

## **MD Ga Holds SOL on Security Deed is 21 Years, Wrongful Foreclosure Claim May Stand Independently of Fraud Claim**

The U.S. District Court for the Middle District of Georgia recently held that **when a mortgagee makes some affirmative misrepresentation or action that renders a foreclosure sale unfair, a claim for wrongful foreclosure may stand independently of a claim for fraud.**

The Court also held that the statute of limitations on a claim under a security deed is 21 years, if the security deed is a sealed instrument under Georgia law.

A copy of the opinion is available at: [Link to Opinion.](#)

On Aug. 26, 2007, in connection with a refinance mortgage loan, the plaintiff wife borrower conveyed a one-half interest in her home by warranty deed to her husband, the other plaintiff.

The plaintiffs signed closing documents for a new mortgage with their lender, including a promissory note and security deed, preprinted with the date of Aug. 14, 2007. The security deeds were recorded.

In 2008, the plaintiffs received an offer for credit life insurance. They determined they did not want the policy and properly declined it. Yet, the insurance company began adding the premium for the life insurance policy to the plaintiffs' mortgage statement. The plaintiffs continued to make their mortgage payments, not including the payment for the insurance policy, until May 2009.

When the plaintiffs attempted to make their May 2009 mortgage payment, they were informed that they owed payments for January through June 2009 plus late fees and penalties because the payments were made to the lender and not to the defendant mortgagee. The plaintiffs were not informed until May 2009 that their payments should have been directed to the defendant mortgagee. The payments for January through May 2009 were not applied to the plaintiffs' account.

In January 2011, the defendant mortgagee's counsel sent a letter demanding payment and advised the plaintiffs of their right to dispute the debt. The plaintiffs subsequently sent a letter to the defendant requesting an accounting.

In February and March 2011, the plaintiffs faxed numerous documents to the defendant mortgagee in support of their inquiry into the debt. In May 2011, in

order to avoid foreclosure, the plaintiffs paid \$8,000 to replace uncredited January through May 2009 payments.

The plaintiffs also contacted the Office of the Comptroller and initiated a case. The Comptroller found that the defendant mortgagee's response to the plaintiffs was adequate.

On Feb. 10, 2012, the plaintiffs attempted to make another mortgage payment by personal check but it was rejected. The plaintiffs were told they would have to make their payment by certified funds. In late March 2012, the defendant mortgagee sent another notice of foreclosure sale to the plaintiff-husband, showing that he was the sole borrower.

On Sept. 3, 2013, the plaintiffs' security deed was foreclosed upon. In October, title was conveyed to the defendant mortgagee and subsequently transferred. After the foreclosure sale, the defendant mortgagee maintained an open account for the plaintiffs. As recently as Feb. 5, 2016, the defendant mortgagee sent a notice to the plaintiffs that their loan was in foreclosure, providing a reinstatement payment amount. However, there was an eviction proceeding pending against the plaintiffs.

The plaintiffs alleged they have made every mortgage payment when due, except for those that were not accepted.

The plaintiffs asserted three substantive claims against the defendants: breach of contract, fraud, and wrongful foreclosure. The plaintiffs also sought equitable relief against the REO owner to stop the eviction proceedings against them. The defendants moved to dismiss each of the plaintiffs' claims against them for failure to state a claim upon which relief can be granted.

### **Breach of Contract**

The defendants argued that the breach of contract claim was barred by the six-year statute of limitations on written contracts pursuant to Georgia law. The plaintiffs disagreed, arguing that the statute of limitations is 21 years because the security deed is a sealed instrument under Georgia law.

**For simple contracts in writing, O.C.G.A. § 9324 provides, “All actions . . . shall be brought within six years after the same become due and payable. However, this Code section shall not apply to actions for the breach of contracts for the sale of goods under Article 2 of Title 11 or to negotiable instruments under Article 3 of Title 11.”**

**And for sealed instruments, O.C.G.A. § 9323 reads, “Actions . . . shall be brought within 20 years after the right of action has accrued. No instrument shall be considered under seal unless so recited in the body of the instrument.”**

In Georgia, a sealed instrument must contain both a recital in the body of the instrument of an intention to use a seal and the affixing of the seal or scroll after the signature. The affixing of a seal may simply be the word “seal” written next to the signor’s signature.

Georgia courts have held that even where a grantee did not sign a deed, where the deed was otherwise a covenant, in writing, under seal, the grantee accepted the legal consequences resulting from the character and form of the instrument and was therefore bound by the 21-year statute of limitations.

The allegedly breached contract was the August 2007 security deed the plaintiffs entered into with the lender. On the security deed, each of the plaintiffs’ signatures was accompanied by the word “seal.”

Accordingly, the District Court found that the plaintiffs alleged breach of contract on a sealed instrument. Therefore, the Court held, **THE BREACH OF CONTRACT CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AS THE 21-YEAR STATUTE APPLIES.**

## **Fraud**

The plaintiff borrowers alleged that the lender committed fraud in soliciting their purchase of a credit life insurance policy, and continuing to charge the premium payments for the policy even after they rejected it.

The defendants moved to dismiss the fraud claim on the basis that it was barred by the four-year statute of limitations for injuries to personalty under Georgia law. The plaintiffs argued the fraud is continuous and ongoing and thus was not barred by the statute of limitations.

O.C.G.A. § 9331 reads, “Actions for injuries to personalty shall be brought within four years after the right of action accrues.” Georgia courts have held generally that O.C.G.A. § 9331 applies to common law fraud claims. The statute of limitations for a continuous tort runs from the happening of any given injury.

The plaintiffs alleged they were first charged with the life insurance policy in April 2008. This action was filed in August 2014. Incorporated into the plaintiffs’

complaint was a document that indicated the policy ceased to be charged approximately 12 months after the first charge appeared in April 2008.

Therefore, the Court held that even if the plaintiffs were charged the insurance premiums every month for two entire years after the first charge in April 2008, the claim would still be barred by the four-year statute of limitations. Although the plaintiffs alleged the fraud was ongoing because the policy payments were not refunded, the Court noted that the plaintiffs expressly alleged that the premium charges were the fraudulent acts.

Accordingly, the District Court found that the fraud claim against the defendants was barred by the four-year statute of limitations and granted the defendant lender's motion to dismiss.

### **Wrongful Foreclosure**

The plaintiffs' wrongful foreclosure claim arose from their allegations that the defendant mortgagee failed to act in good faith when foreclosing on their home. The plaintiffs also allege that the defendant REO owner was not a good faith third-party purchaser because the REO owner was closely identified with the defendant lender.

The defendants argued that the plaintiffs failed to state a wrongful foreclosure claim against the defendant REO owner because the REO owner was not the foreclosing party and thus could not have violated the foreclosure statutes and did not owe a legal duty to the plaintiffs. The District Court agreed.

In addition, the Court found the plaintiffs' arguments that the REO owner and lender were closely aligned was insufficient to state a claim for wrongful foreclosure against the REO owner.

For its part, the defendant mortgagee argued that the plaintiffs had not alleged unfairness in the foreclosure procedure itself, and therefore did not state a claim for wrongful foreclosure.

**To assert a wrongful foreclosure claim, the plaintiffs must establish a legal duty owed to them by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury they sustained, and damages. Allegations of a violation of the foreclosure statute are required to maintain a claim for wrongful foreclosure.**

The Court noted that a claim for wrongful exercise of a power of sale under O.C.G.A. § 232114 can arise when the creditor has no legal right to foreclose. Alternatively, the Court also noted that *when a lender makes some affirmative misrepresentation that renders the foreclosure sale unfair, a claim for wrongful foreclosure may stand independently of a claim for fraud.*

The plaintiffs' allegations centered on the theory that the defendant mortgagee breached a duty of good faith. The District Court had allowed a wrongful foreclosure claim for breach of duty of good faith in the loan modification context, where the mortgagee in that case had made repeated oral and written assurances that a loan modification would be granted, accepted payments, and nonetheless continued with a foreclosure sale.

However, where a different mortgagee failed to respond to a debtor's request for a loan modification, and had no obligation to grant him a modification, and the debtor failed to make payments, another District Court held that the debtor could not maintain a wrongful foreclosure claim because he had caused his own damages by failing to pay the amount owed.

The Court found that the plaintiffs here stated a wrongful foreclosure claim for breach of duty of good faith.

The Court noted that the plaintiffs alleged they made every mortgage payment except for those the defendant mortgagee would not accept. The plaintiffs also alleged they sought an accounting of the amount owed and payments made, but never received one. The Court also noted that the plaintiffs alleged they relied on the insurance company's oral instruction that they continue to make their usual mortgage payments and disregard the life insurance premium.

**For their wrongful foreclosure claim, the plaintiffs sought to set aside the foreclosure in order to recover the property and also sought damages. The District Court held that the plaintiffs may seek both forms of relief against the defendant bank. The Court also held that the plaintiffs' allegations that they tried to tender full payment to the defendant bank was sufficient to state a claim for equitable relief.**

Thus, the District Court denied the defendant mortgagee's motion to dismiss the wrongful foreclosure claim, but granted the REO owner's motion to dismiss.

**Attorney's Fees and Punitive Damages**

The defendants also moved to dismiss the plaintiffs' claim for attorney's fees and punitive damages. Because the plaintiffs' breach of contract and wrongful foreclosure claims against the defendant mortgagee remained, the Court denied the motion to dismiss. However, the motion to dismiss was granted as to the REO owner.