

IN THE SUPREME COURT OF MISSOURI

—
Appeal No. SC85773

—
KEVIN S. BROWN AND MELODY L. BROWN,

Respondents,

vs.

FIRST HORIZON HOME LOAN CORPORATION,

Appellant.

—
Appeal from Division II of the Circuit Court of Stoddard County, Missouri

Honorable Joe Z. Satterfield

—
BRIEF OF RESPONDENT

—
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POINTS RELIED ON

- I. **THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE PLAINTIFF'S DEMAND LETTER COMPLIED WITH THE REQUIREMENTS OF MO. REV. STAT. SECTION 443.130.**

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- II. **THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE DEFENDANT DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE TO PLAINTIFFS.**

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III. **THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE MO. REV. STAT. SECTION 443.130 IS SUFFICIENTLY CLEAR THAT NO PERSON OF COMMON INTELLIGENCE MUST GUESS AT ITS MEANING AND DOES NOT VIOLATE ARTICLE 1, SECTION 10 OF THE CONSTITUTION OF MISSOURI NOR THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

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Constitution of Missouri, Article I, Section 10

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ARGUMENT

I. **THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE PLAINTIFF'S DEMAND LETTER COMPLIED WITH THE REQUIREMENTS OF MO. REV. STAT. SECTION 443.130.**

A. Standard of Review.

Appellate review of a Summary Judgment is essentially de novo. ITT Commercial Finance v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The trial court's entry of Summary Judgment may be affirmed under any theory which is supported by the record. In Re Estate of Blodgett, 95 S.W.3d 79, 81 (Mo.banc 2003). Statutes are presumed constitutional. In re Marriage of Kohring, 999 S.W.2d 228, 231 (Mo.banc1999). A statute will not be found unconstitutional "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Id.* Because of the presumption of constitutionality, the burden to prove a statute unconstitutional is upon the party bringing the challenge. Linton v. Missouri Veterinary Medical Bd., 988 S.W.2d 513, 515 (Mo. banc 1999).

B. The Browns Invoked R.S.Mo. §443.130.

The Browns sent First Horizon a "demand letter" as required by § 443.130, on March 4, 2003, received by First Horizon on March 7, 2003. (SLF 1, 2). To prevail upon a claim based upon § 443.130, the plaintiff must prove: (1) payment of debt; (2) demand for a deed of release; and (3) tender of cost. Trovillion v. Countrywide Funding Corp., 910 S.W. 822, 824

(Mo.App. E.D. 1995), citing Dunkin v. Mutual Benefit Life Ins. Co., 63 Mo. App. 257, 260-261 (Mo.App. W.D. 1895). Mo. Rev. Stat. § 443.130.2 sets forth the requirements of the Mortgagor (the Browns) to qualify for the penalties imposed by the statute, to wit:

443.130.2 To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

The Browns demand letter was sent certified mail return receipt requested and received by First Horizon on March 7, 2004, (SLF 2); thus the Browns have met the requirement of the first sentence of § 443.130.2. Furthermore, the Browns' demand letter stated that certified funds had been advanced and included the tracking number of the overnight delivery service and included a check for tender of recording fees, (SLF 1) which is good and sufficient evidence that the debt secured by the deed of trust was satisfied and that the expense of filing and recording the release was advanced; thus the Browns have met the requirements of the second sentence of § 443.130.2., as well as the requirements as set forth in Trovillion.

A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty. No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested. Martin v. STM Mortgage Co., 903 S.W.2d

548, (Mo.App. W.D. 1995); quoting 59 C.J.S. Mortgages § 474c (1949).

The statute does not require the Mortgagor, the Browns in the case at hand, to cite the statute or to explain to Mortgagee, First Horizon, of the time requirements imposed by the statute, in the demand letter, as the Appellant argues. If one were to follow Appellant's argument that the Browns have the burden of explaining the law to Appellant, the Browns' demand letter would also have to inform the Mortgagee of the penalty for non-compliance or Appellant would argue that it did not know a penalty would be imposed for failure to comply with the statute and therefore, it should not be penalized. The Browns had no duty to educate Appellant of the requirement of § 443.130, as Appellant argues. Individuals, as well as corporations, are presumed to know the law. Mo. Highway & Transp. Comm'n v. Myers, 785 S.W.2d 70, 75 (Mo.banc 1990); In re Estate of Pittman, 16 S.W. 3d 639, 643 (Mo.App. 2000); Deal v. Bank of Smithville, 52 S.W.2d 201, 205 (Mo.App. 1932). Appellant is presumed to be aware of § 443.130 and the requirements of the statute.

Appellant's reliance on Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 679-80 (Mo. App. S.D. 2002) is misguided. The holding of Lines is limited to the peculiar facts of that case. Specifically, in Lines, there had been prior litigation between the parties and a settlement agreement had been reached between the parties, which in part, required the release of the deed of trust. The Southern District found that the terms of the settlement agreement, which was referenced in Mr. Lines demand letter, was incorporated into the demand letter sent by Mr. Lines, and therefore, the bank had not been put on notice that the demand letter was a statutory demand, as opposed to a demand pursuant to the settlement agreement reached between the

parties.

The Browns and First Horizon had not had any prior litigation between them. They had not executed any type of such settlement agreement as the parties in the Lines case. Appellant could not have been confused as to whether the Browns' letter was a statutory demand or demand pursuant to a settlement agreement.

Appellant further argues that the demand the Browns made for "*full and complete release be made*" is a fatal flaw in their demand letter. Respondent acknowledges the language of § 443.130 provides that a "*sufficient deed of release*" be delivered to the person making satisfaction of the underlying promissory note. However, in the case at hand, the Browns loan had been paid in full - only a full release, as opposed to a partial release, could be sufficient.

Finally, Appellant argues that due to the Browns complying with the statute and tendering cost for recording, they have misled, or tricked, Appellant into mailing the Deed of Release to the Recorder of Deeds instead of to the Browns. Once again, Appellant is presumed to know the law. The requirement of § 443.130 is to deliver the Deed of Release to the person "*making satisfaction.*" (emphasis added.) The Browns did not direct Appellant to deliver the Deed of Release to the Recorder of Deeds in their demand letter (SLF 1). It was the implementation of Appellant's "Company Liability Policy" which dictated Appellant to send the deed of release to the Recorder of Deeds, as opposed to the Browns. (A1) Appellant clearly realized its' duty to provide a Deed of Release direct to the Browns when it provided the Browns with a duplicate Release on April 10, 2003, by a "Priority Release Specialist", some 24 days after receipt of the Browns' demand letter. (A2, A3).

Appellant also argues that the Browns have a statutory duty under § 443.130 to make the check for the recording fees payable to Appellant, as opposed to the Recorder of Deeds. The statute only requires that “the expense of filing and recording the release was advanced.” § 443.130.2. Appellant’s argument must fail.

The legislature amended § 443.130 in 1994. Missouri has similar statutes dating back to at least 1899. Trovllion at 823. The legislature was keenly aware of the huge problems created by un-released Deeds of Trust and the habits of Mortgagees not timely releasing their liens, even though they have been paid in full. The legislature was keenly aware of the sizeable penalty for failure to comply with the statute. The legislature wanted to provide motivation to the Mortgagors to do “the right thing” and release their liens in a timely fashion. Mortgagors routinely file their Deeds of Trust within hours. Why is it unfair to think they should file their Releases with three weeks or 15 business days?

Is Mo. Rev. Stat. § 443.130 somewhat of a “trap” for lenders? Sure. Do lenders have “traps” for borrowers who are a day late with their monthly payment? Sure. If lenders would file their Deeds of Release within 15 business days as a matter of course, just as borrowers make monthly payments, they would never be penalized. It is inexcusable that lenders do not promptly file their Releases, even without demand letters being sent. Appellant and other lenders are very much aware of § 443.130. The demand sent by the Browns put Appellant on notice that a prompt filing was expected.

II. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE DEFENDANT DID

NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE TO PLAINTIFFS.

The standard of review for this point is the same as for Point I, supra.

Even if Appellant mailed a Deed of Release to the St. Louis County Recorder on March 21, 2003, Appellant failed to comply with § 443.130 in that the statute requires delivery to the person making satisfaction, not to the recorder. The Browns did not direct Appellant to mail the Deed of Release to the recorder. Appellant chose to do so (presumably, to follow Appellant's company policy, not the direction of the Browns.) (A1). Appellant chose to assume the risk of non-compliance with this statute when it mailed the Deed of Release to the St. Louis County Recorder of Deeds. Of interest, the only evidence the Release was mailed on March 21, 2003, was an Affidavit of Edward Hyne, who had no personal knowledge of the mailing of the Release, but stated that Appellant's "internal File Tracker System" indicated that a Deed of Release was sent for recording to St. Louis County on March 21, 2003. (LF 22). Said Affidavit does not indicate whether the Release was sent to the Recorder of Deeds of St. Louis County or some other third party in St. Louis County; nor does the Affidavit state whether said Release was sent by U.S. Mail postage prepaid. (LF 22).

The only proof a Release was executed by Appellant is the Duplicate Release dated April 10, 2003, and mailed to the Browns on April 10, 2003 (A1, A2, A3) and the recording of a Release on April 8, 2003, in the St. Louis County Recorder of Deeds. (LF 23).

III. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE MO. REV. STAT. SECTION 443.130 IS SUFFICIENTLY CLEAR THAT NO PERSON OF

COMMON INTELLIGENCE MUST GUESS AT ITS MEANING AND DOES NOT VIOLATE ARTICLE 1, SECTION 10 OF THE CONSTITUTION OF MISSOURI NOR THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The standard of review for this point is the same as for Point I, supra.

Appellant raises the violation of Article 1, Section 10 of the Constitution of Missouri for the first time on appeal. To properly preserve a constitutional challenge for appeal, the general rule is that the issue must be raised at the earliest opportunity. Call v. Heard, 925 S.W.2d 840, 847 (Mo.banc 1996); Hoskins v. Business Men's Assur., 79 S.W.3d 901 (Mo.banc 2002). Appellant failed to raise this constitutional challenge in its' Answer (LF 7-10) or Motion for Summary Judgment or Suggestions in Support thereof. (LF 11-20). This challenge should be dismissed.

The principles relating to a void for vagueness challenge to the Fourteenth Amendment of the United States Constitution were recently restated by this Honorable Court in Harjoe v. Herz Financial, 108 S.W.3d 653, 655 (Mo.banc 2003):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. State v. Mahan, 971 S.W.2d 307, 312 (Mo.banc 1998). The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. *Id.* The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite

warning as to the proscribed conduct when measured by common understanding and practices. State v. Schleiermacher, 924 S.W.2d 269, 276 (Mo.banc 1996). However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. State v. Duggar, 806 S.W.2d 407, 408 (Mo.banc 1991). Moreover, it is well established that "if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect." *Id.* (quoting from City of St. Louis v. Brune, 520 S.W.2d 12, 16-17 (Mo. 1975)). Finally, courts employ "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957-58 (Mo.banc 1999).

Applying these principals, the constitutional challenge should be rejected.

Appellant argues that it is confused as to why the legislature would require that the expense of filing and recording fees would be required when the statute states the Release shall be delivered to the person making satisfaction of the underlying note. Arguably, the legislature attempted to balance the rights of both the Mortgagor and Mortgagee, taking into consideration the Mortgagor's need for assurance that the lien has been released promptly by the Mortgagee after payment in full, and thus, requiring the Release be delivered to the person making satisfaction; and the Mortgagee's internal policies, and industry customary procedures, which require the delivery of the Release to the Recorder of Deeds to avoid loss of original Releases

by Mortgagors, and thus, requiring of the tendering of costs for recording of the release.

Upon receipt of a demand letter, the Mortgagee may: (A) deliver the Release to the person making satisfaction, together with the cost that the Mortgagor had tendered; (B) deliver the Release to the recorder and hope that it is recorded and delivered to the person making satisfaction in a timely fashion; (C) execute duplicate original Releases and deliver one Release to the person making satisfaction and deliver one Release to the Recorder of Deeds, together with the cost that had been advanced, which is the Mortgagee's safest choice of action. With today's advanced technology and word processing programs, the legislature may have recognized that producing duplicate originals is not a burden upon Mortgagees and that may be the best way to balance the interest of Mortgagors and Mortgagees..

Appellant may not like its options when it receives a demand letter pursuant to § 443.130, but the statute is not so vague as to be unenforceable. A person of ordinary intelligence, upon reading of § 443.130, gains a sufficiently definite understanding as to the proscribed conduct. Appellant's conduct was not caused by confusion created by the statute. Appellant conduct was part of its standard operating procedures and it simply did not comply with the terms of the statute in a timely basis.

CONCLUSION

For the reasons set forth above, the judgment of the trial court in favor of the Browns should be sustained.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed, first class, postage prepaid, to the person listed below this 11th day of May, 2004.

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06 (b) AND (c)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06 (b) and that the number of words in the Brief are 3,381. The undersigned relied on the word count feature of his word processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.

James R. Tweedy

APPENDIX

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