

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

WILLIAM TURNER, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 4:00-CV-833 CAS
v.	)	
	)	
UNITED STATES SMALL BUSINESS	)	
ADMINISTRATION, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on remaining defendant Small Business Administration’s (“SBA”) motion to dismiss or in the alternative for summary judgment.<sup>1</sup> Plaintiffs oppose the motion. For the following reasons, defendant’s motion to dismiss and alternative motion for summary judgment will be granted.

**Background.**

Plaintiffs William and Mary Turner originally filed their Petition for Temporary Restraining Order, Temporary Injunction and Permanent Injunction in the Circuit Court of St. Louis County, Missouri on May 10, 2000. Plaintiffs sought to restrain the SBA from foreclosing on certain real property located at 828 North Rock Hill in St. Louis County (the “Property”). The petition alleges that although the SBA claims it has a deed of trust on the Property, plaintiffs deny that SBA has a deed, and assert that any claim of SBA to the Property is barred by the statute of limitations, and was discharged in plaintiffs’ bankruptcy proceeding in 1973. Plaintiffs also contend that a title search conducted by Netco Title Company did not reveal an SBA deed of trust on the Property, and

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<sup>1</sup>Plaintiffs’ claims against defendant Netco Title Company were dismissed without prejudice on January 3, 2001, for failure to comply with Federal Rule of Civil Procedure 4(m).

that Netco Title Company had received a release from the SBA stating it had no claim on the Property.

The state court issued a temporary restraining order on May 10, 2000, and the SBA moved to dismiss the restraining order, but the state court denied the motion on May 15, 2000. The SBA removed the action to this Court on May 18, 2000. SBA filed its answer, which asserts that plaintiffs' petition fails to state a claim upon which relief may be granted, it has a valid first deed of trust on the Property, and the release relied upon by Netco is a forgery.

The SBA moves to dismiss plaintiffs' claims for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment. Neither the SBA's motion nor its memorandum in support indicate the basis for its motion to dismiss, but the notice of motion states in part, "The defendant submits that it cannot be enjoined . . . ." The Court concludes the basis for the SBA's motion to dismiss is contained in the third argument in its memorandum in support, that pursuant to 15 U.S.C. § 634(b)(1), the SBA may not be enjoined from exercising its administrative powers in foreclosing its deed of trust. The SBA also asserts that it holds a valid, recorded deed of trust on the Property by assignment, and that (1) plaintiffs' bankruptcy discharge does not discharge the in rem lien of the deed of trust; (2) statutes of limitation are not a bar to foreclosure by the United States; (3) the purported release is a forgery; and (4) laches is not a bar to a federal action.

Plaintiffs do not respond to the assertion that a federal statute precludes any attempt to enjoin the SBA from carrying out the foreclosure. Plaintiffs respond that any debt they owed to SBA was discharged in bankruptcy in 1973, and that it would constitute unjust enrichment to permit defendant to foreclose on the Property because they have maintained and upgraded it while SBA has taken no action to foreclose on the deed of trust for 28 years. Finally, plaintiffs argue that SBA released its deed of trust on the Property, and cannot attack the recorded release with an affidavit.

### **Standards of Review.**

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. A complaint shall not be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his or her claim. Id.; see also Neitzke v. Williams, 490 U.S. 319, 327 (1989). When ruling on a motion to dismiss, this Court must take the allegations of the complaint as true. The Court must liberally construe the complaint in a light most favorable to the plaintiff. Midwestern Machinery, Inc. v. Northwest Airlines, Inc., 167 F.3d 439, 441 (8th Cir. 1999); Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649, 651 (8th Cir. 1998).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the Court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Fed. R. Civ. P. 56(c).

Once the moving party has met its burden, the non-moving party may not rest on the allegations of its pleadings but must set forth specific facts, by affidavit or other evidence, showing

that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Anderson, 477 U.S. at 257; City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc., 838 F.2d 268, 273-74 (8th Cir. 1988). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

### **Discussion.**

#### **I.**

The Court first addresses SBA's motion to dismiss, which asserts that dismissal is required because 15 U.S.C. § 634(b)(1) precludes the issuance of injunctive relief against the SBA. This section provides in pertinent part:

(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may  
(1) sue and be sued in . . . any United States District Court, and such jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property.

15 U.S.C. § 634(b)(1).

This provision waives sovereign immunity by allowing the SBA's Administrator to sue and be sued and confers jurisdiction on the district courts to hear actions against the Administrator. See Expedient Services, Inc. v. Weaver, 614 F.2d 56, 58 (5th Cir. 1980). The SBA has cited no case law interpreting the provision, but the Court in independent research has found cases which state that it prohibits the issuance of an injunction against the Administrator. See, e.g., Emplanar, Inc. v. Marsh, 11 F.3d 1284, 1290 (5th Cir.), cert. denied sub nom Emplanar, Inc. v. West, 513 U.S. 926 (1994); Little v. United States, 489 F. Supp. 1012, 1016 (C.D. Ill. 1980), aff'd, 645 F.2d 77 (7th Cir. 1981)

(unpublished table decision); Expedient Services, 614 F.2d at 58 (“a suit praying solely for injunctive relief against the Administrator is barred by the language of section 634(b)(1)”); Mar v. Kleppe, 520 F.2d 867, 869 (10th Cir. 1975); Palmer v. Weaver, 512 F. Supp. 281, 285 (E.D. Pa. 1981); Jets Services, Inc. v. Hoffman, 420 F. Supp. 1300, 1308-09 (M.D. Fla. 1976); cf. Mueller v. Abdnor, 1989 WL 62191, \*1, No. 87-1965C(6) (E.D. Mo. June 7, 1989) (holding that language of 15 U.S.C. § 634(b)(1) precluded claim for injunctive relief in the nature of specific performance).

Other courts, however, have found that § 634(b)(1) does not bar injunctions in all circumstances. See Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987) (holding that declaratory judgment invalidating an SBA certificate of competency was not the equivalent of injunctive relief against SBA; stating in dicta that even if declaratory judgment were to be considered injunctive relief, district court had jurisdiction to enter injunction by virtue of 28 U.S.C. 1491(a)(3)); Cavalier Clothes, Inc. v. United States, 810 F.2d 1108, 1111-12 (Fed. Cir. 1987); Related Indus., Inc. v. United States, 2 Cl.Ct. 517 (Cl. Ct. 1983). These decisions are readily distinguished because each was based on 28 U.S.C. § 1491(a)(3), now repealed, which specifically authorized the United States Court of Federal Claims to issue injunctive relief against the SBA. A few other decisions have stated that injunctive relief may be available against the Administrator when he exceeds his authority, but in each case the court refused to issue such relief. See, e.g., Valley Forge Flag Co., Inc. v. Kleppe, 506 F.2d 243, 245 (D.C. Cir. 1974); Ricks v. United States, 434 F. Supp. 1262, 1272 (S.D. Ga. 1976); Dubrow v. Small Business Admin., 345 F. Supp. 4, 7 (C.D. Cal. 1972).

The Eighth Circuit does not appear to have addressed this issue. This Court is inclined to agree with the weight of authority and hold that the plain language of § 634(b)(1) precludes the issuance of injunctive relief against the SBA. As plaintiffs’ complaint seeks only injunctive relief, it should therefore be dismissed for failure to state a claim.

## II.

In the alternative, in the event it is appropriate to determine whether the SBA has attempted to act outside of its authority prior to determining if injunctive relief may be issued against it, the Court holds that the SBA is entitled to summary judgment on plaintiffs' claims for injunctive relief because there is no genuine issue of material fact as to whether the SBA has exceeded its authority in attempting to foreclose on plaintiffs' Property.

### **Findings of Fact.**

With the appropriate standard in mind, the Court finds the following facts for purposes of the instant motion for summary judgment. The factual findings are taken largely from the SBA's exhibits, which are not controverted by plaintiffs except as noted herein.<sup>2</sup>

Exhibits attached to the SBA's memorandum in support show that SBA, by assignment, is the owner and holder of a deed of trust on the Property dated October 10, 1972, duly recorded at Book 6619, Page 1233, in the Office of the Recorder of Deeds for St. Louis County. (Def.'s Ex. 1.) The assignment of the secured note is recorded at Book 6696, Page 1185, in the Office of the Recorder of Deeds for St. Louis County. (Def.'s Ex. 2.) The terms of the deed of trust provide for SBA's right to foreclosure. (See Def.'s Ex. 1.) A title search on the Property reflects recording of the SBA deed of trust and assignment but does not reflect recording of a deed of release from SBA. (Def.'s Ex. 3.)

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<sup>2</sup>The Court notes that the SBA did not comply with Local Rule 4.01(E), which requires a memorandum in support of a motion for summary judgment to include a statement of uncontroverted material facts, to be set forth in separately numbered paragraphs and indicating whether each fact is established by the record. This is a serious omission, which alone could be a basis for denying the SBA's summary judgment motion. In this case, however, the Court is able to glean the relevant facts from the record, and will proceed to address the summary judgment motion in the interest of judicial economy. The government is cautioned to comply with Local Rule 4.01(E) in the future or risk the denial of future motions for summary judgment on that basis.

By letter dated March 24, 2000, from Wayne L. Millsap, successor trustee under the deed of trust, plaintiffs were advised that they were in default under the note and that the SBA had accelerated the balance due under the note and scheduled a foreclosure sale of the Property to occur on May 11, 2000. (Def.'s Ex. 4.) A second letter to plaintiffs from Wayne L. Millsap dated April 19, 2000, states that is it accompanied by a copy of the Notice of Publication of foreclosure sale, which listed the date of the schedule foreclosure, the property to be foreclosed, and the time and location of the foreclosure sale. The April 19, 2000, letter was send by certified United States Mail. (Def.'s Ex. 5.) No copy of the Notice of Publication has been submitted in the record before the Court.

Attached to the SBA's memorandum is a copy of a "Full Deed of Release" with respect to the SBA's deed of trust, dated January 6, 1999, which purports to release the interest of the "Small Business Administration, a Corporation of the State of Missouri" in the Property, as authorized by the SBA's Board of Directors. (Def.'s Ex. 7.) The "Full Deed of Release" is signed by "Darrel Westbrook, Assistant Supervisor," and acknowledged before Sharon Jackson-Craig, a notary public. The SBA has submitted the affidavit of Darrell W. Westbrook, Chief of Portfolio Management and Liquidation. (Def.'s Ex. 6.) The Westbrook affidavit states in pertinent part that the signature on the "Full Deed of Release" purporting to be "Darrel Westbrook" is not his, that the document was not executed or authorized by him, and that "Darrel Westbrook" is not the correct spelling of his name. Westbrook testified in his deposition that the "Full Deed of Release" was not the same form used by the SBA in preparing releases (Westbrook Dep. at 6), and that the SBA is not a corporation of the State of Missouri and does not have a board of directors, but rather is an independent agency of the United States government. (Id. at 6-7.) Westbrook testified that the deed of trust held by SBA on the Property has not been authorized to be released. (Id. at 9.) Westbrook testified that he has never,

to his knowledge, met Sharon Jackson-Craig, been at her place of business, or authorized anyone else to sign his name. (Id. at 8.) Westbrook also testified that he is Caucasian. (Id. at 4.)

Westbrook testified that the plaintiffs' loan was placed on inactive status years ago, and there would not have been an active attempt to collect on the deed of trust until the Property was sold or refinanced. (Id. at 24.) Westbrook testified that the SBA decided to foreclose on the Property after it became aware of the "Full Deed of Release," which Westbrook termed a forgery and from which concluded that someone was trying to defraud the SBA. (Id. at 23.)

Westbrook testified that he was aware the plaintiffs had filed for bankruptcy protection at some point in the 1970s. (Westbrook Dep. at 24-25.) Westbrook testified that he believed the plaintiffs' personal obligation on the loan evidenced by the note may have been discharged in bankruptcy, but that the loan was still secured with a deed of trust on the Property. (Id. at 26.)

The SBA also submitted the deposition testimony of Sharon Jackson-Craig, who testified that while her signature and notary seal appear on the "Full Deed of Release," she did not recall "Darrel Westbrook" appearing before her, and did not recall the "Darrel Westbrook" signature. (Jackson-Craig Dep., pp. 9-12.) Jackson-Craig testified that she does not always ask persons for identification, and has never taken an affidavit such as the "Full Deed of Release" from a white person. (Id. at 11.)

In opposing the motion for summary judgment, plaintiffs assert that SBA would be unjustly enriched if it were permitted to seize the Property after plaintiffs have maintained and upgraded it for twenty-eight years. Plaintiffs also assert, without evidentiary support, that their mortgage company obtained a full deed of release from the SBA in late 1998 and filed it with the St. Louis County Recorder of Deeds. Plaintiffs attach a copy of a Full Deed of Release on the Property from Midlantic Bank, N.A., dated November 1, 1994, which released a deed of trust dated February 18, 1965, recorded at Book 5907, Page 12, in the Office of the Recorder of Deeds of St. Louis County,

Missouri. This is not the deed of trust which SBA holds. Plaintiffs have submitted no affidavits or deposition testimony in opposing SBA's motion for summary judgment, and do not challenge the facts as alleged by SBA, except to state that the "Full Deed of Release" is "an official government document registered with the St. Louis County Recorder of Deeds and can not [sic] be attacked in this court by parole evidence as defendant attempts to do with an affidavit by Darrell Westbrook." (Pls.' Answer to Mot. Dismiss at 2, ¶ 6.)

**Discussion.**

In order to determine if fact issues exist concerning whether SBA could be enjoined from foreclosing on the Property because it is acting outside of its authority, the Court addresses each of plaintiffs' arguments.

First, plaintiffs argue that SBA does not possess a valid deed of trust on the Property, and that they have a valid deed of release from SBA. Plaintiffs have presented no facts, however, to support this argument. The title search submitted by SBA shows that SBA is the assignee of a duly recorded deed of trust on the Property, and that no release of the deed of trust has been recorded. The affidavits and deposition testimony submitted by SBA show that the so-called "Full Deed of Release" was not prepared by SBA and was not signed by an SBA official. The testimony of notary public Sharon Jackson-Craig shows that someone other than Darrell W. Westbrook of the SBA appeared before her and signed the "Full Deed of Release." The burden therefore shifts to plaintiffs to show the existence of a genuine issue of material fact with respect to whether SBA released the deed of trust and whether the release was recorded. Plaintiffs have responded only with unsupported assertions that the Full Deed of Release is valid. This is insufficient to meet plaintiffs' requirement to set forth, by affidavit and other evidence, specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e); Herring, 207 F.3d at 1029. This argument is therefore without merit.

Second, plaintiffs contend the foreclosure notice was defective because they were not given notice as required by statute. Plaintiffs do not state on which statute they rely. Under Missouri law, all sales of real estate under a power of sale contained in a mortgage or deed of trust executed after August 28, 1989, are to be made upon not less than twenty days' notice. Mo. Rev. Stat. § 443.310 (2000). The statute does not apply to the SBA deed of trust, which was executed in 1972. In any event, the issue of notice is moot, because plaintiffs successfully obtained a temporary restraining order halting the sale, so a new notice would be required for any foreclosure sale in the future. See Jenkins v. Thyer, 760 S.W.2d 932, 937 (Mo. App. S.D. 1988). This argument also fails.

Third, plaintiffs contend that SBA is barred from foreclosing on the deed of trust because of the statute of limitations. Again, plaintiffs do not specify which statute they rely on, or the applicable limitations period. As the SBA points out, 28 U.S.C. § 2415, which establishes time limits for commencing actions by the United States, provides in pertinent part:

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right to possession of, real or personal property.

28 U.S.C. § 2415(c).

Courts have held that section 2415(c) applies to an action to foreclose on a mortgage. United States v. Thornburg, 82 F.3d 886, 894 (9th Cir. 1996). Under this section, even if the United States is barred from suing on a note, it may bring a foreclosure action on the mortgage securing the note at any time. See United States v. Begin, 160 F.3d 1319, 1321 (11th Cir. 1998); Thornburg, 82 F.3d at 894; United States v. Copper, 709 F. Supp. 905, 908 (N.D. Iowa 1988). As a sovereign, the United States is subject to a limitations period only when Congress has expressly created one, Guaranty Trust Company of New York v. United States, 304 U.S. 126, 133 (1938) (citation omitted), and is not bound by state statutes of limitations in enforcing its rights. United States v. Summerlin, 310 U.S. 414, 416 (1940). Consequently, state statutes which purport to prohibit foreclosure where the

limitations period has run on the underlying debt are not binding on the United States. See, e.g., United States v. Torres, 142 F.3d 962, 966 (7th Cir. 1998); Farmers Home Admin. v. Muirhead, 42 F.3d 964, 965 (5th Cir), cert. denied, 516 U.S. 806 (1995); United States v. Ward, 985 F.2d 500, 503 (10th Cir. 1993); United States v. Warren Brown & Sons Farms, 868 F. Supp. 1129, 1133-34 & n.23 (E.D. Ark. 1994). This argument is therefore without merit.

Fourth, plaintiffs contend that their discharge in bankruptcy precludes SBA from foreclosing on its deed of trust. As the SBA observes, a discharge in bankruptcy operates to enjoin any act to collect a debt as a personal liability of the debtor. 11 U.S.C. § 524(a)(2). A discharge in bankruptcy does not affect the lien of a mortgage and does not bar an action to foreclose a mortgage, but instead only prevents the mortgagee from holding the mortgagors personally liable on the debt. See, e.g., In re Hagberg, 92 B.R. 809 (Bankr. W.D. Wis. 1988); In re Hagemann, 86 B.R. 125 (Bankr. N.D. Ohio 1988); In re Landmark, 48 B.R. 626 (Bankr. D. Minn. 1985); United States v. Marlow, 48 B.R. 261 (Bankr. D. Kan. 1984).

Plaintiffs' argument confuses their discharge from liability for a debt with the separate issue of the continued existence of a lien on property to secure that debt. The distinction between an action on a personal liability and an action against property has been cogently explained as follows:

An action for money damages based on breach of a promissory note is an in personam action by which the creditor seeks to recover money from the debtor. A foreclosure action, on the other hand, is not a suit against a debtor. Instead, it is an action in rem, a proceeding against the property for the legal determination of the existence of the mortgage lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction.

United States v. Begin, 160 F.3d at 1321 (internal citations and punctuation omitted). Plaintiffs' attempt to rely on their discharge in bankruptcy to avoid foreclosure is therefore without merit.

Finally, plaintiffs' conclusory assertion that it would constitute unjust enrichment to permit SBA to foreclose on the deed of trust after they have improved the Property is entirely without merit and does not warrant further discussion.

**Conclusion.**

For the foregoing reasons, the Court finds that plaintiffs' petition for injunctive relief cannot be maintained against the SBA by virtue of 15 U.S.C. § 634(b)(1), and therefore this action must be dismissed for failure to state a claim upon which relief can be granted. In the alternative, the Court finds that defendant SBA is entitled to summary judgment because plaintiffs have not raised a genuine issue of fact as to whether the SBA has acted outside of its authority in attempting to foreclose on the Property, and therefore no injunction may issue against the SBA.

Accordingly,

**IT IS HEREBY ORDERED** that defendant SBA's motion to dismiss is **GRANTED**. [Doc. 13-1]

**IT IS FURTHER ORDERED** that, in the alternative, defendant SBA's motion for summary judgment is **GRANTED**. [Doc. 13-2]

An appropriate order of dismissal and judgment will accompany this memorandum and order.

/S/ \_\_\_\_\_  
**CHARLES A. SHAW**  
**UNITED STATES DISTRICT JUDGE**

Dated this 10th day of September, 2001