Did You Know?

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MORTGAGE FORECLOSURE - ACTION FOR WASTE

The novel issue presented here, is whether or not a mortgagee who has already foreclosed upon the underlying mortgage, and who is barred by a bankruptcy discharge from obtaining a deficiency judgment, can pursue an action in waste against a mortgagor.

Defendant mortgaged premises to plaintiff in July, 1985, at which time, plaintiff's appraisal showed a valuation of $81,500 for the premises. In October, 1995, defendant filed for personal bankruptcy, naming plaintiff as a secured creditor for $60,400. In this bankruptcy proceeding, the premises were variously appraised at between $63,00 and $65,000. A discharge was granted to defendant in March, 1996, releasing defendant from any personal liability for the mortgage debt.

At a sale conducted at the conclusion of plaintiff's foreclosure action, the premises were purchased by plaintiff, who accepted and recorded a referee's deed therefor. The final judgment had adjudged that $68,600 was owed to plaintiff. However, an appraisal made on 5-1-1997, valued the premises at $50,000.

Plaintiff alleges that the diminution in value was caused by defendant's affirmative and passive acts of waste, which caused the property to be damaged and rendered uninhabitable during the period between his bankruptcy discharge, and the commencement of the foreclosure action. The issue before this Court, was not whether defendant committed waste; but rather, whether plaintiff possessed a right of action against him.

There is well established precedent for permitting a mortgagee to bring an action grounded in tort, in waste, for damages resulting in the diminution of value of its collateral. (*Van Pelt v. McGraw*, 4 NY 110) Such an action is not considered either an action of foreclosure or an action upon the loan indebtedness.

However, the purchaser at the foreclosure sale conducted in *Odell v. Buck* (168 NYS2d 756 [AD]), was barred from pursuing a claim for damages caused by removal of heating and plumbing fixtures. That Court concluded that once the referee's deed was delivered to and accepted by the plaintiff, the mortgage

debt was extinguished, and plaintiff was no longer a lender, having assumed the status of a purchaser. Plaintiff had made a choice as to whether or not to bid, based on the condition of the premises at the time of sale; and not at some time in the past. It was thus barred from bringing an action sounding in waste.

Beneficial Homeowners Services Corp'n. v. Breuer
663 NYS2d 943 (S.Ct.Saratoga Co.-1997)

MORTGAGE FORECLOSURE - APPLICATION FOR DEFICIENCY JUDGMENT

Premises were sold at a foreclosure sale conducted in January, 1996. However, it was not until nine (9) months later that the referee's deed was delivered and recorded; and the referee's report of sale filed. Said report showed a deficiency of $183,800 in monies due plaintiff Bank.

The judgment of foreclosure and sale provided that the Bank could make an application for a deficiency judgment pursuant to RPAPL 1371. In particular, Sec. 1371(2) provides that such a motion must be made within 90 days after the consummation of the foreclosure sale, by delivery of the deed to the purchaser thereat. Citing *Reconstruction Finance Corp'n. v. Finch* (186 NYS2d 956 [AD]), the Court noted that generally the 90 day time limit is figured from the actual date of the delivery of the deed; and not from any earlier date at which time the deed might or should have been delivered.

Defendant contended that because no such application was made within 90 days from the day of sale, he concluded that no such application would be made, and changed his position as to his other creditors, all to his detriment. Contrarywise, the Bank claimed that it had delayed taking title in the "not uncommon" hope that it could find someone to take over its bid; and that it made its intentions known to defendant by its counsel's letter, apparently without objection or demurral by defendant.

From the evidence at hand, the Court concluded that the nine month delay was not "unreasonable"; and was without prejudice to defendant who had the opportunity to, but did not, object to the delay. Further, the Court found that the defendant's decision to settle with his other creditors, was made by his own choice, and not by reason of any representations by the Bank. The Court did, however, agree with defendant, that the rents collected by the Bank during this nine month period, should have been applied to the principal and interest due by defendant, thereby reducing the deficiency judgment by some $46,400.

BSB Bank & Trust v. Yaman
664 NYS2d 209 (S.Ct.Cortland Co.-1997)

MORTGAGE FORECLOSURE - STATUTE OF LIMITATIONS NOT BINDING ON U.S.

Mortgage on defendant's residence was given to secure a loan made to Sealand, defendant's corporation; which loan was guaranteed by the Small Business Administration (SBA). The loan was made on 11-12-1980, and the mortgage was executed and delivered on 9-23-1981. When Sealand failed to repay the loan, the mortgage was assigned by mortgagee, Lafayette Bank, to the SBA on 2-3-1988; and plaintiff, SBA commenced this foreclosure action in December, 1995.

The Court noted that the U.S. SBA is not subject to the six year statute of limitations provided for by CPLR 213(4) for foreclosure actions (*Westnau Land Corp. v. U.S. SBA*, 785 FS 41, 43, aff'd 1 Fed.3 112), unless the statute had run against the mortgagee prior to the time of the assignment to the United States, or an agency thereof. (*United States v. Thornburg*, 82 Fed.3 886, 890) This Court properly determined that separate causes of action accrued on the indebtedness secured, as each installment became due (*Utical Mut. Ins. Co. v. Knox*, 419 NYS2d 332 [AD]); and that therefor, the Statute had not run against any installment due and payable after 2-3- 1982.

United States v. Quaintano
665 NYS2d 191 (A.D.4.D.- 1997)

Note: The Court also properly adjudged that the mortgage was supported by valid consideration, General Oblig. Law, 5-1105. Even though they were not executed on the same date, the loan and the mortgage were clearly part of the same transaction; and therefor there was no need for new or additional consideration to make the mortgage valid and enforceable. (*Liberty Nat'l. Bank v. Gross*, 607 NYS2d 419 [AD])