leary, on September 6, 2019, (DE pp. 40-41), which was more than a year after Mary Leary had been declared incompetent by the court. (DE pp. 14-18). Defendant Anderson herself stated under oath, "The Closing Attorney requested that I execute a Limited Power of Attorney to Sell Real Estate (the "Limited Power of Attorney"). I executed the Limited Power of Attorney and it was recorded prior to the sale." (R p. 53). At the direction of Defendants' closing attorney, Defendant Anderson, yet again,

fraudulently had her mother, Mary Leary, sign a Power of Attorney knowing she did not have the capacity to do so. (DE pp. 40-41). The 2019 Limited Power of Attorney that commissioned the sale of Mary Leary's home is indisputably void and unenforceable. North Carolina courts have consistently held that an individual declared incompetent to handle legal matters, including the execution of legal documents, cannot subsequently execute a legal document such as a Power of Attorney, which is treated as a contract. *See O'Neal by and through Small v. O'Neal*, 254 N.C.App. 309, 314-15 (2017) (holding "a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that the person's mental capacity was restored prior to executing the instrument"). Defendant Anderson was present for the hearing on June 8, 2018 and was fully aware that Mary Leary was declared "incompetent to a limited extent" and that it was ordered that she could not "communicate wishes regarding legal documents or services on her own." (DE pp. 14-18). Despite this fact, Defendant Anderson utilized fraud and undue influence to have Mary Leary sign the unenforceable Power of Attorney to Sell Real Estate to unlawfully sell Mary Leary's home against her wishes, (DE p. 26), and in violation of well-settled statutory and case law. *Id.* Because Defendant Anderson knew Mary Leary had been previously been declared incompetent, and even if she did not know, the 2019 Limited Power of Attorney to Sell Real Estate is void and unenforceable, also making the sale of

the home void as a matter of law. *See Buncombe County v. Cain*, 210 N.C. 766, 188 S.E. 399, 404 (1936).

IV. THE LOWER COURT ERRED IN CANCELLING THE LIS PENDENS THAT WAS FILED ON AUGUST 25, 2020

For the reasons argued above, Defendant Gokam Properties was not entitled to summary judgment. As such, the Notice of Lis Pendens, (R pp. 82-83), should not have been cancelled by the lower court.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's order granting Gokam Properties, LLC summary judgment on all claims and remand for further proceedings.

Respectfully submitted, this 17th day of May 2021,

JUSTICE IN ACTION LAW CENTER



Alesha S. Brown, NC Bar # 53000
521 Briar Creek Road
Charlotte, NC, 28205
P: (704) 500-0197
F: (704) 500-0197
abrown@justiceinactionlaw.com
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure that Plaintiffs-Appellants' Brief is prepared in proportional 14-point Times New Roman and consists of 5,777 words.

This 17th day of May 2021,

/s/ Alesha S. Brown

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing Brief with the clerk of Court by using the North Carolina Court of Appeals' Electronic Filing Site, and served a copy of the foregoing Brief on Defendant-Appellee via electronic mail as follows:

Robert McNeill (NC Bar # 13038)
E-mail: Robert.McNeill@offitkurman.com

Alexandra Edge (NC Bar # 54320)
E-mail: alexandra.edge@offitkurman.com

OFFIT KURMAN ATTORNEYS AT LAW
301 South College Street, Suite 2600
Charlotte, NC 28202

This 17th day of May 2021,

/s/ Alesha S. Brown