

MEMORANDUM

TO: Lawyer
FROM: Lexadigm Solutions LLC
DATE: April 11, 2005

RE: Effect of Erroneous Redemption Period Stated in Sheriff's Deed and Published Notice

I. ISSUES

A. Do any Michigan cases involve an attempt to extend an erroneously stated 6-month redemption period to 12 months?

B. Is a foreclosure where both the sheriff's deed and published notice state an erroneous redemption period voidable by an interested party?

II. SHORT ANSWERS

A. No Michigan case involves an attempt to extend an erroneously stated 6-month redemption period to 12 months. However, as a general rule, equity allows the redemption period sale to be extended in case of fraud, accident or mistake.

B. Yes, it appears that because the published notice was defective and the parties were prejudiced by the erroneous notice, the foreclosure is voidable.

III. FACTS

Agricultural property in ABC City, Michigan was the subject of a foreclosure by advertisement action. The sheriff's deed is dated August 18, 2004 and that "The Indenture shall become operative in accordance with the applicable statute within six months from the date of sale." Furthermore, a notice of foreclosure was published in the local newspaper which says: "Notice is further given that the length of the redemption period will be six months from the date of sale." It is believed that the redemption period applicable to the subject property is actually one year. As a result of the misstatements in the published notice and the deed, the interested parties (mortgagor and subordinate mortgagee) lost the ability to effectively plan and prepare for redemption of the property. In particular, the parties' perception was that they had inadequate time to seek rezoning of the property, raise funds for the redemption, and/or take certain other actions that would have required more time than six months.

IV. ANALYSIS

Section 600.3212 of the Revised Judicature Act of 1961 ("Act") requires the following items to be included in a notice of foreclosure by advertisement:

(a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.

(b) The date of the mortgage and the date the mortgage was recorded.

(c) The amount claimed to be due on the mortgage on the date of the notice.

(d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.

(e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.

MCLA 600.3212 (emphasis added). As per the terms of section 3240, the statutory redemption period for agricultural property is one year. MCLA 600.3240(12).

Further, Section 600.3232 of the Act states the following with respect to the contents of a sheriff's deed:

The officer or person making the sale shall forthwith execute, acknowledge, and deliver, to each purchaser a deed of the premises bid off by him; and if the lands are situated in several counties he shall make separate deeds of the lands in each county, and specify therein the precise amounts for which each parcel of land therein described was sold. And he shall endorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law....

MCLA 600.3232 (emphasis added). However, the citing of the redemption period is not a necessary constituent of the sheriff's deed. In *U.S. v. Garno*, 974 F.Supp. 628 (E.D. Mich. 1997), the court held the following:

The fact that a sheriff's deed does not list a redemption period is not crucial to the validity of a foreclosure sale, as the foreclosure statutes are not to be construed as specifically prescribing the form of the sheriff's deed. Furthermore, the provision in M.C.L. § 600.3232, which requires the officer conducting the sale to endorse upon the deed when it will become operative, has been held to be merely directory in nature, not altering the legal period of redemption and not voiding the foreclosure.

In this case, although the redemption period was not listed on the sheriff's deed it was listed on the "Affidavit of sale by Sheriff" which was attached to and recorded with the sheriff's deed after the sale. This constituted substantial compliance with the statute and amply provided defendants with notice of their redemption rights.

Id. at 633 (emphasis added and internal citations omitted).

Relying on the authorities cited above, it appears that the one year long legal period of redemption is required to be listed in the published notice of foreclosure but not necessarily the sheriff's deed.

A. Extension of erroneously stated redemption period.

There are no cases in Michigan involving an attempt to extend an erroneously stated 6-month redemption period to 12 months. However, the Supreme Court of Michigan has held that equity allows the redemption period to be extended in case of fraud, accident or mistake. *Detroit Trust Co. v. George*, 247 N.W. 697 (Mich. 1933); *Schulthies v. Barron*, 167 N.W.2d 784, 785 (Mich. Ct. App. 1969) (“The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.”). In *Schulthies*, 167 N.W.2d 784, the court held that the mortgagor's mistake in believing that period of redemption was one year rather than six months would not permit an equitable extension of the period to redeem from statutory foreclosure sale by advertisement and posting of notice. *Id.* at 785.

In the instant case, there appears to be a clear showing of irregularity and/or mistake in the posting of the redemption period in the advertisement and on the sheriff's deed. It is clear that an erroneous period of six months was posted as the redemption period when in fact the statutory redemption period was one year from the date of the notice. Accordingly, it appears that the period of redemption may be extended to correct the irregularity in the calculation of the redemption period and its posting and thereby to incorporate the legitimate period of redemption.

B. Foreclosure action voidable by interested party

A defect in notice of foreclosure renders a foreclosure sale voidable, not void. *Jackson Investment Corp. v. Pittsfield Products, Inc.*, 413 N.W.2d 99 (Mich. Ct. App. 1987). The Court in *Jackson* held:

We hold that a defect in notice renders a foreclosure sale voidable. Our Supreme Court reached a similar result in *Fox v. Jacobs*, 289 Mich 619, 286 N.W. 854 (1939), holding that the failure of the notice to specify an assignee of the mortgage, as required by statute, did not render the foreclosure sale absolutely void, but only voidable...

M.C.L. § 600.3208; M.S.A. § 27A.3208 and M.C.L. § 600.3212; M.S.A. § 27A.3212 set forth the requirements of notice. The failure to properly observe any of these requirements provides a host of potential defects which could occur. By holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential

opportunity to preserve some or any portion of his interest in the property, we see little merit in the rule of law which Jackson advocates. Such a rule would automatically nullify the sale without regard to or consideration of the intervening interests of other parties. We conclude that the trial court correctly held that the notice defect rendered the sale voidable and not void. Such a result is consistent with that in *Kuschinski v. Equitable & Central Trust Co.*, 277 Mich. 23, 268 N.W. 797 (1936), where our Supreme Court held that a foreclosure sale held in violation of a restraining order rendered the sale voidable and not void.

Id. at 101-102 (emphasis added); *Guardian Depositors' Corp. of Detroit v. Keller*, 282 N.W. 194, 198 (Mich. 1938) (“The blunders which appear to have got into the notice of sale indicate very careless printing, and the changes in the different issues are not easily explained. But how far they can be allowed to defeat the sale depends on the effect they were likely to have on the persons interested.” (citation omitted)); *see also*, *Worthy v. World Wide Fin. Services, Inc.*, 347 F.Supp.2d 502, 509-510 (E.D. Mich. 2004) (holding that under Michigan law, misstatement of mortgagor’s gender in the notice of foreclosure was an inconsequential mistake that did not render the foreclosure notice invalid because the statute identifying information to be included in notice of foreclosure by advertisement did not require identification of mortgagor’s gender).

In *Calvert Assoc. v. Harris*, 469 F.Supp. 922 (E.D. Mich. 1979), the court held that incorrect statement of the redemption period in the published notice was a “minor deficiency” since the mortgagor was not prejudiced by the error and there was other “substantial compliance” with the requirements of MCLA 600.3212. In that case, the published notice erroneously stated that “Pursuant to federal law there is no post-sale redemption period applicable to this property.” *Id.* at 926. In holding that the mortgagor was not prejudiced by the error and thereby refusing mortgagor’s request for an injunction, the court reasoned as follows:

[I]t is clear that there is a right of redemption in this case. However, the court must determine what effect, if any, this ruling has on the pending foreclosure proceedings. As has been pointed out in the briefs and argument, there may well be fewer people who would be willing to purchase a certain piece of property subject to a right of redemption than there would be for the same piece of property if it were sold unencumbered. Therefore, it seems to this court that anyone who would be interested in buying the property subject to a right of redemption would be even more interested in the same property if such a right did not exist. This means that given the advertisements that have been published with the incorrect statement regarding redemption rights, all those buyers who would be interested in buying the property subject to the right of redemption would appear. This being the case, the court finds that the plaintiff will not be prejudiced if the sale is permitted to be held as scheduled but with the right of redemption as provided by state law in existence and made clear to those present at the auction. Because the plaintiff will not be prejudiced by the minor deficiency in the published notice, the court finds that there has been substantial compliance with the requirements of M.C.L.A. s 600.3212.

Id. at 927 (emphasis added). Because the facts of *Calvert* are unique in the sense that the erroneous statement arguably generated more interest in the subject property, its holding is likely limited to its facts. In any event, it is clear that where a case involves an erroneous statement of the redemption period in the published notice, the court's inquiry focuses on whether the plaintiff was prejudiced by the error.

In the instant case, there was a misstatement of the length of the redemption period in the notice of foreclosure, which was a mistake of consequence. As provided by MCLA 600.3212(e), the notice of foreclosure must contain the length of the statutory redemption period. *See* Part A, *supra*. As a result of this misstatement, the interested parties lost the ability to effectively plan and prepare for redemption of the property. In particular, the parties' perception was that they had inadequate time to seek rezoning of the property, raise funds for the redemption, and/or take certain other actions that would have required more time than six months. These facts demonstrate that the erroneous redemption period cited in the published notice prejudiced the interested parties and therefore distinguishes the instant case from *Calvert Assoc. v. Harris*, *supra*. Accordingly, the foreclosure proceeding at issue in the instant case is voidable by the interested parties.

V. CONCLUSION

Because the published notice was defective and the interested parties were prejudiced by the erroneous notice, the foreclosure is voidable.

Lexadigm Solutions LLC