

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30664

EDMOND E. WOOD  
ANDREA T. WOOD

Debtors

EDMOND E. WOOD and  
ANDREA T. WOOD

Plaintiffs

v.

Adv. Proc. No. 01-3054

KENNETH R. ROSS,  
MYRTLE ERWIN, and  
JOHN W. CLEVELAND, TRUSTEE

Defendants

**MEMORANDUM ON DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

On April 16, 2001, the Debtors filed a Complaint to Determine Validity of Foreclosure Proceeding, to Quiet Title and to Avoid Transfer of Property (Complaint). The Complaint asks the court to set aside the February 5, 2001 foreclosure sale of certain real property owned by the Debtors.

Now before the court is the Defendants' Motion for Summary Judgment filed on August 2, 2001. All parties have submitted briefs and affidavits in support of their respective positions regarding summary judgment.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(E), (O) (West 1993).

## I

The Debtors purchased two parcels of real estate from Defendant Kenneth R. Ross (Ross) on January 22, 1999. As part of the consideration, the Debtors executed a Deed of Trust on at least one parcel (Parcel One) in favor of Ross. Defendant John W. Cleveland, Trustee (the Trustee), was later named as substitute trustee under the Deed of Trust.

Regarding foreclosure, the Deed of Trust provides in material part:

At the option of Beneficiary, the Beneficiary may enforce or foreclose this Deed of Trust, or enforce the obligations of the Grantor secured hereby, through any and all means authorized under the laws of the State of Tennessee, and after giving all notices required by Tennessee law.

The time period required for notices of foreclosure sale under Tennessee law is governed in relevant part by TENN. CODE ANN. § 35-5-101:

(a) In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of such sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made.

(b) The first publication shall be at least twenty (20) days previous to the sale.

TENN. CODE ANN. § 35-5-101(a)-(b) (1996).

On February 5, 2001, the Trustee sold Parcel One to Defendant Myrtle Erwin (Erwin) at a foreclosure sale. Advance notice of the sale was placed in three editions of the Monroe County *Advocate-Democrat* (the *Advocate*) newspaper. The earliest of the three editions was dated January 17, 2001 - only nineteen days prior to the foreclosure sale.

## II

Because the Trustee allegedly did not provide a twenty-day notice as required by the Deed of Trust and Tennessee law, the Debtors ask the court to set aside the sale to Erwin.<sup>1</sup> In support of their Motion for Summary Judgment, the Defendants have produced an Affidavit of David Smith (Smith), the Circulation Editor of the *Advocate*. Smith states that 650 copies of his newspaper are delivered to newsstands at 6:30 p.m. on the evening preceding the date printed on

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<sup>1</sup> The Defendants point out that, even if the Trustee did fail to provide adequate notice, TENN. CODE ANN. § 35-5-106 directs that a sale failing to comply with that chapter's notice requirements, including § 35-5-101, "shall not, on that account, be either void or voidable." TENN. CODE ANN. § 35-5-106 (1996) (emphasis added). However, in their Response to Motion for Summary Judgment, the Debtors counter that they do not seek to void the sale for failure to comply with § 35-5-101, but rather for failure to comply with the requirements of the Deed of Trust. *See Progressive Bldg. & Loan Ass'n v. McIntyre*, 89 S.W.2d 336, 336 (Tenn. 1936) (The notice requirements of a deed "must be followed strictly by the trustee, in order to deprive the makers of their title by means of a sale thereunder."); *cf. Henderson v. Galloway*, 27 Tenn. 692, 1848 WL 1802, at \*2 (Tenn. 1848) (If notice of sale is not provided to the grantor as required by the deed, "the sale is unauthorized and void and will communicate no title to the purchaser."); *Cowan v. Child*, 1993 WL 141552, at \*4 (Tenn. Ct. App. May 5, 1993) (same); *But see McSwain v. American Gen. Fin., Inc.*, 1994 WL 398819, at \*3 (Tenn. Ct. App. July 22, 1994) (Under § 35-5-106, "a sale is not rendered void by failure to advertise as required by law or by the deed of trust.").

the newspaper. Accordingly, the Defendants assert that the notice of foreclosure was in fact “published” twenty days prior to sale.

In response, the Debtors point to the Trustee’s Deed to Erwin, which states that the property was first advertised on January 17, 2001, and to the Trustee’s Notice of Foreclosure Sale, which bears a first “Insert Date” of January 17, 2001.<sup>2</sup> Through this evidence, the Debtors have demonstrated a “genuine issue of material fact” which precludes summary judgment. See FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2509-12 (1986).

The Defendants’ Motion for Summary Judgment must therefore be denied. An order consistent with this Memorandum will be entered.

FILED: September 10, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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<sup>2</sup> The Debtors also question whether a 6:30 p.m. distribution qualifies as a day of “publication” due to the late hour of the newspaper delivery. Additionally, the court notes that Mr. Smith’s Affidavit does not indicate whether the subject newsstands are still open at 6:30 p.m. or, if so, how many papers are typically purchased on the first night.

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Defendants

**ORDER**

For the reasons stated in the Memorandum on Defendants' Motion for Summary Judgment filed this date, the court directs that the Motion for Summary Judgment filed by the Defendants on August 2, 2001, is DENIED.

SO ORDERED.

ENTER: September 10, 2001

BY THE COURT

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE