

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 07-129

Requirement of Indemnity Bond by Sheriff for Execution of Writ of Possession

QUESTION

Whether a sheriff may require an indemnity bond for the execution of a writ of possession when the plaintiff asserts that title to the property is not disputed but does not provide proof of this assertion?

OPINION

No. A sheriff may not require an indemnity bond from a plaintiff for the execution of a writ of possession absent a reasonable basis for believing title to the property is disputed.

ANALYSIS

You have asked whether a sheriff may require an indemnity bond for the execution of a writ of possession when the plaintiff asserts that title to the property is not disputed but does not provide proof of this assertion. Since your question does not distinguish between real and personal property, we assume that your question encompasses both.

Actions to recover personal property are governed by Tenn. Code Ann. §§ 29-30-101, *et seq.*, and 29-30-201, *et seq.* Judgment for a plaintiff in such an action is enforced through the issuance and execution of a writ of possession. Tenn. Code Ann. § 26-1-101. As for real property, Tennessee statutes provide several alternatives for bringing an action to recover real property: ejectment, forcible entry and detainer, forcible detainer, and unlawful detainer. *See* Tenn. Code Ann. §§ 29-15-101 and 29-18-106. Like judgments in actions to recover personal property, a judgment for a plaintiff to recover real property is enforced through the issuance and execution of a writ of possession. Tenn. Code Ann. §§ 26-1-101, 29-15-114 and 29-18-124.

Included in a sheriff's duties is the duty to execute writs of possession. Tenn. Code Ann. § 8-8-201(a) provides in part:

(a) It is the sheriff's duty to:

(1) Execute and return, according to law, the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to the sheriff for that purpose;

* * * *

(5)(A) Execute all writs and other process legally issued and directed to the sheriff, within the county, and make due return thereof, either personally or by a lawful deputy or, in civil lawsuits only, by a lawfully appointed civil process server except in counties specified in subdivision (a)(5)(B).

In examining the sheriff's duty to execute writs of possession, Tennessee courts have found this duty to be ministerial.

When an execution, issued by a court having jurisdiction of the subject, is regular and valid upon its face, the simple duty of the officer is that he execute the writ, as by it he is commanded. He is not bound to enquire after the judgment, or whether the same has been satisfied; nor is he permitted to do so, for his office in this respect, is merely ministerial.

Mason v. Vance, 33 Tenn. 178, 180 (1853) (citation omitted); *Harris v. Dobson-Tankard Co.*, 298 S.W.2d 28, 32 (Tenn. Ct. App. 1956). In fact, even when the writ is irregular or voidable, the sheriff has a duty to execute it. *Barnes v. Hayes*, 31 Tenn. 304, 306 (1951); *Stevenson v. McLean*, 24 Tenn. 332, 334-35 (1844). Only when an execution, on its face, shows that it was unlawfully and improperly issued may the sheriff not execute the writ. See *Clark v. Bond*, 66 Tenn. 288, 291-92 (1874); *Stevenson*, 24 Tenn. at 334-35; *Martin v. England*, 13 Tenn. 313, 317 (1833).

When a sheriff executes a writ of possession, valid on its face, the sheriff is completely protected from liability. *Mason*, 33 Tenn. at 180; *Barnes*, 31 Tenn. at 306-07; *Kelton v. Vandervort*, 707 S.W.2d 517, 520 (Tenn. Ct. App. 1985); see *Restatement (Second) of Torts* § 266 (1965) (sheriff or law enforcement officer is privileged to commit acts that would otherwise be a trespass to chattel or conversion when he or she acts pursuant to court order valid on its face). However, the defense that a sheriff acted pursuant to a writ regular upon its face, and issued by a court of competent jurisdiction, is not available where the sheriff levies upon the goods of a stranger to the writ. A writ directing a sheriff to seize property of the defendant gives no right to take the property of a third person, and affords no protection if, acting under that writ, he or she seizes goods belonging to and in the possession of a third person. See *North v. Peters*, 138 U.S. 271, 284-85, 11 S.Ct. 346, 349-50, 34 L.Ed. 936 (1891); *Jobe v. Sellars*, 28 Tenn. 178, 180-82 (1878).

Recognizing that the sheriff has a ministerial duty to execute writs, but that the imposition of that duty could subject the officer to liability if the property belonged to a person other than the defendant in the execution, the General Assembly long ago enacted protection for sheriffs and other officers. 1825 Tenn. Pub. Acts ch. 40; *State v. Sharp*, 34 Tenn. 615, 617 (1855); *Jobe*, 28 Tenn. at 181. This Act entitled the sheriff to ask for indemnity before levy or sale in all cases where the title

to property was disputed. *Id.* This Act is presently codified in Tenn. Code Ann. § 26-3-104, which provides:

No sheriff or other officer shall be required to levy an execution on any property, the title of which is disputed, or to sell the same after levy, unless the plaintiff will first give bond and security to such officer, to indemnify the sheriff or other officer against all damages and costs in consequence of the levy or sale.

Under this statute, a sheriff is authorized to require an indemnity bond before levying an execution on disputed property.¹ However, it is not necessary for the sheriff to notify the plaintiff that the title is disputed, or demand indemnity, to become entitled to the protection of the statute. *Sharp*, 34 Tenn. at 617-18. In short, for the sheriff to be protected, the essential requirement is that title of the property is disputed. *See, e.g., Sharp*, 34 Tenn. 615, 617-18 (1855); *Jobe*, 28 Tenn. at 181-82; *Saunders v. Harris*, 23 Tenn. 72, 73 (1843).

Tennessee courts have not examined the right to demand indemnity in the absence of a claim to the property by a third person. However, other states with similar statutes have. For instance, other courts have found that an officer, in demanding an indemnity bond, must act in good faith; and in the absence of any claim to the property by a third party, the right to demand an indemnity bond is generally to be denied. *Mayfield Woolen Mills v. Lewis*, 117 S.W. 558, 560-61 (Ark. 1909). An officer has no right to act arbitrarily or capriciously in demanding indemnity. *Endicott-Johnson Corp. v. Davis*, 56 S.W.2d 178, 179 (Ark. 1933). To support such a demand, there must be a real and substantial reason to doubt the defendant's title to the property or to apprehend that the officer may incur liability by proceeding. *Id.*

Similarly, in some jurisdictions, reasonable doubt is required, and the officer must be able to state the reason for doubt as to ownership of the property. *Ter Maat v. Barnett*, 457 N.W.2d 551, 553-54 (Wis. Ct. App. 1990); *Planters' Chemical & Oil Co. v. Daniel*, 96 So. 424, 426-27 (Ala. 1923). The unspecified possibility of litigation does not constitute reasonable doubt. *Ter Maat*, 457 N.W.2d at 554.

Moreover, courts have found that if property levied on by an officer under execution is in the possession of the defendant, it is presumptively the defendant's, and the officer, in the absence of notice of anything to rebut such a presumption, has no right to demand indemnity or refuse to make the levy, and no right to release the property after making the levy, upon the refusal of the plaintiff to indemnify the officer. *Pilcher v. Hickman*, 31 So. 469 (Ala. 1902).

We believe a Tennessee court would interpret Tenn. Code Ann. § 26-3-104 in a similar manner. This statute clearly states that a sheriff may require an indemnity bond when title to property is disputed. If a sheriff were able to demand an indemnity bond absent a reasonable basis

¹ It is important to note that this statute is confined to executions. There is no law that authorizes sheriffs or other officers to require indemnity bonds before levying attachments on disputed property. *Grigsby v. Manly*, 79 Tenn. 636, 639-40 (1883); *Shaw v. Holmes*, 51 Tenn. 692, 693-94 (1871).

for believing title to the property is disputed, Tenn. Code Ann. § 26-3-104's provision that an indemnity bond may be requested when title is disputed would be rendered meaningless. Such an interpretation would be contrary to statutory construction rules. *See Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975) (court is to give effect to each word, phrase, and clause of a statute to carry out legislative intent; it is the duty of a court to construe a statute so that no part will be inoperative, superfluous, or insignificant). Accordingly, we are of the opinion that Tenn. Code Ann. § 26-3-104 does not permit a sheriff to require an indemnity bond when a plaintiff asserts that title to the property is not disputed and the sheriff does not have an independent reasonable basis for believing that title to the property is disputed.²

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

LAURA T. KIDWELL
Assistant Attorney General

Requested by:

Honorable Eric Watson
State Representative
205 War Memorial Building
Nashville, TN 37243-0122

² While an indemnity bond may not be statutorily required, we note that courts under certain circumstances have found an implied contract of indemnity to arise when a sheriff makes a levy in accordance with a plaintiff's instructions. *See, e.g., Weir v. Hum Tong*, 46 P.2d 45, 46 (Mont. 1935); *Arnold v. Fowler*, 51 A. 299, 300-01 (Md. Ct. App. 1902); *Ranlett v. Blodgett*, 17 N.H. 298 (1845).