November 1996

BANKRUPTCY DISCHARGE OF MORTGAGE DEBT AS AFFECTING FORECLOSURE ACTION

Plaintiff is the holder of a promissory note and mortgage on certain real property owned by defendants Rose, given as security for a line of credit utilized by a corporate entity, owned by the Roses. In a collateral action, plaintiff secured a money judgment against the Roses, which included monies which were the subject of the said note and mortgage. Subsequent to the entry of this judgment, the Roses filed a joint petition under Chapter 7 of the Bankruptcy Code. The automatic bankruptcy stay was modified upon application of the plaintiff, to permit them to commence the instant foreclosure action. It is undisputed that the discharge which the Roses obtained in the bankruptcy proceeding, voided plaintiff's money judgment, and operated to prevent plaintiff from the commencement or continuation of any action to collect on the said judgment.

Plaintiff did not attempt to execute against the Roses' real property prior to the commencement of this foreclosure action. Consequently, when the plaintiff moved for summary judgment in the foreclosure, the trial court determined that pursuant to RPAPL 1301, the judgment in the action that led to their obtaining the money judgment, "constituted an election of remedies precluding this foreclosure action."

RPAPL 1301(1) prevents the commencement of a foreclosure action where a money judgment has been rendered for the plaintiff in an action to recover all or a portion of the mortgage debt, unless an execution against the property of the defendant has been issued upon the judgment, and the same has been returned wholly or partly unsatisfied. The purpose of this statute is to avoid multiple suits to recover the same mortgage debt, and to confine the proceedings to one court and one action. (*Dollar Dry Dock Bank v. Piping Rock Bldrs.*, 581 NYS2d 361) It is the "embodiment of the equitable principle" that once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity (ie. foreclosure) is sought. Dollar Dry Dock is also cited for the proposition that this statute must be strictly construed since it is in derogation of a plaintiff's common-law right to pursue alternate remedies of foreclosure and recovery of the mortgage debt, at the same time.

The Court stated that under the unique circumstances presented in this case, equitable concerns militate against a mechanistic application of RPAPL 1301(1). It based this position upon the facts that: *a.* Plaintiff did not bring an action to obtain a money judgment; rather it obtained the same via a counterclaim in an action which defendants' brought; *b.* After plaintiff commenced this foreclosure action, defendants, Rose, received a discharge in bankruptcy, rendering the money judgment unenforceable; and *c.* If plaintiff were precluded from maintaining this foreclosure action by the operation of 1301, it would be unable to conform to that statute so as to commence a second foreclosure action. In conclusion, the Court held that the principals of RPAPL 1301 are not disserved by permitting the plaintiff to maintain this foreclosure action.

Valley Savings Bank v. Rose
646 NYS2d 349 (A.D.2.D.-1996)

BANKRUPTCY STAY AS AFFECTING A STATUTE OF LIMITATION

This case involving the effect of the automatic bankruptcy stay on the tolling provisions of C.P.L.R. Sec. 204, is a matter of first impression.

This is an action to foreclose a mortgage which became due on June 1, 1988, and was commenced on October 21, 1994. In October, 1992, the Owner had filed a petition under Chapter 11 of the Bankruptcy Code. In December, 1992, plaintiff submitted an application to the bankruptcy court to dismiss the proceeding; and, in the alternative, for relief from the automatic stay provided for in 11 U.S.C. 362. This was in connection with an action involving the bankruptcy filing Owner, which had no relation to the case at bar. This motion to lift the automatic stay as to such other action, was granted.

In March, 1994, plaintiffs requested the bankruptcy court to lift the automatic stay so as to permit the commencement of this action. This application was never decided since shortly after the filing thereof, the Trustee in bankruptcy moved to dismiss the bankruptcy proceeding, which application was granted by order dated May, 1994. Defendant herein moves for summary judgment, asserting as a defense, inter alia, the running of the statute of limitations.

C.P.L.R. 204(a) provides that: "When the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced." The Owner contends that the only period for which the statute was tolled, was the period from the date when plaintiff moved to vacate the stay with respect to the subject mortgage, to the date when the bankruptcy proceeding was dismissed. Since this was only a two month period, this action would not have been brought timely, even taking into account the tolled period. Further amplifying its position, defendant relies on a series of case where a state statute created a condition precedent to the institution of suit. These have held to give a plaintiff the ability to satisfy the condition, with the consequence that the period ran only from the time of the court application, to the date of the determination of such application. Where a plaintiff had complete control over the acts necessary to

effectuate compliance with a statutory mandate, ie. the waiting time for the appointment of an administratrix, the same did not toll such a time limitation. (cf. *Velez v. MVAIC*, 392 NYS2d 292) Other cases involving situations where certain statutes specifically prohibit commencement of suit for a period after a claim is filed, have been held to create a toll under Sec. 204. (*Burgess v. L.I.R.R. Authority*, 579 NYS2d 631).

This court then went on to distinguish those state cases which involve statutory conditions precedent to the institution of suit, from an automatic bankruptcy stay which would prevent the filing of suit, and may be lifted on motion of a claimant. The court did not find material, that plaintiff herein waited 17 months before filing for relief from the stay which theretofor had prevented them from bringing this action.

Citing *Aslandis v. U.S. Lines, Inc.* (7 F.3d 1067, 2nd Cir), the court held that Bankruptcy Code Sec. 108 which provides tolls of a statute of limitations where the period of limitation expired during the operation of a stay, for a period of 30 days after the termination thereof, had no relevance to the issue of whether Sec. 204 creates a toll under state law upon the filing of a bankruptcy petition. It concluded that the bankruptcy filing tolled the statute of limitations from the date the petition was filed until the date the case was dismissed. Plaintiff's motion for summary judgment was granted.

Zuckerman v. 234-6 W. 22 St. Corp.
645 NYS2d 967, (S.CT. N.Y. Co.-1996)

MORTGAGE FORECLOSURE - STANDING TO REDEEM

Defendants, Rusin conveyed title to their home to two of their sons, who made a mortgage to SCF, and then reconveyed title to Richard (Rusin). Defendants continued to live in the premises. Upon default, the mortgage was foreclosed, and the mortgage and cause of action was assigned to plaintiff. Fearing the loss of their residence, and remaining in possession of the premises, defendants (Rusin), allegedly without knowledge of the judgment of foreclosure, made interest only payments to plaintiff, for approximately eight years. After subsequent defaults, plaintiff moved to re-notice the foreclosure sale, and the Rusins cross-moved to stay the sale, and to be permitted to tender the amount due to redeem their interest in the premises. Thereafter Richard Rusin conveyed title to one Rispo, in escrow, conditioned upon Rispo obtaining a mortgage commitment.

Plaintiff appeals from the granting of the Rusins' motion, challenging the trial court's application of a 9% interest rate in its calculation; and additionally alleging that neither the Rusins, nor Rispo had sufficient interest in the property to have standing to compel a redemption.

Citing *Marine Mgt. V. Seco Mgt.* (574 NYS2d 207, aff'd. 80 NY2d 886), the appellate Court approved the use of the statutory 9% interest rate as the basis of interest computation on the unpaid principal owed. It held that in the absence of language in the mortgage or other agreement, setting forth a "clear,

unambiguous, and unequivocal" expression to pay an interest rate higher than the statutory rate, such statutory rate should be applied.

Relying on *Lorisa Capital Corp v. Gallo* (506 NYS2d 62), the Court concluded that the Rusins had the requisite standing to seek a redemption, based upon their thirty years of residence in, and possession of, the property. The Court then analyzed Rispo's alleged interest, as follows. Citing well established law, the Court found that: (a) Transfer of title is accomplished only by the unconditional delivery and acceptance of an executed deed; and (b) Since a deed delivered to be held in escrow, is by its nature, conditional, it is of no force or effect until the condition is met. Accordingly, the Court concluded that Rispo did not have an interest in the subject property, and therefor, no right of redemption.

Erhal Holding Corp. v. Rusin
645 NYS2d 93 (A.D.2.D.-1996)

MORTGAGE FORECLOSURE - GROUNDS FOR VOIDING A STIPULATION

A judgment of foreclosure and sale was entered against defendants in October, 1990. The same was amended in December, 1990 by a stipulation entered into between the parties, that provided that the appellants would forebear with the continuance of their foreclosure action, on condition that respondants made payments to them in accordance with a schedule then orally agreed upon in open court. Upon respondants' default in holding to that payment schedule, respondent sought to prevent appellant from proceeding with the foreclosure action, alleging that they had entered into the said stipulation by a mistake of law, not realizing that they had a possible meritorious defense. This appeal followed the trial court's granting of said motion.

Citing *N.Y. Bank for Savings v. Howard Cortlandt St.* (482 NYS2d 836), this Court held that a stipulation is essentially a contract, and may be enforced as such, despite a mistake of law. Where, as here, there is an oral stipulation made in open court, it is valid and binding and will not be set aside absent of facts less than that needed to avoid a contract, ie. fraud, collusion, mistake of fact, accident or some other ground of similar nature. (*Hallock v. State of New York*, 485 NYS2d 510 [Ct. of Ap.]

This Court acknowledged that trial court correctly found that a stipulation would fail in the absence of adequate consideration. However, noting *Birchwood Towers #2 Assoc. v. Haber* (469 NYS2d 94), this Court found that there was consideration for the stipulation; and that "a mistake as to the law, is insufficient grounds" upon which to vacate a stipulation.

Varveris v. Fisher
645 NYS2d 853, (A.D.2.D.-1996)

TRANSFER TAX - AFFECTED BY OVERLEASE & RECONVEYANCE OF UNITS Petitioner is the current fee owner of the premises. Petitioner has been advised that pursuant to a resolution adopted by the Industrial Development Agency (IDA), certain economic development benefits were authorized in order to induce a Company to retain its offices in NYC.

Since an Industrial Development Agency must have a legal ownership interest in the property benefited, Petitioner as an accommodation to the Company, converted the subject Building into a condominium, and has conveyed title to some units, representing the portion of the Building, that the Company will occupy (the IDA units), to the IDA for a nominal consideration. Title to these IDA Units will revert back to the Petitioner-owner in the year 2016, or sooner, when the financing leases or subleases, or benefits afforded to he Petitioner terminate. Simultaneous with the such conveyance, the IDA leased the IDA units back to petitioner {"Overlease"} at a nominal consideration, for a period co- existent with the IDA's title in these IDA units.

While the IDA holds title to the IDA Units, the Overlease contemplates, and the parties to the transaction intend, that petitioner is, the "beneficial {defacto} owner" of these units. The IDA has no beneficial interest in the IDA Units; and has no obligations to construct, improve or maintain the premises. The IDA, inter alia, has no interest in any condemnation awards; and has no rights to sell, assign or mortgage its interest in such units. Petitioner has the right to mortgage the IDA Units, to which the IDA will subject its title to such mortgages. Petitioner has the responsibility for the maintenance of these units. Petitioner has leased these IDA Units to the Owner for up to 20 years, with three five year renewal options.

Tax Law 1402 imposes a transfer tax on each conveyance of real property or interest therein, where the consideration exceeds $500.00. Transfer Tax Regulation (NYCRR), Sec. 575.7 provides that the creation of a lease or sublease, not coupled with an option to purchase, constitutes a conveyance of such an interest, only where: a. The term of such lease, with any option to renew, exceeds 40 years; b. Substantial capital improvement are or may be made by or for the benefit of the leasee; and c. Such lease is for substantially all of the premises constituting the real property (ie. 90% or more). NTCRR Sec. 575.9(c) exempts conveyances to governmental organizations from such taxation.

Among those examples of conveyances which are subject to the real property transfer tax, are conveyances to an IDA by a person who is not the beneficiary of such IDA financing, at the direction of such beneficiary. In such a transaction, such beneficiary leases the property from the IDA. The beneficiary is deemed to be the grantee, not the IDA. Consistent therewith, the beneficiary of the IDA transaction is deemed to be the grantor of the conveyance to the IDA. In both of these situations, the transaction is taxable (NTCRR Sec. 575.11).

Among the examples of conveyances which are not subject to the transfer tax, are conveyances by the beneficiary of the IDA financing to the IDA, in connection with the receipt of such financing; and a conveyance by the IDA, as grantor, to the beneficiary of the IDA financing, as grantee. (NTCRR Sec. 575.11).

Citing Sec. 575.11, the Opinion concludes that a. The conveyance and transfer of title to an IDA for the purpose of obtaining such financing, is not subject to the NYTT; b. The leaseback (reversion or reconveyance) by an IDA to Petitioner, is not subject to the transfer tax, since the Petitioner remains the "beneficial owner" of the real property. [In the subject case, while Petitioner is not the beneficiary of the financing, it is the "beneficial owner" of the real property. Therefor, the creation of the Overlease, whether in connection with the addition or deletion of additional units to the IDA Units, is not subject to the transfer tax.] c. Neither the termination of the Overlease), nor the creation of the Prime Lease in connection with the addition or deletion of additional Units to the IDA Units for a term of less than 49 years, including renewal periods, is subject to the transfer tax.

Petition of Metropolitan Life Insurance Company
Advisory Opinion, TSB-A-96(12)R, dated 9-18-1996; Petition No. M960426A.