IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2008 Session at the University of Tennessee College of Law[1]

ESTATE OF LORINE GOODWIN HINDMON v. JIMMIE R. JONES, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-06-694 John B. Hagler, Jr., Judge

No. E2007-00670-COA-R3-CV - FILED JUNE 27, 2008

This appeal focuses on a dispute as to whether the defendants, Jimmie R. Jones ("Mrs. Jones") and Larry D. Jones ("Mr. Jones"), are obligated to indemnify the plaintiff, the Estate of Lorine Goodwin Hindmon ("the Estate"), for the value of property owned by Mrs. Hindmon that was foreclosed upon and sold, the proceeds from which were applied against a debt for which the Joneses were obligated. The trial court held that the plaintiff had a right to indemnification from the defendants and, as a consequence of that holding, granted the plaintiff summary judgment. We affirm.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which SHARON G. LEE, J. and NORMA MCGEE OGLE, Sp.J, joined.

Charles W. Pope, Jr., Athens, Tennessee, for the appellants, Jimmie R. Jones and Larry D. Jones.

Roger E. Jenne, Cleveland, Tennessee, for the appellee, Estate of Lorine Goodwin Hindmon.

OPINION

In the early 1990s, Reta Goodwin ("Mrs. Goodwin"), the daughter-in-law of Lorine Goodwin Hindmon ("the Decedent"),[2] started an interior design business called Design Resources, Inc. ("DRI"). Mrs. Jones testified that she was Mrs. Goodwin's partner in this business, along with Doris

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[1] Oral argument was heard in this case before law students at the University of Tennessee College of Law as a part of the Court's annual Docket Day at the College.

[2] Mrs. Hindmon died on December 14, 2005.

and Mel Rinehart.[3] According to Mrs. Jones, her former husband was "involved in the business," but was not a partner.

Initial financing for the business was through a $300,000 loan from Cleveland Bank & Trust Co., arranged by Mr. Jones ("the 1993 note"). A rental property belonging to the Decedent was pledged as collateral to secure this loan. The Decedent personally signed the deed of trust ("the 1993 deed of trust"), but she was not a maker, guarantor, or obligor on the note. Other property pledged as security for the loan included a parcel of property owned by Mr. and Mrs. Jones, along with a parcel owned by Mr. Jones and his sister, Jackie Moore ("Mrs. Moore"). After refinancing was obtained, this note and the underlying deed of trust were eventually paid off and released.

In 1995, DRI obtained a loan ("the 1995 note") from Capital Bank, who provided a $100,000 line of credit in addition to $300,000. The deed of trust securing the loan listed not only the property pledged in the 1993 deed of trust but also a second parcel belonging to the Decedent upon which her personal residence stood. The Decedent did not sign the deed of trust.[4] This note was later modified in July 1996. The real estate of the Decedent pledged is described as follows:

> TRACT ONE:
>
> In the Old Third Civil District of Bradley County, Tennessee:
>
> Being a portion of Tract 12 of the Subdivision of the Lloyd L. Jones Farm as it appears on plat of record in Plat Book 1, Page 273, in the Register's Office of Bradley County, Tennessee. Said tract begins at the Northwest corner of Lot 13 of the Lloyd L. Jones Farm, said point being located in the East line of U.S. Highway No. 11, also known as Lee Highway, and running thence East along the North lines of Lots 13 and 26, a distance of 668 feet to the Northeast corner of Lot 26, this being a corner with Hollace Priddy; thence North in a direct line in prolongation of the East lines of Lots 26-32, inclusive, a distance of 429 feet to a corner with James Chase; thence West along James Chase's South line and in a direct line, 650 feet to the Southwest corner of Tract 11 in the East line of Lee Highway; thence South along the East line of Lee Highway, 265 feet to the beginning corner.

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[3] The prior opinion of this court listed the owners of the business as Mrs. Goodwin, Mrs. Jones, and Mr. Rinehart.

[4] In this court's opinion in the related case of ***Hindman v. Moore***, No. E2005-01287-COA-R3-CV, 2006 WL 1408394 (Tenn. Ct. App. E.S., filed May 23, 2006) (last name of the Decedent was spelled differently in prior lawsuit), the court determined that the Decedent's name was signed to the deed of trust by Mrs. Goodwin without the knowledge or permission of the Decedent or Mr. Goodwin.

> Reference for prior title is made to deed of record in Book 263, Page 107, in the Register's Office of Bradley County, Tennessee.
>
> TRACT FOUR:
>
> In the Third Civil District of Bradley County, Tennessee:
>
> Beginning at the Northwest corner of residence property, said beginning point being the Southwest corner of Tract 11 of the Lloyd L. Jones Farm, as it appears on plat of record in Plat Book 1, Page 273, in the Register's Office of Bradley County, Tennessee; and running thence North along the East side of U.S. Highway No. 11, also known as Lee Highway, a distance of 626 feet to the Northwest corner of Tract 9 of the Lloyd L. Jones Farm; thence South 60 degrees 30 minutes East with the North line of Tract 9, 400 feet to a point; thence in a Southwesterly direction along a line running parallel with said Lee Highway, 626 feet, more or less, to a point in the North line of Chase property; thence in a Westerly direction along the North line of Chase and the South line of Goodwin, 400 feet to a point, the place of beginning. ALSO INCLUDED is an easement over an existing road running from Lee Highway referred to in deed of record in Book 331, Page 966, said Register's Office.
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> Reference for prior title is made to deed of record in Book 331, Page 966, in the Register's Office of Bradley County, Tennessee.

(Capitalization in original.) These tracts of property are located respectively at 6472 Lee Highway North and 6500 Lee Highway North, Cleveland, Tennessee.

The 1995 note was refinanced through a second Capital Bank loan dated June 5, 1998 ("the 1998 note"). The promissory note executed to Capital Bank in the amount of $321,952.86 was signed by Mrs. Goodwin, Mr. and Mrs. Jones, and Mr. Rinehart. The note obligation was secured by a deed of trust wherein the Decedent's two parcels of real estate were again pledged as security. The deed of trust was signed by Mrs. Moore, Allen Moore ("Mr. Moore"), Mr. and Mrs. Jones, and by Mr. Goodwin as the attorney-in-fact[5] for the Decedent without her knowledge.[6]

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[5]The Decedent had executed a document appointing her son her attorney-in-fact on October 16, 1981. The document was never revoked.

[6]Mr. Goodwin testified that at the time he signed the 1998 deed of trust, he thought it was a continuation of the 1993 deed of trust and thought that the new instrument did not include the Decedent's personal residence.

The 1998 note and deed of trust were modified in December 1999. The modification reduced the principal amount and released the lien on the real estate of Mr. and Mrs. Jones, which was then sold to pay off one-third of the loan obligation. The Decedent's rental property and personal residence remained as security for the note. The modification was signed by Mrs. Goodwin, Mr. Rinehart, Mr. and Mrs. Jones, Mr. and Mrs. Moore, and Mr. Goodwin in his capacity as attorney-in-fact for the Decedent. Concerning the modification, Mr. Jones testified as follows:

> Q: [T]here was a modification of the note, and I guess that's when Jimmie sold her house --
>
> A: That's when we sold our house.
>
> Q: Okay. Were you-all still together then?
>
> A: Yeah, uh-huh.
>
> Q: Okay. All right.
>
> A: Yeah. We sold the house and paid a third of the obligation off.
>
> Q: Okay. So you paid down on this debt, and then they did the modification agreement?
>
> A: Well, that was part of the modification agreement.
>
> Q: Right. And this is your signature on that, as well?
>
> A: Yeah.
>
> Q: And according to this, the note obligation was reduced, then, from three hundred twenty-one thousand some odd dollars to two hundred twenty thousand five twenty-one, is that correct?
>
> A: Uh-huh.
>
> Q: All right. After that modification agreement occurred, which is Exhibit No. 7, nobody paid any money on it?
>
> A: I don't have any idea what happened to the note after that.

Mrs. Jones testified that she was not certain of exactly how much was paid on the note. The couple apparently paid about $100,000 toward the note. Mrs. Jones stated as follows:

> Q: Okay. Let's talk about your -- the house that you had that you sold and applied toward this indebtedness.
>
> A: Yes, sir.
>
> Q: How much did you sell that house for?
>
> A: Oh, I think a hundred and twenty-three.
>
> Q: That was the total sale price?
>
> A: Yes, sir.
>
> Q: Was it paid for when you sold it?
>
> A: Yes, sir.
>
> * * *
>
> Q: Okay. Did all the money that came out of that house, did that go to Capital Bank or did you keep any of it?
>
> A: All but twenty-three thousand, and I -- we had suppliers that we were paying off.
>
> Q: Okay.
>
> A: I paid about thirty-five thousand to suppliers.
>
> * * *

Despite the modification of the agreement, the business continued to do poorly and the note obligation went into default. Mrs. Jones testified as follows regarding a conversation with Mrs. Goodwin about the fact that the note was not being paid:

> A: The conversation I had with Reta was that I sold my house to pay off that debt. She said she wasn't going to do anything else about it. And I said, if you'll sell - that house is worth more than what you owe on this note. If you'll sell it, you'll have money left over.

Q: What house were you talking about?

A: The rental house.

Q: Okay -- Ms. Hindmon's rental house?

A: Yes, sir.

Q: Okay. If you'll sell that, is that what you were suggesting to --

A: That's what I suggested to Reta.

Q: -- Reta, that they sell Ms. Hindmon's rental house and pay it toward the note?

A: Yes, sir. This is a debt we owe.

Q: Okay. Did you make that same suggestion to Alvin?

A: I certainly did.

Capital Bank was in the process of commencing foreclosure proceedings when, on September 22, 2000, Mr. and Mrs. Moore purchased the note and deed of trust from the bank by absolute assignment. As the holders of the note and deed of trust, the Moores designated Larry D. Cantrell as substitute trustee. On October 16, 2006, the real estate owned by the Decedent was sold by the substitute trustee to the Moores for a total consideration of $330,000.[7]

The Estate filed a complaint seeking indemnification against Mr. and Mrs. Jones. The Joneses subsequently admitted the execution of the promissory note, acknowledged that the property was pledged as security for the note obligation, and agreed that the property was being foreclosed upon by reason of their default. The Estate moved for summary judgment. The Estate's statement of undisputed facts was not contested by Mr. and Mrs. Jones. Even after being allowed additional time by the trial court, the response of their counsel was not in accord with Tenn. R. Civ. P. 56.03. At a motion hearing, the Estate's statement of material facts was not challenged. The trial court granted the motion for summary judgment in favor of the Estate and entered a judgment against the

[7]In our earlier opinion dealing with the underlying transaction in the case now before us, we noted that the Decedent attempted to set aside the 1998 deed of trust by asserting that the pledge of her residence was done without her knowledge, permission, or consent. In a holding subsequently affirmed by this court, the trial court found that even though the Decedent had no knowledge that her residence had been pledged as collateral, she had executed a valid power of attorney and was bound by the actions of her attorney-in-fact. Mr. Goodwin claimed in the earlier case that he first learned that the Decedent's personal residence was listed in the 1998 deed of trust when he saw the foreclosure notice.

Joneses in the amount of $330,000 for indemnity as a matter of law based upon undisputed facts. Mr. and Mrs. Jones have timely appealed.

II.

The issues raised by the appellants, stated verbatim, are as follows:

> 1. Whether the doctrine of unclean hands bars the plaintiff/appellee from recovering when the decedent and Alvin Goodwin have facilitated fraudulent activity and Alvin Goodwin, as the alter ego of the estate, violated his fiduciary duties and will benefit from his own wrongdoing.
>
> 2. Whether res judicata bars plaintiff/appellee from recovering when the claim was a compulsory counterclaim in prior litigation and the issues relied upon in the present suit were those central to prior litigation.
>
> 3. Whether plaintiff/appellee is entitled to indemnification when the decedent and Alvin Goodwin were active participants in creating the harm and the proximate cause of the injury sustained.

III.

Summary judgment is warranted where the moving party demonstrates, without challenge, that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. ***Doe v. HCA Health Servs. of Tenn., Inc.***, 46 S.W.3d 191, 196 (Tenn. 2001). Because a summary judgment involves an issue of law rather than an issue of fact, ***Planters Gin Co. v. Federal Compress & Warehouse Co.***, 78 S.W.3d 885, 889 (Tenn. 2002), an order granting summary judgment is not entitled to a presumption of correctness on appeal. ***Guy v. Mutual of Omaha Ins. Co.***, 79 S.W.3d 528, 534 (Tenn. 2002).

Appellate courts do not employ the standard of review in Tenn. R. App. P. 13(d) when reviewing an order granting summary judgment. ***Mason v. Seaton***, 942 S.W.2d 470, 472 (Tenn. 1997); ***Estate of Kirk v. Lowe***, 70 S.W.3d 77, 79-80 (Tenn. Ct. App. 2001). Rather, we determine for ourselves whether the moving party has satisfied the requirements of Tenn. R. Civ. P. 56. ***Hunter v. Brown***, 955 S.W.2d 49, 50-51 (Tenn. 1997); ***Cantrell v. DeKalb County***, 78 S.W.3d 902, 905 (Tenn. Ct. App. 2001). In this process, we must consider the evidence in the light most favorable to the nonmoving party and resolve all inferences in the nonmoving party's favor. ***Johnson v. LeBonheur Children's Med. Ctr.***, 74 S.W.3d 338, 342 (Tenn. 2002); ***Webber v. State Farm Mut. Auto. Ins. Co.***, 49 S.W.3d 265, 269 (Tenn. 2001).

IV.

The Estate initially contends that because the brief of the Joneses rambles and has no reference to the record as required by Tenn. R. App. P. 27 and Rules 6(a) and 6(b) of the Rules of the Court of Appeals, the appeal should be dismissed pursuant to the holding in ***Bean v. Bean***, 40 S.W.3d 52 (Tenn. Ct. App. 2000). The Estate also asserts that the appeal is frivolous in violation of Tenn. Code Ann. § 27-1-122 (2000), and that the Estate is therefore entitled to costs, including attorney fees.

In our discretion, we have elected to address the issues raised by the Joneses despite the many deficiencies in their brief.

A.

Apparently trying to analogize to a concept in corporation law, Mr. and Mrs. Jones contend that the Estate is the "alter ego" of Mr. Goodwin, as he is the residuary beneficiary of the Estate. Thus, they claim that Mr. Goodwin is the real party in interest. Mr. and Mrs. Jones note that the personal representative of the Estate is Mr. Goodwin's daughter, Laura Bailey. Counsel for the defendants argued as follows:

> Your Honor, . . . [the] estate granted to two granddaughters an interest in two properties. Those two real properties have been foreclosed upon, your Honor, and those two properties it's res judicata that they will never get those two properties, . . . but the remainder of the estate, every single penny that goes to this estate will go to this man, Alvin Goodwin . . . .

Counsel continued as follows:

> Your Honor, it is undisputed that Mr. Alvin Goodwin caused the loss to sustain to his mother's property. His mother had denied all along that she obligated her property in this series of notes. But what is res judicata, your Honor, is that this gentleman right here, Alvin Goodwin, breached his fiduciary duty. He signed, pursuant to a power of attorney, his mother's name. His mother signed on one occasion and the Court felt [that] vested him with some authority and that's one reason the Court ruled in favor of the Moores in that action, your Honor. But, your Honor, that is undisputed that he breached his fiduciary duty, obligated his mother's property, and caused her to sustain loss.

In support of their argument, Mr. and Mrs. Jones note that in ***Master v. Chalko***, 124 Ohio Misc. 2d 46, 48 (Ct. Com. Pl. 1999), an Ohio trial court found that an individual named as beneficiary had become the "alter ego of the estate" of a elderly physician.

The Joneses cite to no Tennessee authority to support their position that the "alter ego" concept in corporation law should be extended to entities other than corporations. Nevertheless, they implore this court to adopt such a view. We find no support in Tennessee jurisprudence for such an extension of the law. We are unpersuaded by the decision of the Ohio trial court. We decline to adopt counsel's novel theory.

Mr. and Mrs. Jones assert that the doctrine of "unclean hands" applies in this case. Under the doctrine,

> he who comes into a court of equity, asking its interposition in his behalf, must come with clean hands; and if it appears from the case made by him or by his adversary that he has himself been guilty of unconscionable, inequitable, or immoral conduct in and about the same matters where of he complains of his adversary, or if his claim to relief grows out of or depends upon or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the court.

C.F. Simmons Med. Co. v. Mansfield Drug Co., 23 S.W. 165, 168 (Tenn. 1893). "[A] complainant, who has been guilty of unconscientious conduct or bad faith, or has committed any wrong, in reference to a particular transaction, cannot have the aid of a Court of Equity in enforcing any alleged rights growing out of such transaction." ***Hogue v. Kroger Co.***, 373 S.W.2d 714, 716 (Tenn. 1963) (quoting Henry R. Gibson, *Gibson's Suits in Chancery* § 51, at 63 (Arthur Crownover, Jr. ed., 5th ed. 1955)). The doctrine of unclean hands "expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies." 27A Am. Jur. 2d *Equity* § 126 (1996) (footnotes omitted). A transaction need not be punishable as a crime to justify application of the doctrine. ***See McDonnell Dyer, P.L.C. v. Select-o-Hits, Inc.***, No. W2000-00044-COA-R3-CV, 2001 WL 400386, at *10 (Tenn. Ct. App. W.S., filed April 20, 2001). The operation of the maxim is confined to misconduct connected with the subject matter of the litigation. ***Greer v. Shelby Mut. Ins. Co.***, 659 S.W.2d 627, 630 (Tenn. Ct. App. 1983) (citing Henry R. Gibson, *Gibson's Suits in Chancery* § 18, at 20-21 (William H. Inman ed., 6th ed. 1982)). The equitable defense may be raised in circuit court or in chancery court, even if the suit is one at law. ***Continental Bankers Life Ins. Co. v. Simmons***, 561 S.W.2d 460, 464 (Tenn. Ct. App. 1977).

Mr. and Mrs. Jones claim that because Mr. Goodwin failed to fulfill his fiduciary duties to the Decedent as her attorney-in-fact, the doctrine of unclean hands prevents the Estate – because Mr. Goodwin is the beneficiary – from obtaining indemnification from them. They claim that if the

estate is allowed to recover any amount whatsoever from them, Mr. Goodwin will profit from his own wrongdoing.

Counsel for the Estate asserted the following:

> [Counsel for the defendants] admits every fact that I assert as an undisputed fact. He agrees that there are no disputed material facts. And based upon these undisputed material facts, we're entitled to a judgment as a matter of law.
>
> This business about Alvin Goodwin is simply nonsensical in this litigation. I mean, they've got their rights, they've got their remedies, they can sue whoever they want to. But in this litigation where this lady lost her property, even if she didn't pledge her property, even if Alvin Goodwin pledged her property under that power of attorney, the property was taken and foreclosed upon to pay an obligation [owed] by the makers of this note jointly and severally.
>
> I cited to the Court the statute, . . . we don't have to proceed against one individual; we can proceed against all of them on the note or we can proceed against one of them on the note. And obviously we are proceeding against the one where we believe we can effect a recovery in this case.[8]
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> * * *
>
> Very simply, my client's property was used as collateral to secure a note obligation of Jimmie and Larry Jones. That fact is undisputed

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[8]Mrs. Jones was named as a beneficiary under the will of her brother, Joe Ellis. She is "supposed to get forty-five percent" of her brother's home. She testified as follows:

> A: Well, the home was to stay there. I'm not to get forty-five percent, I'm to live in it because I'm divorced. That was his way of taking care of me.
>
> My younger brother has fifty-five percent. That means he'll have to take care of the house when I live in it.
>
> Q: Okay. But as far as -- it says -- the will says that you're to have forty-five percent ownership.
>
> A: Yes, sir.

The home, however, apparently is burdened by a mortgage. Mrs. Jones will additionally receive a distribution from her brother's residuary estate, to be divided among ten persons.

> in the record and it's undisputed in their testimony, the deposition testimony, which I cite to the Court.

(Footnote added.)

In this case, the Estate is the plaintiff, not Mr. Goodwin. The Decedent had no obligation under the promissory note. When her real estate which was pledged as security for the promissory note was sold with the proceeds applied to the note obligation, the Estate became entitled to complete indemnity against each and every one of the obligors on the note. Mr. and Mrs. Jones, as makers of the note obligation, were jointly and severally liable. Tenn. Code Ann. § 20-1-107 (1994) provides as follows:

> All joint obligations and promises are made joint and several, and the debt or obligation shall survive against the heirs and personal representatives of deceased obligors as well as against the survivors, and suits may be brought and prosecuted on the same against all or any part of the original obligors, and all or any part of the representatives of deceased obligors, as if such obligations and assumptions were joint and several.

B.

Mr. and Mrs. Jones further assert that the Estate's claims are barred as a result of the lawsuit the Decedent brought against the Moores to set aside the deed of trust which encumbered her property as security for the note. The Estate responds that the prior ruling is not relevant to the claim for indemnity, as the Joneses were not parties to the former litigation, nor were they in a privity relationship as to invoke the doctrine of *res judicata*.

The defendants have not pointed to any portion of the record to support their contention. Furthermore, this cause of action for indemnification arose subsequent to the ruling in the earlier lawsuit, as the foreclosure and loss of the property did not occur until after the opinion in ***Hindman v. Moore*** was released. (*See* footnote four.) The party seeking indemnification must first suffer the loss for which indemnity is claimed before a cause of action arises under Tennessee law. *See* ***Olin Corp. v. Yeargin, Inc.***, 146 F.3d. 398, 406 (6th Cir. 1998); ***Sec. Fire Prot. Co. v. City of Ripley***, 608 S.W.2d 874, 877 (Tenn. Ct. App. 1980). Along the same line of reasoning, the argument by Mr. and Mrs. Jones that the indemnity action was a compulsory counterclaim pursuant to Tenn. R. Civ. P. 13.01 in the Decedent's earlier lawsuit must fail, as the claim did not arise until after the prior lawsuit was concluded.

C.

Lastly, Mr. and Mrs. Jones argue that the Decedent bears some fault in this matter. They contend that her actions led them to rely on her as an obligor and on Mr. Goodwin as her agent. However, they have not cited us to any material in the record to support this conclusion.

The Estate is entitled to a judgment for indemnity against Mr. and Mrs. Jones. Indemnity may be recovered on the basis of implied indemnity. A right to indemnity "exists whenever one party is exposed to liability by the action of another who, in law or equity, should make good the loss of the other." 41 Am. Jur. 2d *Indemnity* § 25 (1968). It is undisputed that Mr. and Mrs. Jones owed a note obligation to Capital Bank. This note obligation was secured by two parcels of real estate owned by the Decedent. The note obligation went into default. The note and deed of trust were subsequently assigned to the Moores, who foreclosed upon the Decedent's real estate. The amount of $330,000 was realized from the sale of the property and applied toward the note obligations owed by Mr. and Mrs. Jones. In ***Jarnigen v. Stratton***, 32 S.W. 625 (Tenn. 1895), the Tennessee Supreme Court noted as follows:

> Mr. Story says: "Where the note is the several as well as the joint note of the makers, the holder is at liberty to elect upon whom he will make the demand and presentment." Story, Prom. Notes, § 256. To the same effect, see 1 Daniel, Neg. Inst. § 596. The reason of the rule in both cases is the same. It is only necessary to make demand in the one case of all the makers where they are joint makers, and to give notice to all the indorsers where they are joint indorsers, to bind those notified. If they are joint and several indorsers, notice to any one is sufficient to bind him.

Id., 32 S.W. at 626. The estate was entitled to choose from whom it desired to seek indemnification. As to the assertion by Mr. and Mrs. Jones that this claim is barred by any statute of limitation, the contention lacks merit, as the action did not arise until the foreclosure occurred in 2006.

V.

We do not find that this appeal is frivolous. Hence, the Estate's request for costs pursuant to Tenn. Code Ann. § 27-1-122 is denied.

VI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Jimmie R. Jones and Larry D. Jones. This case is remanded to the trial court for enforcement of the trial court's judgment and collection of costs assessed below, all pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE