



HOUSE BILL 407: Trustee-Atty Fee/Foreclosures/Clerk Approval

2013-2014 General Assembly

Committee: Senate Judiciary I
Introduced by: Rep. Turner
Analysis of: Second Edition

Date: June 3, 2013
Prepared by: Bill Patterson
Committee Counsel

SUMMARY: *House Bill 407 would authorize superior court clerks to determine the reasonableness of counsel fees paid to an attorney serving as a trustee in a proceeding to foreclose under a power of sale, and would presume the fee to be reasonable if it is in compliance with G.S. 6-21.2(1) and (2).*

CURRENT LAW: Article 2A of Chapter 45 of the General Statutes requires a trustee conducting a foreclosure pursuant to a power of sale in a deed of trust to pay the costs and expenses of the sale first out of the sale proceeds. G.S. 45-21.31(a)(1). The clerk of superior court is not authorized under Article 2A to inquire into the reasonableness of the payments made for costs and expenses of the sale.¹

BILL ANALYSIS: House Bill 407 would amend G.S. 45-21.31 to authorize clerks to determine the reasonableness of payments made for counsel fees to an attorney serving as the trustee in a foreclosure under a power of sale.

The bill would permit payment of such fees only upon a finding by the clerk that the professional services rendered are different from those normally performed by a trustee and are of a type that would reasonably justify a decision by a non-attorney trustee to retain legal counsel. Counsel fees would be presumed reasonable if they are in compliance with G.S. 6-21.2(1) and (2),² and the bill would authorize the clerk to approve a higher fee if deemed reasonable.

EFFECTIVE DATE: This act is effective when it becomes law.

¹ G.S. 45-21.33 requires the clerk to conduct an audit of the trustee's final report. However, in carrying out this duty, "the clerk is only authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee," and does not have the discretionary authority to allow, disallow, or modify the amount of the payments. In re Foreclosure of Deed of Trust from Webber, 148 N.C. App. 158, 161, 557 S.E.2d 645, 647 (2001). Under Article 6 of Chapter 32, clerks are authorized to allow counsel fees to an attorney serving as a fiduciary or trustee upon a finding that "the attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would reasonably justify the retention of legal counsel by a fiduciary or trustee who is not licensed to practice law." G.S. 32-61. In 2012, however, the N.C. Supreme Court held that this statute does not grant clerks any authority over payments to an attorney serving as trustee in a foreclosure proceeding, because it applies only to trusts as defined in the North Carolina Uniform Trust Code which, pursuant to G.S. 36C-1-102, expressly excludes from its scope "trusts for the primary purpose of paying debts," and does not grant the clerks any discretionary authority. In re Vogler Realty, Inc., 365 N.C. 389, 393, 722 S.E.2d 459, 462 (2012).

² "Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

- (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
- (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness."

G.S. 6-21.2(1), (2).

O. Walker Reagan
Director



Research Division
(919) 733-2578