

Office of the Attorney General
State of North Dakota

Opinion No. 85-42

Date Issued: November 4, 1985

Requested by: Pat S. Fricke
Executive Director
Housing Finance Agency

--QUESTIONS PRESENTED--

I.

Whether the Housing Finance Agency may foreclose by advertisement a mortgage purchased by it prior to July 1, 1983.

II.

Whether N.D.C.C. §§ 32-19.1-04, 32-19.1-04.1, and 35-22-20, as amended by 1985 N.D. Sess. Laws 376, are applicable to the foreclosure by advertisement of a mortgage given to the Housing Finance Agency prior to March 14, 1985.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the Housing Finance Agency may foreclose by advertisement a mortgage purchased by it prior to July 1, 1983.

II.

It is my opinion that N.D.C.C. §§ 32-19.1-04, 32-19-04.1 and 35-22-20, as amended by 1985 N.D. Sess. Laws 376, are not applicable to the foreclosure by advertisement of a mortgage given to the Housing Finance Agency prior to March 14, 1985.

--ANALYSES--

I.

The remedy of foreclosure by advertisement is set out in N.D.C.C. Ch. 35-22, and the remedy of foreclosure by action is set out in N.D.C.C. Ch. 32-19.

Prior to July 1, 1983, N.D.C.C. § 35-22-01 provided as follows:

35-22-01. FORECLOSURE UNDER POWER OF SALE--PROHIBITION--EXCEPTION. Every mortgage of real property executed to the president of the Bank of North Dakota, as mortgagee, and every mortgage of real property heretofore or hereafter executed to the Bank of North Dakota, as mortgagee, and every mortgage negotiated by the board of university and school lands to the state of North Dakota as mortgagee, containing a power of sale, upon default being made in the conditions of such mortgage, may be foreclosed by advertisement in the manner provided by law. No other mortgage of real property shall be so foreclosed, but must be foreclosed by action.

N.D.C.C. § 35-22-01, as amended by the Legislature in 1983, presently provides as follows:

35-22-01. FORECLOSURE UNDER POWER OF SALE--PROHIBITION--EXCEPTION. Every mortgage of real property held by the state or any of its agencies, departments, or instrumentalities, containing a power of sale, upon default being made in the conditions of such mortgage, may be foreclosed by advertisement in the manner provided by law. No other mortgage of real property shall be so foreclosed, but must be foreclosed by action.

The following rules of statutory construction are applicable in determining the legislative intent of this amendment:

The primary purpose of statutory construction is to ascertain the intent of the Legislature. (citations omitted.) The Legislature's intent in enacting a statute must first be sought from the language of the statute itself. (citations omitted.) Furthermore, the statute must be considered as a whole, with a view toward arriving at the legislative intent. (citations omitted.) Any interpretation of a statute must be reasonable and consistent with the intent of the Legislature (citation omitted) and conflicting *pari materia* provisions are to be reconciled, if possible. (citation omitted.) *Puklich & Swift, P.C. v. State Tax Commissioner*, 359 N.W.2d 846, 849 (N.D. 1984).

With these rules in mind, it is clear from the face of this statute that the Legislative intent is that the state may foreclose any mortgage of real property by advertisement regardless of when or how acquired by the state.

The next step in the resolution of this question is to determine whether it would be an impairment of contract, which is prohibited by the 'Contract Clause' of both the United States Constitution and the North Dakota Constitution, to allow the Housing Finance Agency to foreclose by advertisement a mortgage which the Agency had acquired prior to the effective date of the legislation authorizing the Agency

to foreclose a mortgage by advertisement. A contract is 'impaired' if it is diminished in value or excellence or strength. State v. Klein, 249 N.W. 118 (N.D. 1933).

The United States Supreme Court made the following observation concerning whether legislation has the effect of impairing a contractual obligation:

The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement . . . This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached. . . . The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations upon a law adjusting the express terms of an agreement. United States Trust Co. v. New Jersey, 431 U.S. 1, 19-21 n. 17 (1977).

With this general principle in mind, a comparison of the remedies of foreclosure by action and foreclosure by advertisement is appropriate.

Both foreclosure by action and foreclosure by advertisement provide that a notice of intention to foreclose must be served on the record title owner of the real estate described in the mortgage at least 30 days, and not more than 90 days, before any further proceedings of foreclosure may be commenced. N.D.C.C. §§ 35-22-03, 32-19-20.

N.D.C.C. § 35-22-03 provides that a notice of intention to foreclose by advertisement must be in the form specified in N.D.C.C. § 32-19-21, and must be served in the manner provided for the service of a notice of intention to foreclose by action.

Following the expiration of the 30-day notice period, a foreclosure by action may be commenced by the service of a summons upon the mortgagor. If the mortgagor fails to plead or otherwise appear within 20 days after the service of the summons, the mortgagee may file a motion for entry of a default judgment in favor of the mortgagee. Following the entry of judgment, a written execution may then be issued to the sheriff of the county within which the real property is located and that officer is then required to conduct a sale of the property after advertising the sale once a week for three successive weeks, the last publication appearing at least 10 days prior to the date of the sale, as provided by N.D.C.C. § 28-23-04.

In a foreclosure by advertisement, either prior to or following the expiration of the 30-day notice period, a mortgagor may obtain an order from the district court of the county where the real property is located enjoining the mortgagee from foreclosing the mortgage by advertisement and directing that all further proceedings for the foreclosure be had in that district court when it has been made to appear by the affidavit of the mortgagor that the mortgagor has a legal counterclaim or any other valid defense against the collection of the amount due on the mortgage. The district court may also direct that all further proceedings for the foreclosure of the real property be conducted in the district court. N.D.C.C. § 35-22-04.

If the affidavit of the mortgagor alleges the 'confiscatory price defense' set out in N.D.C.C. §§ 28-29-04, 28-29-05, and 28-29-06, 'he is entitled to an injunction as a matter of law, thereby forcing the mortgagee . . . to proceed by action.' Heidt v. State, 372 N.W.2d 857 (N.D. 1985).

If the mortgagor does not obtain an order from the district court within the 30 day notice period enjoining the mortgagee from foreclosing by advertisement, the mortgagee may proceed to foreclose the mortgage by publishing a notice of the sale of the mortgaged property for six successive weeks in a newspaper published in the county where the mortgaged real property is located. N.D.C.C. § 35-22-06.

The notice of sale must be in substantial compliance with the notice of sale form set out in N.D.C.C. § 35-22-07.

N.D.C.C. § 35-22-04 sets out the manner in which a mortgagor may obtain a hearing in a proceeding to foreclose a mortgage by advertisement. A close reading of this section reveals that a mortgagor has the opportunity to be heard pursuant to this section not only during the 30-day period, following the service of a notice of intention to foreclose, but also during the period when the notice of sale is being published and until the sheriff's sale takes place. Notice of hearing, together with the affidavit, must be served upon the mortgagee not less than eight days prior to the hearing. A mortgagor is not required to make any special showing when an affidavit is filed after the expiration of the 30-day notice period but prior to the sheriff's sale, whereas in a foreclosure by action a mortgagor who fails to plead or otherwise appear within 20 days after the service of the summons must make an additional showing, such as 'excusable neglect,' in order to be heard on the merits of the mortgagor's defense in the foreclosure.

From this comparison of the remedies of foreclosure by action and foreclosure by advertisement, it appears that the 1983 amendment is 'a reasonable modification of statutes governing contract remedies' and that a mortgage which previously could only be

foreclosed by action, but may now also be foreclosed by advertisement, is not 'impaired.'

Therefore, it is my opinion that the Housing Finance Agency may foreclose by advertisement a mortgage purchased by it prior to July 1, 1983.

II.

Prior to the effective date of 1985 N.D. Sess. Laws 376, which was March 14, 1985, N.D.C.C. §§ 32-19.1-04, 32-19.1-04.1, and 35-22-20, provided as follows:

32-19.1-04. REDEMPTION PERIOD UNDER CHAPTER. All real property sold as provided in section 32-19-08 upon foreclosure of a mortgage executed pursuant to this chapter may be redeemed within the time period specified in this chapter and in such manner as is prescribed by chapter 28-24. . . .

32-19.1-04.1. REDEMPTION PERIOD TO COMMENCE UPON FILING OF SUMMONS AND COMPLAINT. In the event of foreclosure under this chapter, the period of redemption will commence to run at the time of the filing of the summons and complaint in the office of the clerk of the district court, unless it is determined by the district court that the mortgagee is not entitled to judgment, and in no event will the final date for redemption be earlier than sixty days after the sheriff's sale.

35-22-20. REDEMPTION WITHIN ONE YEAR--WHO MAY REDEEM--NOTICE TO OFFICER MAKING SALE. The property sold may be redeemed within one year from the day of sale in like manner and with the same effect as is provided for redemption of real property sold upon execution . . .

Following action taken by the 1985 Legislature, 1985 N.D. Sess. Laws 376, these three statutes now provide as follows:

32-19.1-04. REDEMPTION PERIOD. All real property sold as provided in section 32-19-08 or 35-22-08 upon foreclosure of a mortgage executed pursuant to this chapter may be redeemed within the time period specified in this chapter and in such manner as is prescribed by chapter 28-24 . . . (Emphasis supplied).

32-19.1-04.1. COMMENCEMENT OF REDEMPTION PERIOD. In the event of foreclosure under this chapter, the period of redemption will commence to run at the time of the filing of the summons and complaint in the office of the clerk of the district court or at the time of the first publication of the notice of foreclosure by advertisement, unless it is determined by the district court that the mortgagee is not entitled to judgment, and in no event will the final

date for redemption be earlier than sixty days after the sheriff's sale. (Emphasis supplied).

35-22-20. REDEMPTION--WHO MAY REDEEM--NOTICE TO OFFICER MAKING SALE. The property sold may be redeemed in like manner and with the same effect as is provided for redemption of real property sold upon execution in chapter 28-24 . . . (Emphasis supplied).

The decision of the North Dakota Supreme Court in First Federal Savings and Loan Association v. Haley, 357 N.W.2d 492 (N.D. 1984) is controlling on this question. The question before the Court in Haley was whether N.D.C.C. § 32-19.1-04.1, which was amended in 1981 to provide as set out above prior to the 1985 amendment, could be applied to mortgages executed prior to the effective date of the 1981 amendment. The Court's conclusion, in part, is as follows:

It is obvious that Section 32-19.1-04.1, by changing the date upon which the redemption period begins to run, shortens the redemption period as effectively as if the Legislature had prescribed a shorter duration of time for it to run . . . Because the sheriff's sale necessarily occurs after the filing of the summons and complaint, the redemption period will, in every case, expire sooner under Section 32-19.1-04.1.

We conclude that Section 32-19.1-04.1, N.D.C.C., shortens the period of redemption. It therefore cannot be constitutionally applied to mortgages executed prior to its effective date. Id. at 494-495.

This holding is equally true with regard to the three statutes set out above. The obvious intent of these statutes is to shorten the period of redemption in a foreclosure by advertisement. It would be an impairment of contract to apply them to a mortgage executed before their effective date.

Therefore, it is my opinion that N.D.C.C. §§ 32-19.1-04, 32-19.1-04.1, and 35-22-20, as amended by 1985 N.D. Sess. Laws 376, are not applicable to the foreclosure by advertisement of a mortgage given to the Housing Finance Agency prior to the effective date of 1985 N.D. Sess. Laws 376, which was March 14, 1985.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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