



## 02/12/86 REFCORP v. RONNIE CHARLES FRYE

1986 | Cited 0 times | Court of Appeals of Tennessee | February 12, 1986

HOUSTON M. GODDARD, J.

### OPINION

This is a declaratory judgment action wherein Refcorp, Inc., which purchased a tract of land sold at foreclosure and NCNB National Bank of North Carolina, which financed the purchase, Plaintiffs-Appellees, seek a determination that Ronnie Charles Frye, Defendant-Appellant, waived his statutory right of redemption in connection with the sale of the property pursuant to the recorded deed of trust.

The Chancellor found that the statutory right of redemption had been waived and the Defendant appeals contending this was error.

The pertinent provisions of the various instruments involved are as follows:

### DEED OF TRUST

Section 1.12. Costs of Enforcement. The Grantor agrees to bear and pay all expenses (including reasonable attorneys' fees and appellate attorneys' fees) of or incidental to the enforcement of any provision hereof, or the enforcement, compromise or settlement of this Deed of Trust or the Indebtedness, and for the curing thereof, or for defending or asserting the rights and claims of the Beneficiary in respect thereof, by litigation or otherwise. All rights and remedies of the Beneficiary shall be cumulative and may be exercised singly or concurrently. Notwithstanding anything herein contained to the contrary, the Grantor: (a) hereby waives trial by jury: (b) will not (i) at any time insist upon, or plead or in any manner whatever claim or take any benefit or advantage of any stay or extension or moratorium law, any exemption from execution or sale of the Mortgaged Property or any part thereof, wherever enacted, now or at any time hereafter in force, which may affect the covenants and terms of performance of this Deed of Trust, nor (ii) claim, take or insist upon any benefit or advantage of any law now or hereafter in force providing for the valuation or appraisal of the Mortgaged Property, or any part thereof, prior to any sale or sales thereof which may be made pursuant to any provision herein, or pursuant to the decree, judgment or order of any court of competent jurisdiction, Nor (iii) after any such sale or sales, claim or exercise any right under any statute heretofore or hereafter enacted to redeem the property so sold or any part thereof; (c) hereby expressly waives all benefit or advantage of any such law or laws: and (d) covenants not to hinder, delay or impede the execution of any power herein granted or delegated to the Beneficiary, but to



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suffer and permit the execution of every power as though no such law or laws had been made or enacted. The Grantor, for itself and all who may claim under it, waives, to the extent that it lawfully may, all right to have the Mortgaged Property marshaled upon any foreclosure hereof.

### Section 2.02. Remedies.

(b) Upon the occurrence of an Event of Default and the election of the Beneficiary to effect a trustee's sale of the Mortgaged Property in lieu of judicial foreclosure, then the Beneficiary may instruct the Trustee to commence such sale and consummate such sale in the following manner:

Said Trustee, or his successor in trust, is hereby authorized and empowered, upon giving twenty (20) days' notice by three publications in any newspaper, daily or weekly, of general circulation published in Knox County, Tennessee, to sell the property described in Schedule A at the front door of the Courthouse in said county to the highest bidder for cash, at public outcry, free from the equity of redemption, homestead, dower and all other exemptions of every kind, which are hereby expressly waived.

(e) In the event that the Grantor has an equity of redemption and the Mortgaged Property is sold pursuant to the power of sale or otherwise under or by virtue of this Article II, the purchaser may, during any redemption period allowed, make such repairs or alterations on said property as may be reasonably necessary for the proper operation, care, preservation, protection and insuring thereof. Any sums so paid together with interest thereon from the time of such expenditure at the rate of 1 1/2% per month (if not prohibited by law, otherwise at the highest lawful contract rate) shall be added to and become a part of the amount required to be paid for redemption from such sale.

### NOTE

In the event of a default in any of the terms, conditions, covenants or obligations contained in this Note or in the aforementioned Deeds of Trust and Security Agreements or in any other instrument securing this Note and the election by the holder hereof to accelerate the payment of the entire indebtedness evidenced hereby, then a tender of payment by the maker hereof, or by any successor or assignee of such maker, or by any other party acting for or on behalf of such maker, of the amount necessary to satisfy all sums due hereunder made at any time prior to the trustee's sale of the property covered by said Deeds of Trust, or any form of redemption after such sale of after a foreclosure under said Deeds of Trust, shall constitute an evasion of the payment terms hereof and shall be deemed to be a voluntary prepayment hereunder, and any such payment, to the extent permitted by law, shall therefore include the prepayment premium which would have been payable hereunder if the indebtedness evidenced hereby had been prepaid in full on the date the default occurred. If on that date there shall be no right of prepayment, then any such payment, to the extent permitted by law, shall include a prepayment premium equal to five percent (5%) of the then unpaid principal balance. If there shall be a right of prepayment without premium on that date, then this



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paragraph is without effect.

### ADVERTISEMENT OF TRUSTEE'S SALE

Said sale is subject to any and all unpaid taxes, statutory redemption rights, and any other prior claims, liens, easements, setback lines and restrictions.

The statutory right of redemption is found in T.C.A. 66-8-101, which provides the following:

66-8-101. Right of redemption-Waiver. - Real estate sold for debt shall be redeemable at any time within two (2) years after such sale:

- (1) Where it is sold under execution;
- (2) Where it is sold under any decree, judgment, or order of a court of chancery, whether founded upon a foreclosure of a mortgage, or deed of trust, or otherwise, unless, upon application of the complainant, the court orders that the property be sold on a credit of not less than six (6) months, nor more than two (2) years: and that, upon confirmation thereof by the court, no right of redemption or repurchase shall exist in the debtor or his creditor, but that the title of the purchaser shall be absolute:
- (3) Where it is sold under a deed of trust or mortgage without a judicial sentence, unless the right of redemption is expressly waived by the deed or mortgage; (and a waiver of the "equity of redemption," or a waiver using words of similar import, shall be sufficient to waive the right of redemption afforded by this section in all deeds of trust and mortgages, whether heretofore or hereafter existing);<sup>1</sup> and
- (4) Where it is sold for taxes.

The Chancellor in his memorandum opinion found, and we agree, that the language of Section 1.12 clearly waives the statutory right. It is true that the other provisions above quoted speak of the equity of redemption rather than the statutory right of redemption, but we do not believe this renders the instrument ambiguous or unclear, bringing into play the rules of construction urged upon us by the Defendant.

Of course, had other portions of the trust deed or note which was incorporated in the trust deed provided that the Defendant waives the equity of redemption but not the statutory right of redemption, or only the equity of redemption, we would have a different state of facts, perhaps requiring a different resolution.

We say this because, although a number of cases <sup>2</sup> use the term "equity of redemption," which is the



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right of a party to pay an indebtedness after default but before foreclosure,<sup>3</sup> interchangeably with the statutory right. Other cases, when the distinction between the two is significant, have been careful to distinguish them.<sup>4</sup>

A recent case by the Western Section of this Court, Prichard v. Rogers, filed in Jackson January 6, 1984, had the matter before it and found that the term "equity of redemption" was not sufficiently broad to waive the statutory right. It should be pointed out in that case, however, that the deed of trust did not purport to waive any redemption except the equitable one.

Moreover, it apparently was not urged before the Western Section, as is urged here, that the parties themselves treated the phrase "equity of redemption" as including the statutory redemption, because they speak of it in the context of a foreclosure sale, which would be germane only to the statutory rights.

In reaching the foregoing Conclusion, we are mindful of Section 2.02(b), which only speaks of equity of redemption and (e), which speaks of "any redemption period allowed," and makes provisions for repayment of repairs or alterations prior to redemption to the purchasers. While this would be consistent with a non-waiver of the statutory right, we do not find it inconsistent with a waiver. We say this because we, as did the Chancellor, can conceive of situations where the lender for various reasons would find it appropriate to permit the debtor to redeem the property after foreclosure, and this clause would in those cases delineate his obligations. Moreover, we recognize, as also did the Chancellor, that in drawing form instruments the drafter generally tries to cover all eventualities, whether pertinent to the particular factual situation arising or not.

We are also mindful of the provision of the foreclosure advertisement above noted. We likewise agree with the Chancellor who, in addressing this, stated the following:

Defendant also points out that the original trustee in giving notice of a different sale under the same trust deed stated that the sale was subject to "statutory redemption rights" among other things. As with the final paragraph of the notice of the sale in this case, the original trustee's notice seems rather clearly to mean the sale is subject to such rights, if they exist. The language does not mean that the rights do exist.

We concur with the findings of the Chancellor that upon construing all of the instruments in the record it was the intentions of the parties that the statutory right be waived.

For the foregoing reasons the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Defendant.

CONCUR: James W. Parrott, P.J., Herschel P. Franks, J.



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1. The language in parenthesis was enacted subsequent to the execution of the deed of trust in this case, and notwithstanding its express language, the Appellees to not insist that its retrospective provision is valid.
2. McGuire v. Gallagher, 95 Tenn. 349, 32 S.W. 209 (1895); McClean and Hardison v. Harris, 82 Tenn. 510 (1884); Knox v. McCain, 81 Tenn. 197 (1884); Bank v. Ridgway, 71 Tenn. 623 (1879).
3. The equity of redemption cannot be waived prior to default. 59 C.J.S., Mortgages § 818 and cases cited therein.
4. Ewing v. Cook, 85 Tenn. 332, 3 S.W. 507 (1887); Hunt et ux. v. Liles, et al., 35 Tenn. App. 173, 243 S.W.2d 149 (1950).

