



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 21, 2020

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Raighne C. Delaney
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2311 Wilson Blvd., Suite 500
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Re: *G&G, LLC, et al. v. Thoburn Limited Partnership, et al.*, CL 2019-3800

Dear Mr. Peterson and Mr. Delaney:

On September 4, 2020, the court heard argument on the motion for a temporary injunction filed by Defendant Thoburn Limited Partnership. By order of the same date, the court denied the motion because Defendant had shown no likelihood of success on the merits. Further, the court informed the parties that it would issue a letter opinion explaining the reasons for its finding that Defendant had shown no likelihood of success on the merits.

Facts

As explained in the court's letter opinion of October 30, 2019 (overruling Defendant's Plea In Bar), the material facts, striped to the essentials, are simple: by deed dated June 9, 1998, Thoburn Limited Partnership ("TLP") owns a five acre parcel. TLP executed two Deed of Trust Notes ("Notes"), with a maturity date of June 9, 2000, which were secured by a Deed of Trust, also dated June 9, 1998, which does not state a maturity date. TLP filed a voluntary bankruptcy petition on February 27, 2012, which was dismissed on January 22, 2015 (2 years, 10 months, and 26 days), and filed a second voluntary bankruptcy petition on March 9, 2015, which was dismissed on February 1, 2016 (10 months and 23 days). G&G, LLC ("G&G"), the holder in due course of the Notes, filed

suit on March 18, 2019 to foreclose on the property.

The Parties' Contentions

In support of its argument that it has a likelihood of success on the merits, TLP argues again that the specific-date statute of limitations in Code § 8.01-241(B) bars this action because the twenty-year statute of limitations in Code § 8.01-242 does not apply to this action. G&G responds that the twenty-year statute of limitations in Code § 8.01-242 governs and that, pursuant to Code § 8.01-229(D), the twenty years was tolled during the periods which TLP's bankruptcy proceedings were pending.

Analysis

Code § 8.01-241(A) and (B) provide in pertinent part:

A. No deed of trust . . . heretofore or hereafter given to secure the payment of money . . . shall be enforced after 10 years from the time when the original obligation last maturing thereby secured shall have become due and payable according to its terms

B. Notwithstanding the limitations prescribed by subsection A, a deed of trust . . . given . . . for which the original obligation last maturing thereby secured became due and payable according to its terms between July 1, 1988, and July 1, 2000 . . . shall not be enforced after July 1, 2010. . . .¹

Code § 8.01-242 provides in pertinent part:

No deed of trust or mortgage given to secure the payment of 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

TLP takes the position that Code § 8.01-241(B) applies because it speaks directly to a note which became "due and payable according to its terms between July 1, 1988, and July 1, 2000" and the notes at issue here became due and payable on June 9, 2000.

While TLP's position is understandable if Code § 8.01-241(B) is viewed in

¹ Prior to July 1, 2008, the limitation in Code § 8.01-241 was 20 years; effective July 1, 2008, the limitation was reduced to 10 years. Acts of Assembly 2008, Ch. 226. The General Assembly in 2009 amended Code § 8.01-241 by designating the first sentence as paragraph (A), designating the remainder as Paragraph (C), and inserting a new paragraph (B). Acts of Assembly 2009, Ch. 163. Paragraph (B) was retroactive to July 1, 2008 (the effective date of the amendment the previous year shortening the limitation period to 10 years) and extended the limitations period of Code § 8.01-241 to July 1, 2010 so that any lender who had relied upon the 20 year limitation would have another year to bring an action. Code § 8.01-242 was not amended, leaving its limitation period at 20 years.

isolation from Code § 8.01-241(A) and Code § 8.01-242, Code § 8.01-241(B) cannot be viewed in isolation. Rather, it is the duty of the court "to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. [A] statute is not to be construed by singling out a particular phrase." *VEPCO v. Prince William Co.*, 226 Va. 382, 388 (1983) (internal quotation marks and citation omitted).

In context, Code § 8.01-241(B) is an exception to Code § 8.01-241(A) since it begins with the phrase "Notwithstanding the limitations prescribed by subsection A" Thus, for Code § 8.01-241(B) to apply here, Code § 8.01-241(A) must apply. But, under the facts of this case, Code § 8.01-241(A) does not apply because the Deed of Trust does not state a maturity date; because the Deed of Trust does not state a maturity date, Code § 8.01-242 applies.

The court recognizes that, viewed in isolation from Code § 8.01-242, Code § 8.01-241(A) could also apply because it speaks to all deeds of trust, whether or not they state a maturity date. But if Code § 8.01-241(A) is deemed to apply to the exclusion of Code § 8.01-242, including to deeds of trust that do not state a maturity date, then Code § 8.01-242 is rendered a dead letter.² But "repeals by implication are not favored, and a statute passed later in time":

will not be construed as repealing a former statute on the same subject, unless it be clear that the repugnancy between the two statutes is such that they could not have been designed to remain equally in force; but where the co-existence of the two sets of provisions would be destructive of the object for which the later act was passed, it is clear that there must be an implied repeal. In other words, where the later statute embraces the whole subject of the former, and is plainly substituted for all former statutes on the subject, the former will be deemed to be repealed.

Wayt v. Glasgow, 106 Va. 110, 117-118 (1906).

More recently, the Court has stated that there is a "presumption against a legislative intent to repeal where the later statute does not amend the former or refer expressly to it." *Sexton v. Cornett*, 271 Va. 251, 257 (2006).

Application of *Wayt* and *Sexton* to the 2008 and 2009 amendments to Code § 8.01-241 demonstrates that the amendments did not impliedly repeal Code § 8.01-242. First, the *Sexton* presumption is not overcome because the 2008 and 2009 amendments to Code § 8.01-241 neither amended Code § 8.01-242 nor refer expressly to it. Second, there is not such a repugnancy between the amendments and Code § 8.01-242 that they could have been designed to remain equally in force. Third, the co-existence of the amendments to Code § 8.01-241 and Code § 8.01-242 is not destructive of the object for which the amendments were passed. Fourth, the amendments do not embrace the whole subject of Code § 8.01-242 and were not plainly substituted for Code § 8.01-242.

Further, the court adheres to its previously expressed opinion that Code

² To its credit, TLP expressly acknowledges that its interpretation of Code § 8.01-241(A) and Code § 8.01-242 results in Code § 8.01-242 being "impliedly superseded, if not repealed" Defendant's Memorandum at 4.

§ 8.01-241(B) (enacted as part of the 2009 amendments) is nothing more than a transitional provision to ensure that lenders who had relied on the 20 year statute of limitations would not be barred from bringing an action to enforce a deed of trust when the statute of limitations in Code § 8.01-241 was reduced to 10 years.³

In sum, the 2008 and 2009 amendments to Code § 8.01-241 did not impliedly supersede or repeal Code § 8.01-242. Thus, Code § 8.01-242 may apply to the Deed of Trust at issue here. And, because the Deed of Trust at issue here does not state a maturity date, the court concludes that Code § 8.01-242 applies to them.

TLP further argues that the court erred in finding that Code § 8.01-242 encompasses a deed of trust which does not state a maturity date. In its opinion of October 30, 2019, the court so found because, in Code § 8.01-242, the phrase "in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien" modifies "deed of trust or mortgage given to secure the payment of money" TLP contends that the phrase "in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien" modifies only the phrase "payment of money" and that "payment of money" is another way of referring to a note, so that Code § 8.01-242 encompasses deeds of trust where the underlying note does not fix a maturity date. As the underlying notes in the case at bar *do* fix a maturity date, TLP argues, Code § 8.01-242 does not apply.

The court disagrees. The words "given to secure the payment of money" are words describing the type of deed of trust or mortgage to which the code section applies, *i.e.*, a deed of trust or mortgage which is given to secure the payment of money. This is emphasized by the fact that the phrase following "given to secure the payment of money" is the phrase "in which no date is fixed for the maturity of the debt secured by *such* deed of trust, mortgage, or lien" (emphasis added) and, by using the term "such" deed of trust, mortgage, or lien, is plainly referring back to the deed of trust or mortgage mentioned at the beginning of the sentence. Thus, it is the court's finding that Code § 8.01-242

³ TLP urges the court to take into account a document entitled *Summary As Passed Senate* purportedly explaining the 2009 amendments. The court is, however, forbidden by Code § 1-247 from considering such a summary as an indication of legislative intent:

Any legislative summary associated with a bill, joint resolution or resolution, including any summary appearing on the face of such legislation, shall not constitute a part of the legislation considered, agreed to, or enacted, and shall not be used to indicate or infer legislative intent.

In any event, the *Summary* supports the court's interpretation of the 2009 amendments in stating in the introductory sentence:

Provides a transition period for mortgages and deeds of trust for which enforcement rights may have been cut off as a result of 2008 legislation that reduced the time in which a deed of trust or mortgage may be enforced from 20 years to 10 years after the maturity of the underlying obligation.

The language relied upon by TLP (the second and third sentences) merely explain the mechanism by which the transition period is to be implemented.

applies to a deed of trust in which the maturity date of the underlying note is not found in the deed of trust. As the Deed of Trust in the case at bar does not include the maturity date of the underlying note, Code § 8.01-242 applies and limitation period runs from the date of the Deed of Trust (excluding the tolling times discussed in the court's opinion of October 30, 2019).

The court finds that Defendant had shown no likelihood of success on the merits; as a result, Defendant's motion for a temporary injunction is DENIED.

Sincerely yours,



Richard E. Gardiner
Judge

OPINION LETTER