
**In The
Supreme Court of Virginia**

RECORD NO. 139989

**GREEN, GREEN & WATSON, P.C.,
Substitute Trustee,
and
BGG MORTGAGE, LTD.,**

Appellants,

v.

**BRAD L. MASSEY
and
LOIS C. MASSEY,**

Appellees.

BRIEF OF APPELLEES

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IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 139989

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Substitute Trustee,
and
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Appellants,

v.

**BRAD L. MASSEY
and
LOIS C. MASSEY,**

Appellees.

BRIEF OF APPELLEES

To the Honorable Justices of the Supreme Court of Virginia:

Brad L. Massey and Lois C. Massey ("the Masseys") file this Brief in response to the Brief filed by BGG Mortgage, Ltd. ("BGG") and Green, Green & Watson, P.C., substitute trustee ("Trustee"), and in support thereof hereby state as follows.

NATURE OF THE CASE

This is not a case about whether a debt has been repaid or about the secondary market purchases of notes payable to federal agencies. Rather, this case simply concerns the issue of whether a private assignee of a deed of trust from a federal agency, in this case the Small Business Administration ("SBA"), may avoid the Virginia statute of limitations on enforcement of such on the ground that federal agencies are generally immune from state statutes of limitations and that federal law does not prescribe any time limitation for foreclosure. Throughout this case, BGG and the Trustee have consistently relied on Virginia law for assignment and foreclosure procedures for the basic reason that there is no federal statutory law governing same. BGG and the Trustee have even previously admitted that "Congress has not explicitly declared any federal statute of limitations for cases of this nature." (JA 21.) However, BGG and the Trustee, despite their earlier position, now assert that there is an on-point, controlling federal statute of limitations on foreclosure upon which they may rely as a consequence of being an assignee of a deed of trust from a federal agency.

STATEMENT OF FACTS

The Masseys generally agree with the statement of facts presented by BGG and the Trustee but respectfully point out that, in amplification, the relevant facts in this cause are: The deed of trust at the heart of this matter contained no maturity date and

was executed by the Masseys on November 30, 1980 and properly recorded on November 30, 1980 in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia. (JA 1, 7-10.) Default occurred and demand was made upon the Masseys by a letter dated November 14, 1982 from the SBA, the holder of the note of Northern Furniture Storage which was guaranteed by the Masseys. (JA 1.) The Masseys' guaranty agreement was secured by the deed of trust at issue. (JA 1, 7-10.) The SBA made a subsequent demand and threat to foreclose on the deed of trust by letter to the Masseys in April of 2000. The SBA later assigned the deed of trust, while it was still in default, to BGG. (JA 3.) BGG then substituted Green, Green & Watson, P.C., as Trustee of the deed of trust. (JA 13-15.) By letter dated July 20, 2001, the Trustee notified the Masseys of its intent to foreclose under the deed of trust. (JA 2, 11.) The Trustee initiated foreclosure proceedings in 2001, more than twenty years after the date of the Masseys' deed of trust. (JA 2, 11-12.)

The Masseys then filed a Bill to Enjoin the Sale under the deed of trust. (JA 1-6.) On June 16, 2001, the Honorable Judge of the Circuit Court for the City of Hampton, Virginia, entered a decree temporarily enjoining the sale under the deed of trust. (JA 16-17.) On October 5, 2001, after briefing and argument of the parties, the Honorable Judge of that court entered a decree permanently enjoining the sale under the deed of trust. (JA 35-37.)

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

- I. **THE TRIAL JUDGE WAS CORRECT IN ENJOINING THE SALE OF THE PROPERTY UNDER THE DEED OF TRUST ON THE GROUND THAT VA. CODE ANN. § 8.01-242 BARRED THE TRUSTEE'S FORECLOSURE PROCEEDING, WHICH PROCEEDING WAS INITIATED MORE THAN TWENTY YEARS AFTER THE DATE OF THE DEED OF TRUST, EVEN THOUGH BGG AND, THUS, THE TRUSTEE WAS AN ASSIGNEE OF THE SBA, A FEDERAL AGENCY.**

Despite BGG's and the Trustee's assertions to the contrary, their status as an assignee of a deed of trust which originated with the SBA, a federal agency, does not protect them from Va. Code Ann. § 8.01-242, which provides for a twenty-year limitation on the right to enforce a deed of trust. BGG and the Trustee are correct that a federal agency is generally immune from a state statute of limitations. However, this immunity does not extend to a private assignee of a federal agency. Moreover, BGG and the Trustee are arguably correct in asserting that an assignee of a federal agency is entitled to apply a federal statute of limitations to its claim if Congress has prescribed a federal statute of limitations for that claim. However, as will be demonstrated herein, and as BGG and the Trustee have even previously admitted, there is no federal statute of limitations on foreclosure. Thus, in the absence of such a federal statute and in light of the well-settled rule that an assignee of a federal agency is not entitled to the same immunity granted to the federal agency, an applicable state statute of limitations (in this case, Va. Code Ann. § 8.01-242) should be applied.

A. Although The SBA Would Be Immune From Va. Code Ann. § 8.01-242 Since Federal Agencies Are Generally Immune From State Statutes Of Limitations, This Privilege Would Not Extend To Its Private Assignee Where The Assignee Is Asserting A Claim For Its Private Benefit.

The Masseys do not dispute that "[t]he general rule is that a state statute of limitations does not run against the United States once the United States acquires its right." 12A Michie's Jur. Va. & W. Va. *Limitations of Actions* § 5.1 (1989). The United States is not bound by state statutes of limitations nor is it subject to the defense of laches in enforcing its right. *Equal Employment Opportunity Comm'n v. Christianburg Garment Co.*, 376 F. Supp. 1067 (W.D. Va. 1974). Of course, this privilege extends to all agencies of the United States such as the SBA. *See id.* Therefore, "[i]t is firmly established that the United States is exempt from statutes of limitations and laches except where Congress expressly provides otherwise." *United States v. Transamerica Ins. Co.*, 357 F. Supp. 743 (E.D. Va. 1973). Therefore, it follows, and as BGG and the Trustee correctly maintain, that the SBA would not be bound by Va. Code Ann. § 8.01-242. However, this result is fairly irrelevant in light of the fact that this case involves a private assignee of the SBA who is pursuing foreclosure for its own benefit.

"The law appears to be well settled, however, that an assignee of a government claim may not rely upon the government's immunity to the statute of limitations where it is intended to enforce the claim for private benefit." *McClosky & Co. v. Wright*, 363 F. Supp. 223, 227 (E.D. Va. 1973); *see also Shumway v. State*, 163 P.2d 274

(Ariz. 1945); *Brookfield v. Rock Island Improvement Co.*, 169 S.W.2d 662 (Ark. 1943); *Richardson Assocs. v. Lincoln-Devote*, 806 P.2d 790 (Wyo. 1991). Although this rule might appear to be inequitable since it penalizes an assignee for the sovereign-assignor's failure to act, the court in *McClosky* reasoned as follows:

While this construction may in effect penalize the assignee for the laxness of the sovereign-assignor, the contrary result would violate the public policy of the doctrine of repose incorporated in the statute of limitation by allowing suits to be brought many years after an actionable wrong has occurred merely because the government had deferred assignment to a later date.

363 F. Supp. at 228.

There is no question here that BGG and, accordingly, the Trustee, as an assignee of the SBA who is attempting to assert a claim for foreclosure purely for its own benefit, are not entitled to the immunity extended to the SBA. The SBA assigned the deed of trust to BGG for valuable consideration, and BGG and the Trustee are entitled to retain any proceeds garnered by a foreclosure sale of the Masseys' property. "An assignment ordinarily carries with it all rights, remedies, and benefits which are incidental to the things assigned, except for those which are personal to the assignor and for his benefit only." *Wamco III, Ltd. v. First Piedmont Mortg.*, 856 F. Supp. 1076, 1086 (E.D. Va. 1994). There is no question that a federal agency's immunity from a state statute of limitations is purely personal and for its benefit only.

II. 28 U.S.C. § 2415 DOES NOT PLACE TIME RESTRICTIONS ON THE SBA'S ABILITY TO FORECLOSE NOR DOES IT PROVIDE FOR A FEDERAL STATUTE OF LIMITATIONS ON FORECLOSURE UPON WHICH A PRIVATE ASSIGNEE MIGHT BE ABLE TO RELY.

Despite the fact that BGG and the Trustee would not be entitled to assert a general immunity from state statutes of limitations as a result of being an assignee of the SBA, this Court has indicated a willingness to allow a private assignee of a federal agency to take advantage of a federal statute of limitations where such statute addresses the assignee's claim. *See Union Recovery Ltd. Partnership v. Horton*, 252 Va. 418, 477 S.E.2d 521 (1996), *cert. denied*, 520 U.S. 1167 (1997). Relying on the rule announced in *Horton* and other similar cases, BGG and the Trustee contend that the federal statute of limitations on foreclosure can be found in 28 U.S.C. § 2415 and, as a result, they are entitled to rely on this alleged federal statute of limitations on foreclosure as an assignee of the SBA. BGG and the Trustee would have a fairly compelling argument if such a federal statute of limitations on foreclosure actually existed. Of course, there is a total absence of such a federal statute.

Congress has enacted legislation, most notably 28 U.S.C. § 2415, describing the periods within which specified causes of action must be brought by the United States or an agency thereof. 28 U.S.C. § 2415 provides in part that contract actions for money damages that are brought by the United States are barred unless they are filed within six years after the right of action accrues. 28 U.S.C. § 2415(a). Section 2415 also provides that tort actions for money damages that are brought by the United

States are barred unless they are filed within three years after the right of action first accrues. 28 U.S.C. § 2415(b).

Section 2415 makes it clear, however, that neither subsection (a) or (b) applies to actions by the United States for title to or possession of real or personal property. 28 U.S.C. § 2415(c). Subsection (c) merely provides that a party may not assert § 2415 to defend against a foreclosure action brought more than three years (subsection (c)) or six years (subsection (a)) after the claim accrued. Subsection (c) was not, however, an attempt by Congress to announce some sort of statute of limitations applicable to foreclosures. At the very most, it can be said that § 2415 makes it clear that the bringing of a foreclosure action by the United States is not limited to a post-accrual period of six years.

Numerous courts have indicated that Congress has not yet enacted a federal statute of limitations on foreclosure. For example, in *United States v. Alvarado*, 5 F.3d 1425 (11th Cir. 1993), a case which BGG and the Trustee rely upon in their Brief, the court stated, "There is no legislation setting out a statute of limitations specifically applicable to foreclosure actions brought by the United States." *Id.* at 1428 n.9. In *United States v. Warren Brown & Sons Farms*, 868 F. Supp. 1129 (E.D. Ark. 1994), the court commented that "Congress has not established a statute of limitations applicable to foreclosure actions." *Id.* at 1134. In *In re Mongello*, 171 B.R. 662 (Bankr. D. Ark. 1994), the court indicated that the SBA even admitted that there is no federal statute of limitations on foreclosure. "The Government [SBA]

argues that federal law applies and there is no federal statute of limitations governing the SBA's right to foreclose its lien." *Id.* at 663-64. In *Farmers Home Administration v. Mudhead*, 42 F.3d 964 (5th Cir. 1995), the court noted that there is "absent a specific federal limitation" and commented that "28 U.S.C. § 2415(c) does not apply to actions to foreclose mortgages." *Id.* at 966 & n.5.

If this aforementioned judicial commentary was not enough to establish that there is no federal statute of limitations on foreclosure, BGG and the Trustee even admitted in their memorandum in opposition to the Masseys' request for a permanent injunction filed with the trial court that "Congress has not explicitly declared any federal statute of limitations for cases of this nature." (JA 21.) However, BGG and the Trustee have completely retreated from this position in their most recent Brief by making such comments as "there is a controlling federal statute of limitations here" (p. 16), and "Congress has provided a federal statute of limitations for foreclosure in 28 U.S.C. § 2415(c)" (p. 8). BGG and the Trustee's most recent flip-flop is merely a desperate attempt to convince this Court that Congress has gone so far as to enact a federal statute of limitations on foreclosure, even though the case law, and even BGG and the Trustee, have admitted that such is not the case at all.

Moreover, the purpose of 28 U.S.C. § 2415 is to "provide a more balanced and fair treatment of litigants in civil actions involving the government. *Arch Mineral Corp. v. Babbit*, 894 F. Supp. 974, 983 (S.D. W. Va. 1995) (citing S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1996 U.S.C.C.A.N. 2502, 2503). The

Congressional intent in enacting § 2415 is to put the government on parity with those private litigants who may sue and to equalize the position of litigants. *United States Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). It makes little sense that Congress would use § 2415 to establish a statute of limitations on foreclosure, which statute would appear to prescribe no time limit, when the purpose behind the section was to place the government in a similar position to private litigants, which private litigants would clearly be bound by the various states' statutes of limitations on foreclosure (i.e., Va. Code Ann. § 8.01-242).

In addition, in adopting 28 U.S.C. § 2415(c), the Senate merely stated that "[s]ubsection (c) makes it clear that no one can acquire title to government property by adverse possession or other means." 1996 U.S.C.C.A.N. at 2503. When subsection (c) was adopted, the Senate was most concerned with preventing individuals from acquiring government property by adverse possession. There is no indication that Congress intended subsection (c), or the combination of subsection (a) and (c), to be a federal statute of limitations on foreclosure.

As stated above, this Court has allowed a private assignee to rely on a federal statute of limitations when the assignee's claim is addressed by the federal statute. In *Union Recovery Ltd. Partnership v. Horton*, upon which case BGG and the Trustee rely heavily in their Brief, this Court held that a party to which a promissory note was assigned by the Resolution Trust Corporation ("RTC") was entitled to the benefit available under federal law to the RTC of the extended statute of limitations in which

to bring a suit on the note. Several other courts have reached the same conclusion. *See Federal Financial Co. v. Hall*, 108 F.3d 46 (4th Cir. 1997); *National Enterprises, Inc. v. Moore*, 948 F. Supp. 567 (E.D. Va. 1996); *National Enterprises, Inc. v. Moore*, 201 F.3d 331 (4th Cir. 2000). The specific federal statute at issue in *Horton*, 12 U.S.C. § 1821(d)(14)(A), provides in part:

In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(I) in the case of a contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law;

The assignee's claim in *Horton* was to recover on a note and guaranty. This sort of claim is naturally a contract claim. A guaranty is an independent contract. *Bourne v. Board of Supervisors of Henrico County*, 161 Va. 678, 172 S.E. 245 (1934). 12 U.S.C. § 1821(d)(14)(A) pertains specifically to a contract claim and uses the language "in the case of a contract claim." Therefore, 12 U.S.C. § 1821(d)(14)(A) explicitly covered the assignee's claim in *Horton* when the assignee's claim was purely contractual in nature.

The instant case is clearly distinguishable from *Horton* in that it involves a foreclosure claim and there is no federal statute of limitations on foreclosure as there is on a contract claim by the RTC or its assignee. For example, an assignee of the SBA would likely be able to take advantage of the six-year federal statute of

limitations on contract actions for money damages (28 U.S.C. § 2415(a)) if the assignee's action was of such a nature. *See, e.g., FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) (private assignees of FDIC were entitled to same six-year period of limitations as FDIC where assignees were pursuing a contract action for money damages). In other words, when there is an on-point federal statute of limitations addressing an assignee's claim, the assignee may take advantage of that federal statute. However, when the assignee's claim is not governed by a federal statute of limitations, such as a foreclosure claim, it makes little sense for an assignee to invoke a federal statute of limitations pertaining to an unrelated claim. In short, when an assignee of a federal agency brings a claim for which Congress has decided to provide a federal statute of limitations, then the assignee may likely take advantage of that federal statute. However, when the assignee's claim is not governed by any federal statute of limitations and the assignee is not entitled to the immunity of its federal assignor, a court must look elsewhere to find an applicable statute of limitations. Under those circumstances, the state statutes are the obvious and proper place to look.

III. IN THE ABSENCE OF A FEDERAL STATUTE OF LIMITATIONS ON FORECLOSURE, AN ASSIGNEE OF A FEDERAL AGENCY ASSERTING A FORECLOSURE CLAIM IS SUBJECT TO THE STATE STATUTE OF LIMITATIONS ON SUCH.

As stated above, the Trustee, as an assignee of the SBA, who is asserting its foreclosure claim for its private benefit, is not entitled to the general immunity from

state statutes of limitations afforded the SBA as a federal agency. Moreover, there is no federal statute of limitations on foreclosure of which the Trustee could likely avail itself. There being no federal statute of limitations on foreclosure prescribed by Congress, coupled with the rule that the Trustee cannot adopt the immunity of the SBA, its federal assignor, the Virginia statute of limitations on enforcement of deeds of trust and foreclosure (Va. Code Ann. § 8.01-242) should be applied in this case. When there is no limitation prescribed by Congress, the state statute of limitations applies in an action between private parties even if the action is controlled by federal law. *Atlantic Coast Line R.R. v. Virginia Mfg. Co.*, 119 Va. 5, 89 S.E. 103 (1916). When federal law is silent as to the statute of limitations, the limitations period of the forum state is applicable to actions between private parties even where the claims of the parties are governed by federal law. *Maine v. Leonard*, 353 F. Supp. 968 (W.D. Va. 1973); *see also United States v. Thornburg*, 835 F. Supp. 543, 546 (E.D. Cal. 1993) ("[I]n the absence of a federal statute to the contrary, state law regarding the expiration of mortgages should be applied."). Whether the instant case is ultimately governed by federal or Virginia law is fairly irrelevant when federal and Virginia law dictate that in the absence of a federal statute of limitations the court may look to the most appropriate state statute of limitations in cases involving only private litigants.

Of course Va. Code Ann. § 8.01-242 would not apply in this case if the SBA was the party seeking to foreclose. The SBA as a federal agency is immune from state statutes of limitations. However, this case involves an action between two

private parties, and the private party bringing the claim (the Trustee) may not assert the immunity of its federal assignor. If a federal statute of limitations on foreclosure existed, then federal and/or Virginia law dictate that the Trustee would likely be permitted to rely on this federal statute of limitations. However, there being no such federal statute, a court should apply the most appropriate statute of limitations under state law to the private action. Va. Code Ann. § 8.01-242 provides in part:

No deed of trust or mortgage given to secure the payment of money, other than credit line deeds of trust described in § 55-58.2, and no lien reserved to secure the payment of unpaid purchase money, in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien, shall be enforced after twenty years from the date of the deed of trust, mortgage, or other lien.

The deed of trust at the heart of this matter contained no maturity date and was executed by the Masseys on November 30, 1980 and properly recorded on November 30, 1980 in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia. (JA 1, 7-10.) By letter dated July 20, 2001, the Trustee notified the Masseys of its intent to foreclose under the deed of trust. (JA 11.) The Trustee initiated foreclosure proceedings in 2001, more than twenty years after the date of the Masseys' deed of trust. (JA 11, 12.) As such, the Trustee was barred from enforcing the deed of trust pursuant to Va. Code Ann. § 8.01-242. *See generally Allen v. Chapman*, 242 Va. 94, 406 S.E.2d 186 (1991). Thus, the trial judge was correct in enjoining the sale of the property under the deed of trust on the ground that Va. Code Ann. § 8.01-242 barred the Trustee's foreclosure proceeding.

STATEMENT OF THE RELIEF SOUGHT

Based on the foregoing discussion, the Masseys respectfully urge this Court to affirm the Circuit Court's Decree Permanently Enjoining Sale of Property under a Trust Deed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, in compliance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia, twenty copies of the Brief of Appellees have been hand-filed with the Clerk of the Supreme Court and three copies have been mailed, postage prepaid, to counsel for Appellants, Victor F. McDonald, Paige McDonald Assocs., PLLC, Suite 300, 3849 Rosewood Drive, Appleton, Virginia 22953 on this _____ day of June 2002.

Norman M. Malkowich II, Esquire
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