Did You Know?

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CONDITIONAL FEE - TITLE TO “ABANDONED” R.R. PROPERTY

Plaintiffs brought this action against the County claiming, inter alia, title to a trail adjoining their properties, which at one time constituted railroad trackage.

Citing, *Corning v. Lehigh Val. RR Co.* (217 NYS2d 874 [AD]),the Court concluded that plaintiffs first cause of action for title in and to the trail, could not be sustained.

Townsend v. County of Allegany
649 NYS2d 296 (A.D.4.D.-1996)

NOTE: The brevity of the recited facts, does not permit us to make a definitive analysis. Clearly, a conveyance which reads “so long as”, is a grant of a fee contingent on the continued use of the premises for the purposes stated; ie. for railroad purposes. At the time of the original conveyance, the reversionary interest was vested and remained in Farnum, the original grantor. When later deeds made by Farnum excepted the premises conveyed to the railroad, the reversionary interest remained in Farnum, his heirs, successors and assigns. Consequently, howsoever title came into the County, plaintiffs can succeed only on the strength of their own title; and not on the weakness of the County’s title. Since the foregoing facts did not effect a conveyance to plaintiffs’ predecessors in title, plaintiffs must fail in their claim.

BREACH OF CONTRACT - FRAUDULENT MISREPRESENTATION

Plaintiff was the developer of a planned subdivision, to be completed in three phases of nine homes each. One of the seven homes built and sold in Phase I was sold to defendants who gave back to plaintiffs a purchase money mortgage in the sum of $56,000.00, for a portion of the purchase price. Upon default, and the commencement of a foreclosure action by plaintiff, defendant asserted by way of counterclaim, that plaintiff committed fraud in that she represented that this development would be completed; and that

the partially constructed private roads, would be finished. At her EBT, plaintiff testified that she fully intended to complete the development, but was unable to do so, because of the downturn in the real estate market; and that builders were unwilling to purchase and build homes in the developments because of a moratorium imposed on the issuing of sewer permits by the Village which owned the appropriate sewer treatment plant.

Reversing the lower court's denial of plaintiff's motion for summary judgment, granting judgment of foreclosure and sale, this Court held that to constitute fraud, the alleged misrepresentation must constitute "more than merely promissory statements," they must be misstatements of material facts, of "promises made with a present, albeit undisclosed intent not to perform them. (*Schlang v. Bear's Ests. Dvel. Of Smallwood*, 599 NYS2d 141 [AD]) The mere fact that the expected performance was not realized, is insufficient to demonstrate that the promissor "falsely stated her intentions." (*Laing Logging v. Intl. Paper Co.*, 644 NYS2d 91, 93 [AD])

Here, the Court rejected defendant's contention that plaintiff falsely represented that the roads would be installed, and that the development would be completed; and held these statements to be merely promissory in nature. In point of fact, plaintiff had never applied for sewer permits; the builders who purchased the plots and built the homes made such applications. Accordingly, the fact that there were some twenty permits available, was therefor, not evidence of plaintiff's intent not to perform.

Edelman v. Buchanan
650 NYS2d 874 (A.D.3.D.-1996)

CONTRACT: THIRD-PARTY BENEFICIARY;UNJUST ENRICHMENT

In 1984, Kubar Bearings obtained a loan from plaintiff's predecessor, secured by a mortgage of certain leasehold premises. Defendant purchased (inter alia) Kubar's interest in these premises at a sale conducted in December, 1990, in the bankruptcy proceeding filed by Kubar. Plaintiff commenced a foreclosure action in July, 1989, against Kubar's interest in these premises; and in July, 1993, the Receiver appointed in this action, secured a warrant of eviction against defendant S/N (Kubar's successor in interest) in the Town Justice Court. The enforcement of this eviction was stayed pending transfer of title through the foreclosure sale scheduled for August, 1993. Defendant appeals from this warrant of eviction.

Plaintiff as purchaser at the foreclosure sale, commenced a RPAPL 221 action seeking possession of the property; and requested an order directing the Sheriff to evict defendant through a writ of assistance. According to a Stipulation entered into between the Receiver and defendant (S/N), S/N was permitted to remain in occupancy until October 1, 1993; upon payment to the Receiver of rent for the month of September; plaintiff was to adjourn its application for a writ of assistance to October 4; and S/N agreed to withdraw its appeal of the Warrant of Eviction. When defendant failed to vacate on October 1, plaintiff reinstated its application for a writ of assistance; and commenced this action, inter alia, for removal of

S/N; and for unjust enrichment damages resulting from S/N's failure to vacate.

This Court rejected defendants' argument that plaintiff cannot enforce the terms of the Stipulation because it was not a third-party beneficiary of same. The Court found that the Stipulation recognized that plaintiff was the owner of the premises; that the September rent was turned over to plaintiff as anticipated; that plaintiff was involved in the negotiation of the terms of the stipulation; and that plaintiff was going to withdraw its proceeding for a writ of assistance against defendant, S/N. Accordingly, while plaintiff was not a party to the Stipulation, it was an intended third-party beneficiary of the promised performance. (cf. *Port Chester Elec. Constr. Corp. v. Atlas*, 40 NY2d 652, 655,6; 389 NYS2d 327)

Clearly, defendants were aware that possession was to be turned over to plaintiff pursuant to the Stipulation; that the Receiver had been appointed on behalf of plaintiff; and that defendant's possession until October 1, was approved by plaintiff. Accordingly, plaintiff's reliance on the Stipulation was established; and plaintiff as a third-party beneficiary had standing to enforce the Stipulation.

The other issue we deal with in this analysis, is whether a cause of action for unjust enrichment lies against defendants. The Court's review of the facts, found that plaintiff is not entitled to an award for unjust enrichment, since the Stipulation constituted a valid and enforceable contract. Recovery in quasi-contract (unjust enrichment) is ordinarily precluded where the facts establish that the quasi-contract arises out of the same subject matter as the valid enforceable contract. (*Clark-Fitzpatrick v. L.I.R.R. Co.*, 70 NY2d 382, 388; 521 NYS2d 653).

This Court affirmed the granting of summary judgment for trespass, since defendant's remaining in possession was without justification.

Trustco Bank New York v. S/N Precision Enterprises, Inc.
650 NYS2d 846 (A.D.3.D.-1996)

INTEREST IN MORTGAGE AS DETERMINING ABILITY TO FORECLOSE

The Riese family, individually and as principals of corporations, owned some 14 parcels of land. In December, 1987, UFM (which was also owned by the Rieses) issued short term commercial paper notes (debt securities), to the investing public, in the total amount of $75 million; and used the proceeds thereof, to purchase or extend underlying mortgages on these 14 parcels. UFM's obligation to repay the notes was secured by an irrevocable letter of credit issued by plaintiff and the Tokyo Bank. In the event that UFM failed to honor the notes, the Trustee for the note holders was entitled to draw upon the letter of credit to make the required payments to them. As part of the original transaction, UFM, plaintiff and the Bank, entered into a Reimbursement Agreement which provided, inter alia, that plaintiff would make available to UFM, a credit facility of up to $75 million. This draw down, if used to pay off the outstanding balance of such a loan, was to become a term loan, six months after it had been advanced. As evidence of its obligation to plaintiff, UFM executed and delivered to plaintiff a promissory note for $75

million, later reduced to $62.3 million; and which, after extensions matured on 3- 9-95 in that sum. As security for that obligation to plaintiff under the Agreement and note, UFM collaterally assigned to plaintiff all its right, title and interest in the underlying mortgages which encumbered the 14 parcels.

Accordingly, on 3-9-95 the Trustee, in order to repay the debt securities held by the public, drew down the remaining sum of $62.3 million on the letter of credit. When UFM failed to repay this sum to plaintiff within five days of this draw down; this sum, and the underlying notes for each of these mortgages became due. Plaintiff commenced this foreclosure on 6-14-95, when this default was not cured.

The owners and net lessees moved to dismiss the complaint on the grounds that plaintiff lacked standing to maintain the foreclosure; and that the commencement of the foreclosure action, was premature. Specifically, they argued that plaintiff had only a security interest in the mortgages in constituting the mortgage documents; and therefor, is not an assignee of UFM's rights under the mortgages. They viewed plaintiff's security as personality, and controlled by the Uniform Commercial Code, which they claimed does not permit a pledgee to foreclose a mortgage; but requires that a pledgee first conduct a sale of its security interest in the mortgage.

New York Law, both before and since the enactment of the Uniform Commercial Code, permits a pledgee in the case of a mortgage pledged as collateral to secure a debt, to institute an action to foreclose on the mortgaged property provided that the pledgor is joined as a party, either as a plaintiff or defendant. Such a pledge constitutes a complete assignment of the mortgage in which the pledgee has a superior interest. (cf. *Matter of Renaissance Residential Dev. Assocs.*, 146 B.R., 68, 71 [Bkrtcy E.D.N.Y.])

Again citing Renaissance, the Court stated: "'The pledgee may bring [a foreclosure] action and will be deemed a trustee of the pledgor for any of the mortgage debt remaining after satisfying the pledgee's' claim. [I]n cases where the mortgage has been pledged as collateral security for a debt which is less that the amount of the mortgage, the pledgee has a defeasible title in the property; which is extinguished upon payment of the debt. The pledgee is still entitled to foreclose on the pledged mortgage, but the pledgor must be joined as a necessary party to the pledgee's bill of foreclosure.' In a case where 'both the pledgee and pledgor bring a joint foreclosure action, the rights of both parties are foreclosed by the judgment of foreclosure, but the rights as between the pledgee and pledgor are not affected'" Thus, where, as here, the pledgor, UFM, is joined in the foreclosure action, the pledgee of the collateral assignment of a mortgage is entitled to foreclose on the pledged mortgage." [Citations omitted.] *F.D.I.C. v. Forte*, 463 NYS2d 844 [AD]} This rule applies in all cases except where the mortgagee's creditor is attempting to enforce the mortgagee's rights under the mortgage.

Plaintiff, in possession of UFM's promissory note and collateral assignments of the mortgages, has a superior security interest pursuant to Article 9 of the Uniform Commercial Code. Consequently, as the creditor, plaintiff has the right under the real property law to foreclose against the real property. U.C.C. 9-504 determines the disposition of the proceeds therefrom to the pledgee and pledgor in accordance with their respective rights. Clearly, U.C.C. 9-501(1) permits such a foreclosure.

Since both the underlying mortgages assigned herein; and the promissory notes constitute but one obligation, this action has not been prematurely brought.

Bank of Tokyo Trust Co. v. Urban Food Malls, Ltd.
650 NYS2d 654 (A.D.1.D.-1996)

MORTGAGE FORECLOSURE - CONSOLIDATION WITH ANOTHER ACTION

Plaintiff sued to foreclose on its mortgage; and in another action, asserted other claims against a guarantor. The Trial Court denied defendant-guarantor's motion for summary judgment; and granted plaintiff's motion to consolidate the foreclosure action with the action against the guarantor. Guarantor appealed on the ground that RPAPL 1301 barred this consolidation.

Citing *FDIC v. Forte* (463 NYS2d 844), this Court found this reliance to be misplaced, since plaintiff's two actions did not both seek to recover on a mortgage debt. Rather, the second action sought to recover from the principal debtor's breach in connection with its line of credit with plaintiff, and on the guarantee of the same. Clearly, Section 1301 does not apply where, as here, the second action is on a debt, separate and distinct from the mortgage debt. *Git Indust. v. Rose* (438 NYS2d 372, on remand, 462 NYS2d 245, aff. 62 NY2d 659).

The Court concluded, that the consolidation was proper, inasmuch as the two actions arose out of the same contract, and involved interrelated questions of law and fact.

P.T. Bank Central Asia v. Wide Motion Corp.
649 NYS2d 151 (A.D.1.D.-1996)

MORTGAGE FORECLOSURE - IMPROPER DESCRIPTION

Plaintiff commenced an action to foreclose a certain mortgage on premises located in the Town of Poughkeepsie, County off Dutchess. Following default by defendant, a final judgment of foreclosure and sale was entered. However, inadvertently, the property description was omitted from the judgment. In the notice of sale, the proper description was included, except that the location of the premises was given as the City, rather than the Town of Poughkeepsie. After the sale and conveyance pursuant to the judgment of foreclosure, plaintiff moved for an order of removal. Defendant sets forth by way of defense, the foregoing errors, claiming that they were prejudiced by them.

Citing *Marine Midland Bank v. Landsdowne Mortgage Assocs.*, 598 NYS2d 630, lv.den. 82 NY2d 656, this Court these errors to constitute, at most, "nonprejudicial irregularities". The Court also rejected as speculation, defendant's claim that if the Notice of Sale had accurately stated the location of the

premises, more prospective bidders would have attended the sale; and that the bid price would have been substantially higher.

Chemical Bank v. Gardner
649 NYS2d 243 (A.D.3.D.-1996)