Did You Know?

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BANKRUPTCY - SUPER-PRIORITY LIEN MORTGAGE

Debtor is engaged in the production of electrical power under an agreement [PGA] entered into with LILCO. Its business consists of collecting wood debris, which it sorts and burns at its plant to produce steam which in turn, generates electricity that it sells to LILCO. Its plant is located on two acres which it owns; and on an additional adjacent property which it leases. In August, 1995, the wood chip piles that had accumulated as the result of the plant having been closed down for violation of their DEC permit, caught fire and spread to the adjacent parcels, and destroyed Debtor's plant. Being without adequate funds as the result of the cessation of operations, cleanup costs and startup costs, the debtor filed for protection pursuant to Chapter 11. Debtor has made this motion for approval of a super-priority mortgage lien pursuant to Bankruptcy Code Secs. 364(c) and 364(d) in connection with such loan.

Also, as a consequence of this fire, the Town of Islip sustained over $1M in costs to fight this fire and for clean-up costs of various premises adjacent to the plant site. The Town assessed Debtor's real property in order to recover these costs, and assigned the tax collection thereof to the County of Suffolk; which now objects to this application.

Sec. 364 provides that a Debtor may obtain financing secured by a lien senior to all other interests, only if the Trustee is otherwise unable to obtain such credit, and there is adequate protection of the interest of the lien holder on the property of the estate on which such lien is proposed to be granted. Citing In re *495 Central Park Avenue Corp.* (136 B.R. 625; Bankr. S.D.N.Y.), the Court held that as the Debtor-in-possession has the same rights as a Trustee, and if the Debtor meets the burden of proving that he has met the aforesaid requirements, Sec. 364(d) can be used to obtain credit on such terms.

Ruling for the Debtor, this Court found that the debtor had produced unrefuted evidence that it was unable to obtain financing less onerous to his secured creditors, and that the County of Suffolk is adequately protected by the value of the debtor's estate.

In Re Hubbard Power & Light, Debtor

202 B.R. 680 (Bankr. E.D.N.Y.-1996)

DEEDS - WHEN NOT EFFECTIVE AS A CONVEYANCE

In an open court settlement of their matrimonial action, it was provided that defendant (former husband) would pay to plaintiff (former wife), a certain sum of money. Plaintiff further agreed to execute a deed conveying all of her interest in the marital residence, to be held in escrow, pending defendant's payment in full of such sum. To secure this payment, defendant executed a mortgage in favor of plaintiff; and a deed conveying his interest in the premises, both likewise to be held in escrow. It was further provided that in the event of default, plaintiff could either foreclose on the mortgage, or record the deed in lieu of foreclosure. Defendant defaulted after payment of about half the sum due.

The Court held that the trial court erred in determining that plaintiff was the owner of the premises. Citing *Basile v. Erhal Holding Corp.* (538 NYS2d 831[AD]) this Court concluded that the deed executed by the defendant was intended to serve as security for his obligations under the stipulation, and not as an absolute complete conveyance of the property. Accordingly, the deed constituted a mortgage, the plaintiff was required to foreclose the same, to effect a transfer of title, notwithstand- ing the terms of the agreement.

Gioia v. Gioia
652 NYS2d 63 (A.D.2.D.-1996)

EASEMENT - BY NECESSITY, SUFFICIENTLY WIDE

In 1988, plaintiffs purchased four separate parcels of unimproved real property comprising some 87 acres. The property which does not border on a public road, can only be accessed from the nearest public highway by means of a private dirt road which traverses the property of defendant. Defendant has now placed a gate across the roadway leading to plaintiff's premises, which interferes with plaintiff's access.

It is undisputed and the parties agree that plaintiff have established an easement over the dirt road by prescription, and by implication from preexisting use upon severance of title. What remains in dispute, is whether plaintiff has established an easement of necessity; and more particularly, whether the evidence establishes an easement wider than the ten feet granted by the Trial Court. To establish an easement by necessity, plaintiff must show: (a) That there was a unity and then subsequent separation of title; and (b) That at the time of the severance, an easement over defendant's property was absolutely necessary. (cf. *Pickett v. Whipple*, 629 NYS2d 489)

As to the first element, plaintiff has established both a unity of title and then a severance, as both parties trace their titles through maps and an abstracts to title to a common owner. As to the second element,

plaintiff adduced proof, that upon severance, their parcel became landlocked by other properties, due to the nature of the surrounding terrain, except via the dirt road over defendant's lands. Thus the easement was "absolutely necessary."

In determining the extent of the easement, the Court cited *Wolfe v. Belzer* (585 NYS2d 98) to the effect that the creators of the easement must be assumed to have anticipated such uses as "might reasonably be required by a normal development of the dominant tenement." Since applicable zoning requirements mandated a twelve foot wide easement for development of premises by one house, The trial court determination was amended accordingly.

Stock v. Ostrander
650 NYS2d 416 (A.D.3.D.-1996)

EASEMENT - EXCLUSIVITY

Plaintiffs are owners of lots on a certain subdivision map. Each of them are possessed of easements (rights of way) over same by virtue of a grant from a common grantor, over areas designated as "Point Road" and "Beach Lot" on said map. Said grants recited that it was not intended to convey "any right of passage over said [land] by trade-people, market-men, mechanics, delivery-men ... nor by the general public." [italics ours] These thoroughfares were owned by the Village, which acquired title by virtue of a 1946 tax deed. Plaintiffs brought this action to permanently enjoin the Village from opening these thoroughfares to those who do not own lots on the subdivision map; to wit: the general public.

Citing *Hurd v. Lis*, (460 NYS2d 173 [AD]), this Court found that the cited language of the grant of the right of way, was sufficient to exclude third persons. These easement areas owned by the Village were construed as constituting the servient estate; subject to limitations imposed by the words of the original grant. Plaintiff was granted the permanent injunction sought.

Byrne v. Village of Larchmont
651 NYS2d 78, (A.D.2.D.-1996)

MECHANICS LIEN - WHEN BUILDING LOAN AGREEMENT NOT FILED

Plaintiff brought this action to foreclose a mortgage, in a circumstance where a portion of the mortgage proceeds was used for the acquisition of the land. No Building Loan Agreement was filed. Holders of mechanics liens counterclaimed to foreclose or enforce their liens. Plaintiff appeals from the denial of its motion for partial summary judgment, based inter alia, upon its contention that its mortgage was recorded prior to the defendants' mechanics liens, and was superior to these liens at least as to the extent of the monies used for land acquisition.

Pursuant to Lien Law Sec. 22, a building loan contract, with or without the sale of land, must be in writing and filed in the County Clerk's Office. If not so filed, the interest of each party to such contract in the real property is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. This Court rejected plaintiff's contention that so much of its mortgage as secured the loan proceeds apportioned for the purchase of the property, is outside the scope of the Lien Law. Citing *Nanuet Nat. Bank v. Eckerson Terrace, Inc.*, 417 NYS2d 901 [NY]), the Court noted that the language of Lien Law, Sec. 23, "implies" that if a lender fails to comply with the requirements of the Lien Law, its entire mortgage becomes subordinate to any subsequently filed mechanics lien.

Atlantic Bank of New York v. Forrest House Holding Company
651 NYS2d 607 (A.D.2.D.-1996)

MORTGAGE FORECLOSURE - BREACH OF SALES CONTRACT

Minutes before the foreclosure sale, and unknown to the mortgagee, the mortgagor filed a petition of bankruptcy which had the effect of automatically staying the sale. Mortgagee successfully sought and obtained an Order vacating the automatic stay, nunc pro tunc, which had the effect of validating the sale to Aron Malik. Malik then assigned his successful bid to Plaintiff. Before the closing with Plaintiff, the mortgagor sold the premises to an unrelated third party, who satisfied the foreclosed mortgage. Plaintiff refused to accept the return of the downpayment and brought this action against the defendant-mortgagee seeking damages for a tortious breach of contract.

The Court agreed with plaintiff that upon entry of the final judgment of foreclosure and sale, the mortgagor's equity of redemption was foreclosed, and that on the date he transferred title to the third party, he had no title to convey. (cf. *SRF Bulders Capital Corp. v. Ventura*, 639 NYS2d 59 (A.D.2.D.-1996). Plaintiff could have sought specific performance to enforce its rights under the judgment of foreclosure, to have title conveyed to it. Plaintiff's election not to seek specific performance, does not render defendant liable to it for lost profits. Its sole remaining remedy is now limited to a return of its downpayment.

Plaintiff must fail in its action for tortious interference with it contract with the referee, because it did not prove, inter alia, that defendant had knowledge of the contract between the mortgagor and the third party; did not participate with the mortgagor to transfer title; nor prove that defendant intentionally induced defendant to breach the contract.

Metropolitan Homes, Inc. v. Greenpoint Savings Bank
651 NYS2d 193 (A.D.2.D.-1996)

MORTGAGE FORECLOSURE - DEFICIENCY JUDGMENT MOTION

In a foreclosure action in which defendant-fee owner defaulted, the sale pursuant to a final judgment of foreclosure and sale took place in November, 1993. Plaintiff was the successful bidder for the sum of $100.00. Thereafter, plaintiff sought to find a purchaser; and then entered into a contract for the assignment of its bid.

The closing with Landmark Equities, the assignee, took place on August 22, 1995; and on October 31, 1995, plaintiff moved for leave to enter a deficiency judgment. Said defendant opposed, contending, inter alia, that plaintiff "unreasonably" delayed the delivery of the deed. This appeal followed the granting of plaintiff's motion.

The Court affirmed on the basis that this defendant cannot be heard to request the intervention of equity, since his dilemma was self-created by his default in appearing (underline ours) in the action. (cf. *Brandenberg v. Tirino*, 320 NYS2d 358). Further this Court cited *Voss v. Multifilm Corp. of America* (491 NYS2d 434 [AD]), as holding that the requisite 90 day period is measured from the date of the delivery of the deed, to the date of making the motion. Clearly, plaintiff met that test.

Atlantic Bank of New York v. Weiss
651 NYS2d 73 (A.D.2.D.-1996}

Note: There is more than just an inference in the Court's decision, that had the defendant appeared in this action, that the Court might have been more receptive to defendant's equitable contentions.

WATERWAYS - DAM CONSTRUCTION EASEMENT

In 1930, plaintiff's predecessor in title ("The Club), entered into an agreement with defendant's predecessor in title (Redding), whereby Redding paid The Club $300.00 for the right to flood parts of The Club's lands. This Agreement which was recorded, specifically prohibited The Club from boating, fishing, bathing or having any other rights upon the waters of Tusten Lake, over Redding's lands. Plaintiff purchased the parcels of land near the lake, subject to this agreement. In early 1992, the Dept. of Environmental Conservation inspected the dam and found it to be in a dangerous and unsafe condition; and required that it be removed, repaired or reconstructed. Defendants were given a permit to breach the dam by DEC, and did so on November 9, 1992, thus abating the nuisance, and causing a substantial lowering of the water level of Tusten Lake. Plaintiff commenced this action seeking damages to his parcels bordering the lake, due to the lowered water lake level.

The trial court granted defendant's motion dismissing plaintiff's complaint, finding that "[s]ince the dam ... was created by Defendant's predecessors by virtue of an easement acquired over the property occupied by such dam, such Defendant also had the right to abandon the dam at any time thereafter". The trial

court also ruled that the use of the easement in and of itself, did not create a right in the subservient land owner or adjacent landowners to have the dam continue indefinitely. The appellate court sustained this finding, on authority of *Lake Claire Homeowners Assn. v. Rosenberg*, (626 NYS2d 540 [AD]; lv. dism. 86 NY2d 838), where the Court found that the complaint failed to alleged any basis upon which to predicate a duty on behalf of defendant to maintain the dam, even thought plaintiffs had established their littoral rights with respect to Lake Claire. The Court points out, that not only did plaintiff not claim before the trial court that it has a reciprocal prescriptive easement to maintain the dam; but defendants correctly argue, that such rule is not applicable here.

Bird v. Trust Co. of New Jersey
651 NYS2d 246 (A.D.3.D.-1996)