

14 Misc. 2d 1034, *; 177 N.Y.S.2d 652, **;
1958 N.Y. Misc. LEXIS 2980, ***

Louis Mintz, Plaintiff, v. Alex Kupferstein et al., as Executors and Trustees of Theodore Kupferstein, Deceased, et al., Defendants

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Trial Term, Nassau County

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July 3, 1958

DISPOSITION: [***1] The counterclaim is dismissed.

Submit judgment.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff brought an action to foreclose a second mortgage on real property. Defendants, the third and the fourth mortgagees, contended that plaintiff was one of the owners of the fee title and that his purpose in purchasing the first and second mortgages was to cause a default and by foreclosure to freeze them out. Defendants also filed a counterclaim, asking for their mortgages to be made first liens upon the property.

OVERVIEW: Plaintiff was a member of a partnership that owned the property at issue. Defendants urged that plaintiff could not prevail because the mortgage was no longer alive, it having been merged in the fee title, and because if it were alive the relief sought by plaintiff was unconscionable. Upon review, the court found defendants' arguments without merit. The money paid by plaintiff to purchase the first and second mortgages was not paid on behalf of the partnership. Evidence showed that he sought to borrow the money on his personal note and although the partners indorsed his note the mortgage purchase was for his personal account. There was no testimony to the contrary. Although there were facts from which inferences of an interest by the partnership might have been drawn, such inferences were not permissible for the facts were also consistent with plaintiff's theory of the case. The intention of the parties not to have the fee and the mortgage interest merge was unmistakable, positive, and clear. The first and second mortgages were fully alive. Plaintiff, by his purchase of the prior liens at a discount, did not and could not have prejudiced defendants' rights.

OUTCOME: The judgment of foreclosure prayed for in the complaint was granted, together with interest and the

costs of the action. Defendants' counterclaim was dismissed.

HEADNOTES

Mortgages -- foreclosure -- merger in fee -- action by partner to foreclose second mortgage on real estate owned by partnership which was subject to four mortgages; money paid by plaintiff partner to purchase first and second mortgages, with consent of remaining partners, was paid on partner's personal account; assignments of mortgage to plaintiff partner did not make fee title and mortgage interest coextensive, and no merger of two interests resulted; foreclosure granted.

1. In an action by a partner to foreclose a second mortgage on real estate owned by the partnership which was subject to four mortgages, the proof established that money paid by plaintiff partner to purchase the first and second mortgages, with the consent of the remaining partners, was not paid on behalf of the partnership but on his personal account. Hence, assignments of mortgage to plaintiff partner did not make the fee title and mortgage interest coextensive, and no merger of the two interests resulted.

2. Express declaration in the assignments of mortgage that "this assigned mortgage shall not merge with the fee" prevented death of the mortgages [***2] by merger.

3. Plaintiff partner, by his purchase of the prior liens at a discount, did not prejudice the third and fourth mortgages' rights.

4. The court did not find inequitable conduct on the part of plaintiff. There was no fraud or deceit involved. Defendants' mortgages were subject to legal rights, and whether those rights were in plaintiff's hands or in the hands of others did not alter the case. Judgment of foreclosure was granted.

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COUNSEL: *Dreyer & Traub* (Samuel Kirschenbaum of counsel), for plaintiff.

Bernhardt M. Meisels for Alex Kupferstein and others, as executors and trustees, and another, defendants.

Berman & Tomaselli (Charles Sutton of counsel), for LeRoy Simon and another, defendants.

JUDGES: Marcus G. Christ, J.

OPINION BY: CHRIST

OPINION

[*1034] [**653] This is an action to foreclose a second mortgage on real property. The contesting defendants are the third and fourth mortgagees. They contend that the plaintiff is [*1035] one of the owners of the fee title and that his purpose in purchasing the first and second mortgages was to cause a default and by foreclosure to freeze out the third and fourth mortgagees. It is urged that the plaintiff [***3] may not prevail for two reasons, one, that the mortgage is no longer alive, it having been merged in the fee title and secondly that if it were alive the relief sought by the plaintiff is unconscionable.

The plaintiff with six other persons is a member of a partnership called Forest Associates. This partnership is the owner of the property in suit here. It purchased the land herein designated as Parcel No. 3, subject to four mortgages. When this had been acquired the partnership then purchased adjoining land designated as Parcels Nos. 1 and 2. The plan was to develop the whole tract into a residential community. Financial problems, however, beset the undertaking and the partnership decided to abandon Parcel No. 3 to the mortgagees. The plaintiff in discussing the matter with the first and second mortgagees, discovered that he could purchase these mortgages at discounts from the face amounts due. He discussed this with his partners and obtained their consents to go forward to purchase the mortgages and if need be to foreclose them. The bond and mortgage in suit are found to be as described in paragraphs 1 and 2 of the complaint. It contains the usual 30-day default clauses [***4] as to taxes and interest. It is recorded in Liber 5737 of mortgages, at page 83 in the office of the Clerk of the County of Nassau on December 12, 1955 and it covers the land described in [**654] the complaint. This mortgage was assigned by the Franklin National Bank that came to hold it by mesne assignments to Louis Mintz, the plaintiff. The assignment to Mintz contains this clause: "It is the intention that this assigned mortgage shall not merge with the fee."

There are now defaults in interest from December 2, 1956 to date and taxes due from July 1, 1957 to date.

The court finds that the money paid by the plaintiff to purchase the first and second mortgages was not paid on behalf of the partnership but on behalf of himself. Evidence shows that he sought to borrow the money on his personal note and although the partners indorsed his note the mortgage purchase was for his personal account. There is no testimony to the contrary. Although there are facts from which inferences of an interest by the partnership might be drawn, such inferences are not permissible for the facts are also consistent with the plaintiff's theory of the case.

[*1036] Thus, the assignments of [***5] mortgage to Mintz do not make the fee title and the mortgage interest coextensive. This in itself is sufficient to prevent the merger of the two interests, for if there are other interests in the fee, not in the mortgage, the mortgage would be good against the other owners. There is more, however, an express declaration in the assignment that there was not to be a merger, also prevents the death of the mortgages by merger (*Millspaugh v. McBride*, 7 Paige Ch. 509; 2 Jones, Law of Mortgages of Real Property [8th ed.], § 1089, p. 522; 5 Tiffany, Law of Real Property [3d ed.], § 1480, p. 507 *et seq.*). The intention of the parties not to have the fee and the mortgage interest merge is unmistakable, positive and clear.

The court finds that the first and second mortgages are fully alive.

The plaintiff by his purchase of the prior liens at a discount did not and could not prejudice the third and fourth mortgagees' rights.

Prior to Mintz acquiring the mortgages, the defendant mortgagees had certain rights. After Mintz took the mortgages these rights were unimpaired. They were the same after as before.

In the event of a default in principal, interest or taxes, the defendants [***6] could foreclose; they could keep the prior mortgage paid up and proceed against the real property. In this case, no personal judgment could be taken. There is permitted only a judgment in rem against the land, as provided in all four mortgages.

The defendants ask that their third and fourth mortgages now be made first liens upon the property subordinating the prior obligations [**655] to theirs. This would result in an unjust enrichment to them. Mortgages which the defendants now hold to be in jeopardy would become gilt-edged.

The court does not find inequitable conduct on the part of the plaintiff. There is no fraud or deceit involved. There were legal rights to which defendants' mortgages were subject. Whether these rights are in plaintiff's hands or in the hands of others does not alter the case

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here. The allegations of the complaint are found to be true.

This constitutes the decision of the court pursuant to section 440 of the Civil Practice Act.

Judgment of foreclosure as prayed for in the complaint granted, together with interest and the costs of this action.

The counterclaim is dismissed.

Submit judgment.