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Effect of 2006 Tenn. Pub. Acts Ch. 951 on Foreclosures

QUESTIONS

1. a. 2006 Tenn. Pub. Acts Ch. 951 authorizes the beneficiary under a deed of trust or mortgage to appoint a successor trustee, provided conditions within the act are met. The act became effective July 1, 2006. Does the act apply to the appointment of a successor trustee under a mortgage that became effective before July 1, 2006?

b. If the answer to Question 1.a is yes, does the act interfere with contract rights in violation of the Contract Clause of the United States Constitution or the Tennessee Constitution?

c. If the answer to Question 1.a is no, what is the effect on foreclosures enforcing a right of sale under a mortgage that became effective before July 1, 2006, conducted in reliance on Tenn. Code Ann. § 35-5-114, as amended by Chapter 951?

2. What is the effect on the validity of a foreclosure if the substitute trustee does not comply with either of the following statutory requirements:

a. Under Tenn. Code Ann. § 35-5-114(b)(3), where the substitution has not been recorded before the first date the substitute trustee publishes notice of the sale, the substitution of trust instrument must include the following statement:

> Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution.

b. Under Tenn. Code Ann. § 35-5-114(d), if the name of the substitute trustee is not included in the first publication of sale, the substitute trustee must comply with further notice requirements, also to be reflected in an affidavit recorded with the register of deeds.

OPINIONS

1. a. We think a court would conclude that the act applies to any appointment of a successor trustee on or after July 1, 2006, under any mortgage, including one that became effective before July 1, 2006.

b. In order to challenge the act, a plaintiff would have to articulate and establish that the changes it brings about impair his or her rights under the mortgage. In light of the notice requirements included in the act, we are unable to see how the changes impair these rights. Absent such impairment, the act is not subject to challenge under Article I, Section 20, of the Tennessee Constitution or the Contract Clause of the United States Constitution.

c. Because the answer to Question 1.a is yes, this question is moot.

2. a. and b. Under Tenn. Code Ann. § 35-5-106, failure to follow any of the provisions of Tenn. Code Ann. §§ 35-5-101, *et seq.*, including Tenn. Code Ann. § 35-5-114, does not make the foreclosure sale void or voidable. Thus, a foreclosure sale in which a substitute trustee failed to follow the provisions of Tenn. Code Ann. § 35-5-114(b)(3) or (d) would not be void or voidable because of those failures.

ANALYSIS

1. a. Applicability to Mortgages that Became Effective Before July 1, 2006

This opinion concerns the effect of 2006 Tenn. Pub. Acts Ch. 951 ("Chapter 951") on foreclosures. This act amended Tenn. Code Ann. § 35-5-114 regarding foreclosures on real property in Tennessee by adding subsections (b), (c), and (d) to the statute.

Changes to Tenn. Code Ann. § 35-5-114 must be read within the context of the entire statutory scheme governing judicial sales and foreclosures. Under Tenn. Code Ann. § 35-5-101, advertisement of a foreclosure sale must generally be made at least three different times by newspaper. The first notice must be published at least twenty days before the sale. The trustee or other party that sells the property must send the debtor and any co-debtor a copy of the notice. Notice to the debtor must also be sent twenty days prior to the sale or, if the debtor's address is different from the property, thirty days prior to the sale. Thus, depending on the terms of the instrument, the trustee named in the mortgage or deed of trust frequently conducts the foreclosure sale and must provide notice of the sale to the debtors.

The act allows the beneficiary under a deed of trust to appoint a successor trustee provided certain conditions are met. Tenn. Code Ann. § 35-5-114(b)(1) and (2), as amended, provide:

> (b)(1) The beneficiary may, unless the deed of trust contains specific language to the contrary, appoint a successor trustee at any time by filing a substitution of trustee for record with the register of deeds of the county in which the property is situated.
>
> (2) The substitute trustee or its delegate shall succeed to all the power, duties, authority and title of the original trustee and any previous successor trustee or delegatee.

Subsection (b)(3) addresses recording of the substitution, and provides:

> (3)(A) In the event the substitution of trustee is not recorded prior to the first date of publication by the substitute trustee, the beneficiary shall include in the substitution of trustee instrument, which shall be recorded prior to the deed evidencing sale, the following statement:
>
> Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution.
>
> (B) Once a substitution of trustee instrument containing the statement set forth in subdivision (b)(3)(A) is timely recorded, it shall act as conclusive proof as a matter of law that the substitute trustee has been timely appointed and has acted with the authority of the beneficiary.

Subsection (c) provides:

> A substitution of trustee shall be recorded prior to any sale, and no action may be instituted against any person who, acting in good faith without knowledge to the contrary, relies upon the validity of the substitution of trustee or written statements by the beneficiary or substitute trustee as to the authority of the substitute trustee.

Subsection (d) concerns notice to the debtor if the name of the substitute trustee is not included in the first publication of the sale. This subsection provides:

> If the name of the substitute trustee is not included in the first publication, then, not less than ten (10) business days prior to the sale date, the substitute trustee shall send notice by registered or certified mail to the debtor or any co-debtor, as provided in § 35-5-101, and to any interested parties, giving the name and address of the substitute trustee. If the trustee is not a resident of the state of Tennessee, the notice shall include the name and address of a registered agent of the substitute trustee who is located in the state of Tennessee. Record notice of the mailing provided in this subsection (d) shall be evidenced by the substitute trustee's recordation of an

affidavit recorded prior to the deed evidencing the sale or by recitation on the substitute trustee's deed.

Chapter 951 became effective July 1, 2006, "the public welfare requiring it." 2006 Tenn. Pub. Acts Ch. 951, § 2.

The first question is whether (b), (c), and (d) are intended to apply to a mortgage or deed of trust that became effective before July 1, 2006. We think a court would conclude that the act applies to any appointment of a successor trustee on or after July 1, 2006, under any mortgage, regardless of the date the mortgage became effective. By its terms, the act applies only to a mortgage that does not expressly prohibit appointment of a successor trustee. Its effect, therefore, is to supplement the mortgage by providing for the appointment of a substitute trustee, or to change the process by which a successor trustee may be appointed under the mortgage. The act does not change the powers or the duties of the original trustee. It is clear that, within the context of Tenn. Code Ann. §§ 35-5-101, *et seq.*, the purpose of the act is to provide a uniform method by which a successor trustee may be appointed and conduct a foreclosure or judicial sale.

Chapter 951, therefore, appears to be purely procedural or remedial. In general, a statute is procedural "if it defines the . . . proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right." *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999) (citing *Kuykendall v. Wheeler*, 890 S.W.2d 785, 787 (Tenn.1994)). A remedial statute "provides the means by which a cause of action may be effectuated, wrongs addressed, and relief obtained." *Id.* Procedural changes in the law generally apply retrospectively to causes of action arising before such changes became law; but where the pending action has gone beyond the procedural stage to which the amendment pertains, the amendment will not apply. *Smallwood v. Mann*, 205 S.W.3d 358 (Tenn. 2006); s*ee also Nutt v. Champion International Corporation*, 980 S.W.2d 365, 368 (Tenn. 1998)(statutes that are remedial or procedural in nature may be retrospectively applied). Thus, the amendments apply to the appointment of a successor trustee on or after July 1, 2006, under any mortgage, including one that became effective before July 1, 2006.

b. Impairment of Contract Rights

The next question is whether Chapter 951 may constitutionally apply to foreclosures enforcing a right of sale under a mortgage or deed of trust that became effective before July 1, 2006. There is a strong presumption in favor of the constitutionality of acts passed by the legislature. *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007). The party attacking the constitutionality of a statute must bear a heavy burden in establishing some constitutional infirmity of the act in question. *Gallaher v. Elam*, 104 S.W.3d 455 (Tenn. 2003). Article I, Section 20, of the Tennessee Constitution states "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made." Similarly, Article I, Section 10, of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." The Tennessee Supreme Court has stated that the meaning of the federal and state constitutional provisions is identical. *First Utility District of Carter County v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992); *Paine v. Fox*, 172 Tenn. 290, 112 S.W.2d 1 (Tenn. 1938).

Article I, Section § 20, of the Tennessee Constitution prohibits laws "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Doe v. Sundquist*, 2 S.W.3d at 923 (quoting *Morris v. Gross*, 572 S.W.2d 902 (Tenn. 1978)). Among the main tests as to whether the obligation of a contract has been impaired are whether the value of the contract or security has been lessened, *Lake County v. Morris,* 160 Tenn. 619, 28 S.W.2d 351 (1930), or whether the right in full existing at the time the contract was executed has been diminished. *Hannum v. McInturf,* 65 Tenn. 225 (1873). In this case, the act adds a procedure for appointing a successor trustee to a mortgage that does not address the issue or alters the procedure in a mortgage that provides a different procedure for appointing a successor trustee. In order to challenge the act, a plaintiff would have to articulate and establish that this change impaired his or her rights under the mortgage. In light of the notice requirements included in the act, we are unable to see how the change impairs these rights. Absent such impairment, the act is not subject to challenge under Article I, Section 20, of the Tennessee Constitution or the Contract Clause of the United States Constitution.

c. The next question is, if the answer to Question 1.a is no, what is the effect on foreclosures enforcing a right of sale under a mortgage that became effective before July 1, 2006, conducted in reliance on Tenn. Code Ann. § 35-5-114, as amended by Chapter 951? Because our answer to Question 1.a is yes, this question is moot.

2. Effect of Failure to Follow Procedures in Tenn. Code Ann. § 35-5-114(b)(3) and (d)

The last question is the effect of failure to follow certain procedures in the statute on the validity of the foreclosure sale. Under Tenn. Code Ann. § 35-5-114(b)(3), where the substitution has not been recorded before the first date the substitute trustee publishes notice of the sale, the substitution of trust instrument must include the following statement:

> Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution.

Under Tenn. Code Ann. § 35-5-114(d), if the name of the substitute trustee is not included in the first publication of sale, the substitute trustee must comply with further notice requirements, also to be reflected in an affidavit recorded with the register of deeds.

Tenn. Code Ann. § 35-5-106 provides:

> Should the officer, or other person making the sale, proceed to sell without pursuing the provisions *of this chapter*, the sale shall not, on that account, be either void or voidable.[1]

(Emphasis added).

Thus, under Tenn. Code Ann. § 35-5-106, failure to follow any of the provisions of Tenn. Code Ann. §§ 35-5-101, *et seq.*, including Tenn. Code Ann. § 35-5-114, does not make the foreclosure sale void or voidable. Accordingly, a foreclosure sale in which a substitute trustee failed to follow the provisions of Tenn. Code Ann. § 35-5-114(b)(3) or (d) would not be void or voidable because of those failures.

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[1] As codified, the heading to this statute is "Sale without advertisement is not void." The language of the statute, however, clearly applies to a failure to follow any of the sale requirements, not just that of advertising. In any case, under Tenn. Code Ann. § 1-3-109, section headings are not to be construed as part of the law.