Did You Know?

by Theodore P. Sherris

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CO-TENANT'S RIGHTS - FORECLOSURE PRECIPITATED BY PLAINTIFF DENIED

In August, 1988, defendant agreed to purchase plaintiff's property consisting of a hotel and tavern, contingent on his acquiring a liquor license. He also entered into a three year lease of the premises for which he paid plaintiff a monthly rent of $325.00, commencing September 1, 1988. Upon obtaining the license, defendant began to operate the tavern and moved with his family into several rooms in the hotel. Although the sale was not consulated as originally conceived, defendant received a deed in May, 1989, granting him an undivided one-half interest in the premises as a tenant in common, in exchange for which he gave plaintiff a note for $20,000.00, secured by a mortgage on said one-half interest. Defendant continued to operate the bar for three years through August, 1991, paying $657.03 monthly ($325.00 rent; and $332.03 on account of the mortgage.)

Said lease was not renewed, and defendant made no further payments after August, 1991. On September 1st, defendant arrived at the tavern to open it for business, only to discover that the coolers were unplugged, and that customers were being turned away by plaintiff, being told by him, that defendant was "out of business." Subsequently, defendant discovered that plaintiff had transferred the electric service to his own name on August 27th. Plaintiff subsequently commenced this foreclosure action. As a tenant in common, defendant was entitled to "occupy the premises and utilize the same " in an appropriate manner. Plaintiff had no right to interfere with such use and enjoyment. (cf. 24 N.Y. Jur. 2nd, Cotenancy & Partition, Secs. 60-61, p. 316-318) Without question, plaintiff's actions clearly indicated plaintiff's intention to exert total control over the premises, thus effectively "ousting" him from possession. (*Johnston v. Martin*, 583 NYS2d 615 [A.D.])

Accordingly, since plaintiff's own conduct precipitated the defendant's inability to make the mortgage payments, and caused the default, the foreclosure should not have been granted, and the judgment for the same was reversed. It was additionally remanded to adduce proof on defendant's allegation of damages sustained by him by reason of said ouster; and plaintiff's conversion of defendant's property.

Dunn v. Moore

628 NYS2d 195 (A.D.3.D.-1995)

EQUITABLE SUBROGATION - MORTGAGE REINSTATED

Prior to the making of a mortgage to Dunne by The Greenpoint Savings Bank, a title search revealed four prior recorded mortgages. As a condition to making this loan, Greenpoint required that these earlier four mortgages be satisfied of record, in order that its mortgage have a first lien position. These mortgages (including two Hering-Gerstenhaber mortgages) were satisfied with proceeds of the closing that took place on December 3, 1987.

When Greenpoint commenced a foreclosure action in 1990 to foreclose this mortgage, plaintiffs commenced this action to foreclose another mortgage of theirs, for $55,000.00, that was also dated December 3, 1987, but which was recorded prior to that of Greenpoint's. Under New York's race-notice statute, the plaintiff's mortgage had priority over that of Greenpoint's. Accordingly, relying upon the theory of "equitable subrogation," Greenpoint moved for summary judgment dismissing the Zeidel-Hering- Gerstenhaber complaint.

Granting judgment for Greenpoint, the Court held that the doctrine of equitable subrogation applies "where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his, but junior to the one satisfied with his funds." (*King v. Pelkofski*, 20 NY2d 326, 333/4; 282 NYS2d 753) This is to avoid the unjust enrichment of the intervening, unknown lienor. "In this instance, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance."

Idel v. Dunne
626 NYS2d 509 (A.D.2.D.-1995)

JUDGMENT EXECUTION SALE - SHERIFF'S DELIVERY OF DEED

January 10,1990, plaintiff obtained a judgment for $19,700.00 against Insulation Plus; and on July, 1990 issued an execution to the Sheriff for the sale of two parcels of real property owned by them. The premises were sold to plaintiff for $1.00 at the sale conducted on October 1, 1990. Thereafter, defendant Southtowns Industries obtained a judgment for $25,900.00 against Insulation Plus on November 20, 1990. The Sheriff's deed following the sale, was not delivered until after Southtown docketed its judgment. The deeds were recorded in December, following.

erally speaking, the protection afforded by CPLR 5203 to a judgment creditor, relates to a debtor's attempt to transfer real property while a creditor's judgment is effective. In such instance, the unconditional delivery of a deed prior thereto, would be relevant. However, the Court held here, that in a instance such as this, where the judgment debtor's transfer of real property is in satisfaction of a prior judgment, or to a purchaser for value at a judgment execution sale, the subsequent judgment creditor

does not receive such protection. (CPLR 5203(a)[1], [3]). The Sheriff's obligation pursuant to CPLR 5236(f) to deliver the deeds within 10 days of the sale, does not avail Southtown, since the Sheriff's obligation runs to the purchaser at such a sale, and not to third parties such as another judgment creditor.

Relying on *Guardian Loan Co. v. Early*, (47 NY2d 515, 518; 419 NYS2d 45), the Court rejected Southtown's contention that absent delivery of the deed, title had not passed from the judgment-debtor as of the time of the docketing of its judgment. The Court found a "relation-back" situation to exist, stating that "title was deemed to have passed at the time the judgment was docketed." It concluded that a purchaser at a Sheriff's sale, takes immediate title to the property, and is placed in the same position as he would have been in, if the deed have been executed by the judgment debtor, himself.

Insulation Plus, Inc. v. Higgins (Southtown Industries)
626 NYS2d 609 (A.D.4.D.-1995)

MORTGAGE ASSIGNMENT AS OF RIGHT - RPL New Sec. 275

Defendant to sought to compel an assignment upon payment of a mortgage under foreclosure. Agreeing with the lower court, the Appellate Division held that as an action to foreclose a mortgage is an equitable proceeding (*Jamaica Sav. Bk. v. M.S. Investing Co.*, 274 NY 215, 219); under the instant circumstances, plaintiff-mortgagee may be compelled to issue an assignment of mortgage upon full payment of the mortgage indebtedness pursuant to RPL New Sec. 275. (cf. *Goldstein v. Soledad Place Corp.*, 599 NYS2d 213 [S.Ct.])

River Bank America v. Stabile
628 NYS2d 103 (A.D.1.D.-1995)

Note: This case is the first appellate case we have seen interpreting New Sec. 275. Since this reported case is sparse on facts, we are unable to determine if the holding is to be limited to its facts; ie. payment to stop a foreclosure. Some difference of opinion exists as to whether New Sec. 275 effected a change of law which under the old Sec. 275, permitted the mortgagor to require the giving of an assignment, instead of a satisfaction, upon payment. In *Harris v. Crossland Mortgage Corp.* (610 NYS2d 423 [Dist.Ct.Nas.Co.- 1994]), reported in RHODES, Oct.1994, Vol. 6, No. 8, "Did You Know?", that Court declined to follow the Goldstein Case. However, see Dept. of Taxation Memo issued 8-3-1989, (TBS-M-89[6.1]) referred to in said RHODES article.

MORTGAGE - MERGER INTO FEE - EQUITABLY IMPOSED

As a general rule of law, a mortgage may become merged in the fee, and extinguished, where title to the land and ownership of the mortgage becomes vested in the same person or entity. (*Becker v. Snowden Devel. Corp.*, 323 NYS2d 79) However, the Court may intervene to bar, or invoke a merger, where the

same was the intent of the mortgagee, or justice requires. In the case at bar, appellant through the use of aliases and alter egos, held title to the property under one name, and the first mortgage in another, for the purpose of perpetrating a fraud on plaintiff, the holder of the second mortgage. Accordingly, the Court sustained the finding that a merger had occurred.

Cambridge Factors, Inc. v. Thompson
626 NYS2d 259, (A.D.2.D.-1995)

MORTGAGE FORECLOSURE - FACTS CONSTITUTING DEFAULT

In this foreclosure action, plaintiff alleges that defendant was in default by reason of: (1) Failing to make certain interest payments; and (2) Failing to remove two Lis Pendens, and a mechanics lien filed against the premises. In opposition, defendant contents that since the inception of the loan in 1989, plaintiff-mortgagee paid the required monthly interest payments to itself out of an interest reserve account; and that despite the existence of sufficient funds in said account, plaintiff stopped that practice in September, 1989. Defendant also alleges that there are no valid liens against the premises.

Denying plaintiffs' motion for summary judgment, the Court found that since the evidence concerning the existence and operation of the interest reserve account were matters within plaintiffs' control, until adequate disclosure was made to defendant, there was adequate reason to excuse defendant's failure to submit evidentiary proof in admissible form, as to its contentions, which raised questions of fact. (CPLR Sec. 3212(f))

Dealing with the second ground of the alleged default, the Court rejected plaintiff's argument that the mortgage documents could be interpreted as requiring mortgagor to pay a mechanics lien within 30 days of its filing, without regard to its validity. At most, a mortgagor is required to pay valid claims. In any event, the Court found that the lis pendens and expired mechanics lien, were not sufficient to establish a lawfully existing claim. On this basis, there was no reason for plaintiff to declare a default, and cease paying interest to itself out of the reserve fund.

Accordingly, the appellate court upheld the denial of plaintiff's motion for summary judgment.

River Bank America v. Daniel Equities Corp.
624 NYS2d 288 (A.D.3.D.-1995)

MORTGAGE FORECLOSURE - NOTICE TO GUARANTOR

A mortgagee established a prima facie case for foreclosure by production of the mortgage documents, and proof of default. (*Village Bank v. Wild Oaks Holding Co.*, 601 NYS2d 940 {A.D.]). Absent specific language in the mortgage documents specifying the same, there is no requirement that where, as here, the mortgage has been guaranteed, that notice be given to the guarantor with the opportunity to cure a

default.

Bank Leumi Trust Co., v. Lightning Park, Inc.
626 NYS2d 202 (A.D.1.D.-1995)

STATUTE OF FRAUDS - EXECUTION OF CONTRACT BY ONE OWNER

Plaintiff paid a $100.00 deposit and signed a "purchase agreement" to purchase premises for $65,000.00, "on the signing of a formal contract." The agreement was prepared by a real estate broker, and delivered to respondent, Amil Shaban, one of the owners, who signed it. Although premises were jointly owned by Amil and his brother Jack, only Amil singed the agreement as "owner." The $100.00 was returned to plaintiff who alleged fraud, breach of contract, and brought this action for specific performance. Summary judgment was granted to Jack on the ground that he never signed the contract. The action for damages was also dismissed as to Amil. Plaintiff appeals.

In a 4-1 decision, the Court found that as to Jack, the agreement was void under the statute of frauds, inasmuch as it was not executed by the "party sought to be charged." Further, that plaintiff failed to offer any proof that Amil was authorized in writing to act as his brother's agent in this matter. (*DeMartin v. Farina*, 613 NYS2d 655 [A.D.]) Finding that, as a matter of law, the parties did not enter into a binding contract, the Court distinguished this case from *Coppola v. Fredstrom* (358 NYS2d 538 [A.D.]), where an action for damages was maintained against one tenant by the entirety, where she signed her husband's name without his authorization, to an agreement purporting to convey the entire property.

Limiting itself to the dismissal of the allegation of damages against Amil, the Dissent discussed the requirement in the purchase agreement, that it was subject to a "more formal contract." The Dissent contended that if such a "purchase agreement" meets all of the requirements of the Statute of Frauds, the issue still remains, do the parties intend to be bound prior to the execution of the more "formal" contract. (*Healy v. Gumienny*, 531 NYS2d 7 [A.D.])

Arguing that the determination as to whether or not plaintiff can recover the loss of the bargain as against the party who signed the contract (Amil), depends on whether he acted in bad faith (cf. *Coppolla v. Fredstrom*, supra). The Dissent concluded that an issue of fact existed as to this matter; and that summary judgment should not have been granted in favor of Amil.

Chan v. Bay Ridge Park Hill Realty Co.
623 NYS2d 896 (A.D.2.D.-1995)