

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-16

Date issued: May 16, 1988

Requested by: Merle A. Torkelson, McLean County State's Attorney

- QUESTION PRESENTED -

Whether when a judgment of foreclosure includes real property located in more than one county, a county sheriff may sell at an execution sale of the mortgaged property that part of the real property that is not located in his county.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that when a judgment of foreclosure includes real property located in more than one county, a county sheriff may sell at an execution sale of the mortgaged property only that part of the real property that is located in his county.

- ANALYSIS -

Two North Dakota statutes require that all real property subject to an execution sale be sold in the county where the real property is located. N. D. C. C. ' 28-21-05 provides:

28-21-05. Execution issued to sheriff of counties where judgment docketed. When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it may be issued to the sheriff of any county where the property or some part thereof is situated. An execution must be issued from the court of the county which entered the judgment, though more than one execution may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies by the sheriff of that county. or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a certificate of sale to the purchaser as hereinafter provided. If the sheriff of the county to which the execution may be issued was a party in the action which resulted in the judgment or has an interest in any of the property against which the execution may be applied, the execution may be issued to the coroner of that county, and the coroner shall have the same power and authority to enforce the judgment by execution as provided to the sheriff in this chapter.

(Emphasis supplied.) Further, N. D. C. C. ' 28-23-05 provides:

28-23-05. Where sale of real property made. -- All sales of real property, or any interest therein, under execution, must be held at the courthouse, if there is one in the county in which such real property is situated, and if there is no courthouse, then at the door of the house in which the district court was last held, and if there is no courthouse and no district court has been held in the county, then at such place within the county as the sheriff shall designate in his notice of sale.

A third statute, however, could be interpreted to permit a sheriff to sell real property in a foreclosure execution sale even if that property is not situated in the sheriff's county. N. D. C. C. ' 32-19-08 provides:

32-19-08. Sales made by whom and where -- Notice. All sales of mortgaged premises under a judgment of foreclosure must be made in the county where the premises, or some part of them, are situated, by the sheriff of that county or his deputy, or by some person appointed by the court for that purpose, upon the notice and in the manner prescribed by law for the sale of real property upon execution.

(Emphasis supplied.)

N. D. C. C. ' 32-19-08 is ambiguous. The statute could be interpreted to authorize a sheriff to conduct an execution sale of that portion of the mortgaged premises which is under a foreclosure judgment and located in his county, even though another part of the mortgaged premises under the foreclosure judgment lies in another county. Under that interpretation, which would be consistent with the rules set forth in N. D. C. C. " 28-21-05 and 28-23-05, the statute would not give the sheriff the authority to sell real property located in other counties. N. D. C. C. ' 32-19-08 could also be interpreted, however, to permit a sheriff to conduct the sale of the entire mortgaged premises subject to a judgment of foreclosure even though some part of the real property he sells lies in another county.

Neither the North Dakota Supreme Court nor this office has previously addressed the interpretation of N. D. C. C. ' 32-19-08.

When a statute is ambiguous the legislative history of the statute may be considered in determining the statute's interpretation. N. D. C. C. ' 1-02-39.

N. D. C. C. ' 32-19-08 was amended in 1983 by House Bill No. 1382, see 1983 N. D. Sess. Laws ch. 376, ' 1, which was a companion bill to House Bill No. 1381, see Hearings on H. 1381 and H. 1382 before the House Judiciary Committee, 48th Leg. (January 25, 1983) (Tape 22, Side 2). The two bills were proposed by the North Dakota Banker's Association to authorize a lender to bring one suit to foreclose upon all property subject to a mortgage even if the property covered by the mortgage includes land in more than one county. Under the law in existence before these 1983 amendments, a foreclosure action

had to be venued in the county where the real property was located. Therefore, if a mortgage covered land in more than one county, the lender had to institute a separate action in each county that contained any portion of the real property that was subject to the mortgage. Also, the prior law did not permit clerks of court to transcribe foreclosure judgments to other counties. The law, thus, did not permit the execution of a foreclosure judgment in any county other than the county in which the original foreclosure action was instituted. See Hearings on H. 1381 and H. 1382 before the House Judiciary Committee, 48th Leg. (January 25, 1983) (Tape 22, Side 2).

Passage of H. B. No. 1381 and H. B. No. 1382 in 1983 changed the law to allow a lender to bring a single action to foreclose a mortgage even if the foreclosure involves land in more than one county. The amended law further permits the clerk of court in the county in which the suit was brought to transcribe the foreclosure judgment to other counties for the sheriffs in the other counties to sell the land located there. Id.; see also 1983 N. D. Sess. Laws ch. 362; N. D. C. C. ' 28-04-01.

These amendments did not, however, eliminate the long-established requirement that a sheriff sell only real property located in the sheriff's county. At the 1983 hearings on the amendments, Tom Kelsch, testifying on behalf of the bills' proponents, stated:

What will happen then under this law is you go to the first county and start your one action. You get a judgment. You'll have the sheriff sell in that county. If there's not enough money to pay 'em, to pay off the debt, then you go to the clerk. She'll take the judgment. She'll transcribe it to the new county. The sheriff will give notice of the sale there, and then the sheriff will go and sell the property just like he would normally if that action had been started in that county.

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What we could have done, and some states do this, is say once you bring the action in one county and you have the sale, that sheriff can sell all the property, no matter what county it's in, in that one sale. And some states do that. But we thought that was out of line with the history of North Dakota where people are used to having all their mortgages and liens and different documents filed in that particular county. So, in this law you'd still be required to only sell the property in the sale in the one county and then if it was, not enough money was raised, then you'd have to transcribe the judgment, go over to the other county, give another notice, and then sell actually by that sheriff in the county. So, the sheriffs would each, in different counties, would be handling their own sales. So, there'd be notice in both counties.

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What we're doing is, we're having two sales but we're only having one action.

Hearings on H. 1381 and H. 1382 before the House Judiciary Committee, 48th Leg. (January 25, 1983) (Tape 22, Side 2). According to its legislative history, therefore, N.D.C.C. ' 32-19-08 does not permit a sheriff to hold an execution sale of any real property other than real property situated in the sheriff's county.

In conclusion, where a judgment of foreclosure includes real property located in more than one county, a sheriff may sell at an execution sale that portion of the mortgaged premises located in the sheriff's county. The sheriff may not sell at that foreclosure sale any portion of the mortgaged premises not located in the sheriff's county.

- 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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