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Mortgages--Assignment of Rents--Priority of Assignees (Dollar Savings Bank v. Sunnybrook Associates, 272 App. Div. 734 (1st Dep't 1947))

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Where the concealment of the consultation is for an ailment of a serious nature, its materiality may be decided as a matter of law.[7] Thus, as in the instant case, concealment of consultation for an ailment which subsequently was the cause of death would be of such a serious nature.[8] This decision indicates the trend in insurance law to strike a happy medium between the harsh doctrine of warranty and that doctrine which left the decision of materiality to a jury which had a tendency to lean toward the insured.

J. F. M.

MORTGAGES—ASSIGNMENT OF RENTS—PRIORITY OF ASSIGNEES.—The defendant mortgaged an apartment house to the plaintiff bank, which mortgage contained an assignment of rent clause and provided for the appointment of a receiver upon default.[1] The mortgagor, before default, had leased the entire premises to another corporation with the right to collect rent from the existing tenants. The lessee corporation, Sunnybrook Associates, was joined in the foreclosure action, as a defendant, and it moved[2] to modify the order obtained by the plaintiff which appointed a receiver to collect all the rents, profits and issues of the mortgaged premises. The court held that in the absence of bad faith, fraud or collusion, the receiver might not disregard Sunnybrook's lease and was confined to such rents as Sunnybrook was obligated to pay under its lease to the Improved Real Estate Corporation, the mortgagor-lessor. Both the plaintiff mortgagee and the receiver appealed from the order as modified. *Held,* unanimously reversed. As a matter of law, a receiver is entitled to rents in preference to an assignee of rents under an assignment made by a mortgagor after the execution of a mortgage. The lessee, Sunnybrook, is in the position of an assignee of rents. *Dollar Savings Bank v. Sunnybrook Associates,* 272 App. Div. 734, 74 N. Y. S. 2d 759 (1st Dep't 1947).[3]

If we regard the lessee in this case as a mere assignee, such an assignee, who has taken his assignment with knowledge of the existence of a prior assignment, cannot cut off the rights of the prior

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[7] *See* Geer v. Union Mutual Life Ins. Co., *supra* note 3 at 272, 7 N. E. 2d at 130; Giuliani v. Metropolitan Life Ins. Co., 269 App. Div. 376, 382, 56 N. Y. S. 2d 475, 479 (4th Dep't 1945).

[8] Sun Life Assur. Co. of Canada v. Maloney, 132 F. 2d 388 (C. C. A. 5th 1942).

[1] See Statutory Form M, N. Y. REAL PROP. LAW § 258; N. Y. REAL PROP. LAW § 254(10).

[2] "By the settled practice of chancery a stranger may intervene and will be heard *pro interesse suo* when his interests in the subject matter of a receivership are affected to his prejudice by acts of the receiver." Klasko Finance Corp. v. Belleaire Hotel Corp., 257 N. Y. 1, 4, 177 N. E. 289 (1931).

[3] *Motion for leave to appeal on certified questions denied,* 273 App. Div. 808, 76 N. Y. S. 2d 269 (1st Dep't 1948), *motion to dismiss appeal granted,* 297 N. Y. 949, 80 N. E. 2d 346 (1948).

assignee. Even though the prior equitable assignment, contained in the mortgage, is conditioned upon default it should be enforced against the assignor and those who claim under the assignor. The lower court by its decision, would reopen the door to the "milking devices" prevalent during the late depression.[4] This can readily be seen by an examination of the facts in this case.[5] In effect it would allow a mortgagor who is faced with foreclosure, to lease the mortgaged property with all the rent paid him in advance. In such a case once foreclosure was begun, the receiver would be entitled to nothing. If the opinion of the lower court were followed such a lease could only be set aside by proving bad faith, fraud or collusion. Such a result would then defeat the mortgagee's security. If the court had treated Sunnybrook as a lessee it would have been faced with the proposition that when a tenant holds a lease subject to an existing mortgage the lease is not abrogated until the actual sale of the mortgaged property.[6] In *Equitable Life Assurance Society of the United States v. Solomon,*[7] there was also a dispute between the receiver and a lessee concerning the rents of the mortgaged property, but in this case the initial lease was to the defendant and the occupants held from it. The court reached the same result there but on the basis that a principal and agent relationship existed between the lessor and lessee.[8]

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[4] See Note, 46 HARV. L. REV. 491 (1932).

[5] On March 27, 1947, the existing mortgage moratorium [N. Y. CIV. PRAC. ACT §§ 1077a-1077g] was renewed, except as to this type of property. [Laws of N. Y. 1947, c. 472, terminating the emergency except as to one, two and three family dwellings, occupied, wholly or in part by the owner thereof for residence purposes.] Ten days prior to this "repeal," the defendant mortgagor had leased the entire premises to the defendant Sunnybrook Associates, Inc., for a term of three years two and one-half months at an annual rental of $50,400. The rent was payable in advance in equal quarterly instalments beginning June 1, 1947. When the lease was executed, an adjusted payment was made. The annual rent roll of the premises at this time was approximately $90,000. This lease gave Sunnybrook the right to collect and retain all rents due from the occupants and was, by its terms, subject and subordinate to the plaintiff's mortgage and the existing tenancies. Two weeks after the execution of the lease, the mortgagor defaulted in the payment of taxes due on the property. On May 31, 1947 Improved received its first quarterly payment under this lease and it defaulted in the payment of interest due under the mortgage on June 1, 1947.

[6] Metropolitan Life Ins. Co. v. Childs Co., 230 N. Y. 285, 130 N. E. 295 (1921). Here a tenant holding a lease subject to a mortgage sold its fixtures and removed from the premises after judgment of foreclosure was obtained against his lessor. The action was then discontinued as against the tenant and it was held liable on the remaining term of the lease.

[7] 240 App. Div. 255, 269 N. Y. Supp. 591 (1st Dep't 1934), *rev'd sub nom.*, 265 N. Y. 398, 193 N. E. 246 (1934).

[8] It was upon this case that the lower court and the defendant Sunnybrook mainly relied. The Appellate Division there held that if the relationship between the owner and the defendant was that of landlord and tenant, the receiver was not entitled to the rents from the subtenants; but if the relationship was that of principal and agent the receiver was entitled to such rents. 240 App. Div. 255, 269 N. Y. Supp. 591 (1st Dep't 1934). The Court of

It would seem then that the New York courts today as a matter of policy will prevent any attempt by the mortgagor to defeat the mortgagee's security by means of a lease. They will disregard the lease and find either a principal and agent relationship as in the *Equitable* case, or an assignor-assignee relationship as in the instant case. It is submitted that the latter is the more logical.

W. A. H.

PATENT LICENSING AGREEMENTS—PRICE FIXING—ELIMINATION OF COMPETITION.—Respondents were charged in a civil complaint with conspiring, in violation of the Sherman Act [1] to organize the entire gypsum industry in the area east of the Rocky Mountains and to stabilize prices by means of patent licenses. The licensor, United States Gypsum Co., and its licensees constituted a group which controlled the manufacture and distribution of 100% of the gypsum board, 80% of the plaster and miscellaneous gypsum products, manufactured and sold in that area. The licensor established price schedules and uniform production and distribution methods to which the licensees conformed. *Held,* a prima facie case of conspiracy in violation of the Sherman Act is established by proof of industry-wide license agreements to stabilize prices and control methods of distribution. *United States v. United States Gypsum Company,* 333 U. S. 364, 92 L. ed. 552 (1948).

The Supreme Court held that the evidence established an agreement to organize the entire industry and to stabilize prices and that such an agreement is unlawful even though the legality of each separate patent license be assumed. The Court held that the control which the patentee exercised went beyond what the *General Electric* case [2] had sanctioned as lawful. The Court declared illegal those license provisions which require the licensees to pay a royalty on all

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Appeals in reversing found the parties to be principal and agent but did not disapprove of the test as enunciated by the lower court. 265 N. Y. 398, 193 N. E. 246 (1934). To sustain its proposition of the results that would flow from a landlord and tenant relationship the Appellate Division cited Holmes v. Gravenhorst, 263 N. Y. 148, 188 N. E. 285 (1933). See Note, 8 ST. JOHN'S L. REV. 346 (1934); 33 COL. L. REV. 168 (1933). *See also* Prudence Co. v. 160 West 73rd Street Corp., 260 N. Y. 205, 183 N. E. 365 (1932). Later decisions have confined these cases to the proposition that the receiver cannot increase the amount of rents and profits being produced by the mortgaged property. *See* Bank of Manhattan Trust Company v. 571 Park Ave. Corp., 263 N. Y. 57, 188 N. E. 156 (1933). Although the court in the instant case distinguished it from the *Equitable* case these facts should be kept in mind in that the courts at some later date, finding a landlord and tenant relationship, may seek to apply the rule enunciated by the Appellate Division in the *Equitable* case.

[1] 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2 (1946).

[2] United States v. General Electric Co., 272 U. S. 476, 71 L. ed. 362 (1926), where the court was dealing with a situation involving a licensor (General