

# BURR ALERT

## The Rising Tide of Wrongful Foreclosure Lawsuits

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By all accounts, the economic data from last month paints a cloudy housing market picture, with single family home starts, existing home sales, and new home sales registering significant declines. Compounding the problem going forward, the economic data also reflects an uptick in the rate of short-term mortgage delinquencies and that increase in short-term delinquencies will likely translate to an increase in foreclosure measures. With the proliferation of websites and blogs promoting the filing of wrongful foreclosure actions as a defensive mechanism to a bank's or a mortgage servicing company's foreclosure efforts to collect on a past-due obligation, it is reasonable to anticipate a continued rise in the filing of wrongful foreclosure lawsuits. Given the anticipated climb in such actions, this article provides an overview of wrongful foreclosure law in Alabama, Georgia and Mississippi.

A claim of wrongful foreclosure arises when a lender or mortgagee fails to adhere to the terms of a mortgage or fails to comply with the statutory provisions regulating foreclosures. *See Redman v. Federal Home Loan Mortg. Corp.*, 765 So. 2d 630, 636 (Ala. 1999); *see also* ALA. CODE § 35-10-11 to -16. Additionally, where a mortgage provides for a power of sale, under Alabama law, a wrongful foreclosure action lies whenever the power of sale is exercised "for a purpose other than to secure the debt owed by the mortgagor." *Reeves Cedarhurst Dev. Corp. v. First Am. Fed. Sav. & Loan Ass'n*, 607 So. 2d 180, 182 (Ala. 1992). Such an improper purpose includes the mortgagee's goal of oppressing the mortgagor or furthering some interest of another. *Johnson v. Shirley*, 539 So. 2d 165, 168 (Ala. 1988).

In the earliest Alabama Supreme Court opinion on wrongful foreclosure, the plaintiff argued that the mortgage note was ambiguous, and consequently, the defendant wrongfully foreclosed by misinterpreting the ambiguous term. *Dozier v. Vizard Inv. Co.*, 83 So. 572, 573 (Ala. 1919). The court ultimately determined that the specified term was not ambiguous, and therefore, the defendant-mortgagee, in foreclosing per the mortgage terms, did not wrongfully foreclose on the plaintiff's property. *Id.* at 573-74.

Since *Dozier*, the majority of litigation in Alabama has tended to focus on wrongful foreclosure as the exercise of foreclosure power for an improper purpose, rather than in defiance of mortgage terms or statutory mandates. *See, e.g., Paint Rock Properties v. Shewmake*, 393 So. 2d 982, 983-84 (Ala. 1981); *Abel v. Fricks*, 123 So. 17, 18 (Ala. 1929). In *Paint Rock Properties v. Shewmake*, the Supreme Court of Alabama considered whether the mortgagees' contractually authorized exercise of their power of sale could be wrongful based entirely on the apparent unfairness of the foreclosure. 393 So. 2d 982, 984 (Ala. 1981). In that case, the plaintiffs failed to make their first annual mortgage payment. *Id.* at 983. Almost four weeks later, the defendant-mortgagees notified the plaintiffs of their default, demanded payment of the outstanding principal and interest, and outlined the intended foreclosure procedure. *Id.* The plaintiffs acknowledged their failure to

make the required payment, stating it was an oversight, and tendered a check for two annual payments plus the costs incurred by the mortgagees. *Id.* The mortgagees, however, continued with foreclosure proceedings. *Id.*

In their petition to enjoin the foreclosure, the plaintiffs argued that "the foreclosure under the power of sale in the mortgage was being used against equity and good conscience for purposes other than merely to secure repayment of the debt." *Id.* at 983. The Supreme Court of Alabama, in affirming the lower court's findings, determined that the mortgagees' exercise of their power of sale was not for the legitimate purpose of recovery of a debt, but rather served the improper purpose of oppressing the plaintiffs or enabling the defendants to acquire the property. *Id.* at 984. Thus, the wrongful foreclosure on the mortgage was enjoined. *Id.*

While the assessment of a foreclosing party's proper or improper purpose has always been fact specific, a bankruptcy court decision sets forth factors to evaluate in determining whether a wrongful foreclosure claim exists. See *In re Sharpe*, 391 B.R. 117, 153-53 (Bankr. N.D. Ala. 2008). Citing the Alabama Supreme Court opinions *Reeves Cedarhurst Dev. Corp. v. First Am. Fed. Sav. & Loan Ass'n*, 607 So. 2d 180 (Ala. 1992), and *Paint Rock Properties v. Shewmake*, 393 So. 2d 982 (Ala. 1981), the Bankruptcy Court for the Northern District of Alabama compiled a list of four "elements" reviewed by Alabama courts:

1. the actions of the mortgagee were either outside the boundaries of the foreclosure or taken for some purpose other than to secure the debt owed by the mortgagor;
2. the actions of the mortgagee were for some ulterior motive;
3. the power of sale was perverted or used for the mortgagee's or someone else's purpose; or
4. the mortgagee had an ill motive.

*Id.* The court stated that while some or all of these elements need not be met, they can serve as a guideline to determine whether a foreclosure was improper. *Id.* at 153 n.30.

Georgia's approach to wrongful foreclosure disregards the "improper purpose" basis and instead focuses on a lender's/mortgagee's violation of mortgage terms and statutory requirements. See, e.g., *Roylston v. Bank of Am., N.A.*, 660 S.E.2d 412, 417 (Ga. Ct. App. 2008); *Heritage Creek Dev. Corp. v. Colonial Bank*, 601 S.E.2d 842, 845 (Ga. Ct. App. 2004). The Court of Appeals of Georgia has emphasized that violation of a foreclosure statute is a prerequisite to recovery for wrongful foreclosure. *McCarter v. Bankers Trust Co.*, 543 S.E.2d 755, 758 (Ga. Ct. App. 2000). Accordingly, Georgia courts have found summary judgment for a defendant appropriate where a plaintiff has failed to make timely payments, without any consideration of a debtor's alleged justification or a lender's potential underlying improper motive. See *Mitchell v. Interbay Funding, LLC*, 630 S.E.2d 909, 911 (Ga. Ct. App. 2006).

Under Georgia law, to recover for wrongful foreclosure, a plaintiff must show that (1) the foreclosing party owed a legal duty to the plaintiff, (2) there was a breach of that duty, (3) a casual connection existed between the breach and the plaintiff's injury, and (4) the plaintiff suffered damages. *Calhoun First Nat'l Bank v.*

*Dickens*, 443 S.E.2d 837, 839 (Ga. 1994); see also *DeGolyer v. Green Tree Servicing, LLC*, 662 S.E.2d 141, 147 (Ga. Ct. App. 2008). Somewhat similar to a slander of title action, Georgia law also provides for a cause of action for wrongful *attempted* foreclosure. See *Aetna Finance Co. v. Culpepper*, 320 S.E.2d 228, 232 (Ga. Ct. App. 1984). To recover for wrongful attempted foreclosure, a plaintiff-debtor must show (1) defendant's "knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition," and (2) damages directly resulting from this publication. *Id.*; see also *Hauf v. HomEq Servicing Corp.*, 2007 U.S. Dist. LEXIS 9439, at \*19 (M.D. Ga. 2007).

In *Gregorakos v. Wells Fargo National Ass'n*, the Georgia Court of Appeals evaluated a plaintiff's satisfaction of the prescribed elements of a wrongful foreclosure claim while considering the relationship between wrongful foreclosure and deed reformation. 647 S.E.2d 289, 290 (Ga. Ct. App. 2007). In *Gregorakos*, Mary Gregorakos filed suit against Wells Fargo to enjoin foreclosure proceedings and obtain reformation of the lender's security deed. *Id.* Mary Gregorakos's son, Michael, had originally entered into the loan agreement, intending to attach only a portion of his property as collateral. *Id.* Instead, the security deed attached all of Michael's property, including a guest house where his mother lived. *Id.* Michael eventually defaulted on the loan, leading Wells Fargo to commence foreclosure proceedings. *Id.* Michael then entered into an agreement with Wells Fargo whereby the lender would suspend foreclosure proceedings to give Michael an opportunity to obtain new financing, and in exchange, Michael relinquished his right to challenge the validity of the security deed. *Id.*

Michael ultimately did not satisfy the Wells Fargo loan, and upon commencement of foreclosure proceedings, Mary filed suit against the lender. *Id.* at 291. The trial court granted summary judgment for Wells Fargo, holding that Mary, as a stranger to the original transaction, lacked standing to bring an action for reformation, and as such, her wrongful foreclosure claim was moot. *Id.* The Court of Appeals affirmed. *Id.* Because Mary had no legal interest in the property when the security deed was created, Wells Fargo owed Mary no duty. *Id.* Therefore, Mary could not recover for wrongful foreclosure.

Mississippi traces its interpretation of wrongful foreclosure back to the common law action of "trespass on the case." *Southern Land & Resources Co. v. Dobbs*, 467 So. 2d 652, 655 (Miss. 1985). Like Alabama, Mississippi law also recognizes a cause of action for wrongful foreclosure where the foreclosing party acts for an improper purpose. "[A] wrongful foreclosure occurs when a foreclosure is attempted solely for a malicious desire to injure the mortgagor or the foreclosure is conducted negligently or in bad faith to the mortgagor's detriment." *Curlee v. Wells Fargo Home Mortg.*, 2007 U.S. Dist. LEXIS 89376, \*6-7 (N.D. Miss. Dec. 5, 2007); see also *National Mortg. Co. v. Williams*, 357 So. 2d 934, 936 (Miss. 1978). However, at the same time, an action for wrongful foreclosure is not viable where a plaintiff has not satisfied his/her mortgage obligations. See *Neely v. Regions Bank, Inc.*, 2007 U.S. Dist. LEXIS 11775, \*4-5 (N.D. Miss. Feb. 20, 2007).

In *Temple-Inland Mortgage Corp. v. Jones*, the plaintiff-mortgagors filed suit against their mortgagee, stemming from the mortgagee's alleged mishandling of a threatened foreclosure. 749 So. 2d 1161, 1164 (Miss. Ct. App. 1999). Throughout the defendant's servicing of the plaintiffs' loan, the plaintiffs were consistently behind in their monthly payments; they paid late, regularly accruing late fees, and when they did pay, the amount tendered was never in full satisfaction of the installment due. *Id.* at 1163. After five months of such delinquency, the defendant sent the plaintiffs a letter outlining the outstanding balance and notifying them of the intent to foreclose. *Id.* After receiving a second notice from the defendant, the plaintiffs sent a check for fifteen hundred dollars. *Id.* at 1164. The defendant returned the check, notifying the plaintiffs that

it could not accept less than the amount due. *Id.* The pattern of sending an insufficient check and subsequent return continued for four months until the plaintiffs filed suit. *Id.*

The trial court held that the plaintiffs were in default, but because of "glaring defects" in the defendant's accounting, it would be unjust to require the plaintiffs to satisfy the amount due. *Id.* at 1164. The trial court found the defendant's action "unconscionable and unfair and totally uncalled for" and, therefore, awarded the plaintiffs actual and punitive damages. The Court of Appeals of Mississippi affirmed the trial court's ruling to the extent it found the plaintiffs in default, but reversed the judgment pertaining to damages and the defendant's failure to notify the plaintiffs of the amount due. *Id.* at 1170.

Looking at the defendant's alleged failure to provide plaintiffs with an accurate statement of the amount due, the appeals court found that the correspondence from the defendant clearly stated the amount in arrears and provided a phone number for the plaintiffs to call for assistance. *Id.* at 1166. Next turning to the trial court's finding of unconscionability, the appeals court found that the defendant merely exercised its right under the loan agreement. *Id.* Letters and notices were polite and non-threatening, and the defendant tried to work with the plaintiffs for months to avoid foreclosure. *Id.* The appeals court further determined that the plaintiffs showed no injury or damages and therefore were not entitled to recover actual or punitive damages. *Id.* at 1169.

In keeping with the states' varying interpretations of an action for wrongful foreclosure, Alabama, Georgia, and Mississippi provide varying means of recovery for a successful plaintiff. While Alabama courts have not established a bright line rule with regard to available recovery, where a plaintiff has been successful in proving his wrongful foreclosure claim, the courts have provided both equitable and legal remedies. *See, e.g., Paint Rock Properties v. Shewmake*, 393 So. 2d 982, 984 (Ala. 1981) (enjoining foreclosure proceedings); *Thomas v. Bank of Hurtsboro*, 11 So.2d 370, 373 (Ala. 1942) (finding the trial court erred in failing to award damages for lost use of the wrongfully foreclosed property); *Smith v. Stringer*, 125 So. 226, 227 (Ala. 1929) (finding the mortgagee liable for damage to wrongfully foreclosed property). Under Mississippi law, a mortgagor must choose whether to seek cancellation of the foreclosure or damages resulting from the foreclosure. *Southern Land & Resources Co. v. Dobbs*, 467 So. 2d 652, 656 (Miss. 1985). Georgia applies the same principle when a mortgagor seeks to recover for the loss of value to the property. *Clark v. West*, 395 S.E.2d 884, 885 (Ga. Ct. App. 1990). However, Georgia also allows a party to recover damages and set aside a foreclosure when the damages claimed redress another loss or breach of duty. *Id.* Correspondingly, under Georgia law, an aggrieved party can seek damages for mental anguish related to the wrongful foreclosure. *DeGolyer v. Green Tree Servicing, LLC*, 662 S.E.2d 141, 147-48 (Ga. Ct. App. 2008) ("[S]uch action for damages for emotional distress is treated as an action for intentional infliction of emotional distress." (quoting *McCarter v. Bankers Trust Co.*, 543 S.E.2d 755 (Ga. Ct. App. 2000))).

Under both Georgia and Mississippi law, a plaintiff can recover punitive damages for a wrongful foreclosure action. *See, e.g., Hauf v. HomeEq Servicing Corp.*, 2007 U.S. Dist. LEXIS 9439, at \*24-25 (M.D. Ga. 2007); *First Union Nat'l Bank v. Cook*, 477 S.E.2d 649, 656 (Ga. Ct. App. 1996); *Eastover Bank for Sav. v. Hall*, 587 So. 2d 266, 272 (Miss. 1991). Alabama law is less clear on the availability of punitive damages. Alabama courts have not discussed the recovery of punitive damages in a wrongful foreclosure action, and therefore, it is arguable that punitive damages are unavailable.

In conclusion, because of the increase in wrongful foreclosure lawsuits, lenders, mortgagees and mortgage servicing companies will all be well served by ensuring that they not only follow the terms of a mortgage, but also adhere to the underlying philosophy behind foreclosure, particularly in Alabama and Mississippi.

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