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Statutory Short Forms of Deeds and Mortgages

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STATUTORY SHORT FORMS OF DEEDS AND MORTGAGES.—At the 1945 session of the New York State Legislature, Sections 254 and 258 of the New York Real Property Law were amended changing certain clauses in the statutory short forms for mortgages and mortgage bonds, and the construction thereof, in accordance with recommendations made by the Law Revision Commission. The purpose of the amendments is (1) to make the language in the statutory short form mortgage state accurately the effects of the covenants as they are required to be construed by Section 254 of the Real Property Law, and (2) to make the grace period applicable to defaults in the payment of interest also applicable to defaults in the payment of principal in conformity with the language of the statutory covenants.[1] The amendments are to go into effect on July 1, 1946.

At common law a mortgagor's failure to meet the installments of principal or payments of interest, taxes, assessments or insurance premiums did not cause the whole principal to mature at once. Such acceleration of maturity was effected either by statute or by covenants incorporated in the mortgage or mortgage bonds [2] and the default did not become operative to accelerate the date fixed for the payment of the principal debt in the absence of a specific stipulation of the parties to that effect in the mortgage.[3] Such covenants have quite generally been held valid and in many jurisdictions have been included in the statutory forms of bonds and mortgages either expressly or by reference.[4]

The New York Legislature authorized the use of short form bonds and mortgages containing acceleration clauses as early as 1890 and provided for statutory construction of such clauses.[5] At the present time Schedules M and N of Section 258 set forth the optional short forms for real property mortgages and the accompanying bonds, and Section 254 sets forth the construction which must be given to the several clauses in these short forms. Since in some respects the construction stated in Section 254 "enlarges or contradicts the express provisions set forth in Schedules M and N to such an extent that the forms may be a trap for the unwary," [6] the Law Re-

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Although it has been suggested that these drugs be made subject to federal narcotic control laws, authorities are fearful lest such action would result in a breakdown of the effectiveness of the control over narcotics such as opium and morphine which, it is felt, demand more stringent control than the milder barbiturates.

[1] N. Y. LEGIS. DOC. (1945) No. 65 (H) 11 n.

[2] N. Y. LEGIS. DOC. (1945) No. 65 (H) 27

[3] Pennsylvania Co. for Insurances v. Broadway-Stevens Co., 105 N. J. Eq. 494, 148 Atl. 575 (1930); Terrell v. Cheatham, 200 Ky. 667, 255 S. W. 262 (1923).

[4] *See* the Table of State Laws in Handbook of the National Conference of Commissions on Uniform State Laws (1921) 256.

[5] N. Y. Laws 1890, c. 475.

[6] N. Y. LEGIS. DOC. (1945) No. 65 (H) 13.

vision Commission made a comprehensive study of the discrepancies in these statutes and made recommendations which resulted in the passage of the Act herein discussed.

I. Acceleration at the Option of the Mortgagee

Schedules M and N of Section 258 contain the following acceleration clause:

> 4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of interest for . . . days, or after default in the payment of any tax, water rate or assessment for . . . days after notice and demand.

Literally interpreted this clause would seem to provide for an automatic maturity of the principal sum in the event of a default in any of the payments specified in clause "4", and also to provide for a grace period with regard to the payments both of interest and of an installment of principal.

However, Section 254, subdivision 2, construes this covenant to mean that should a default occur in the payment of an installment of principal, or of interest for . . . days, or of any tax, water rate or assessment for . . . days, the whole principal sum with all arrearage of interest thereon, shall, *at the option of* the mortgagee or obligee become and be due and payable immediately, thus making the maturity of the principal sum elective at the will of the mortgagee or obligee, rather than automatic, and also making a vital distinction between the effect of a default in the payment of an installment of principal and a default in the payment of interest.

In *Albertina Realty Company v. Rosbro Realty Corporation*,[7] the Court of Appeals, in a foreclosure action based on a default in the payment of principal, held that the effect of the acceleration clause set forth in the statutory form of mortgage provided by Schedule M of Section 258, as construed by Section 254, was to make the default in the payment of an installment of principal on the due date a ground for accelerating the due date of the entire principal of the mortgage, at the election of the holder thereof, without regard to the days of grace allowed in case of default in the payment of interest. The court further held that "it is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election under an acceleration clause; . . . the unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constitutes a valid election."

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[7] Albertina Realty Co. v. Rosbro Realty Corp., 258 N. Y. 472, 180 N. E. 176 (1932).

It is interesting to note that the acceleration clause of Schedule C of the original Act (Chapter 475 of the Laws of 1890) reads as follows:

> Third. And it is expressly agreed that the whole of said principal sum shall become due *at the option of* the said party of the second part after default in . . . .

and that this phrase "at the option of" continued to be a part of the statute in the amendments of 1896 and 1897.[8] Chapter 681 of the Laws of 1917 amended the statute again and the phrase was at that time omitted from the acceleration clause, although a corresponding amendment was not made in the statutory construction of the clause in Section 254 which continued to use the phrase. The Act of the 1945 Legislature restores the phrase "at the option of" the mortgagee to covenant "4" of Section 258 and thus makes it conform with the construction given in Section 254; and it also makes the covenant conform with the language used in similar forms in the Uniform Real Estate Mortgage Act.

II. Application of Grace Period to Defaults

Much confusion has also grown up regarding the application of the grace period to a default in the payment of an installment of principal as well as to a default in interest payments. Covenant "4" of Schedules M and N now provides that the whole of the principal sum shall become due "after default in the payment of any installment of principal or of interest for . . . days." The language of the covenant would seem to clearly indicate an intent to have the grace period apply to the payment of both principal and interest but subdivision 2 of Section 254, construing the covenant, omits any reference to a default in the payment of an installment of principal and makes the grace period applicable only to defaults in the payment of interest. In the leading case of *Albertina Realty Company v. Rosbro Realty Corporation* it was held that the effect of this omission was to make the default in the payment of the installment of principal on the due date a ground for accelerating the due date of the entire principal, at the election of the holder, without regard to the days of grace allowed in case of a default in the payment of interest. And in the case of *Besa v. Slobodoff*[9] the court held that a clause in the statutory short form mortgage providing that "the whole of the principal sum shall become due after default in the payment of any installment of principal or of interest for thirty days" must be construed, under Section 254, subdivision 2, as limiting the thirty days' provision to the payment of interest and not to the payment of an

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[8] N. Y. LEGIS. DOC. (1945) No. 65 (H) 29.

[9] Besa v. Slobodoff, 129 Misc. 205, 221 N. Y. Supp. 588 (1927).

installment of principal, and that, accordingly the mortgagee was within his rights in demanding payment of the whole principal sum although the mortgagor made a tender of the installment of principal before the thirty days had expired. The court further said here that the mortgagor was laboring "under the common erroneous impression that the provision requiring the lapse of a certain time after a default before the acceleration of the time of payment of the principal goes into effect gives a period of grace for payment of an installment of principal. The payment of interest and of installment of principal becomes due on the date specified in the mortgage and there is an immediate default if not then paid, and the time is not enlarged by any provision in respect to the acceleration of the due dates of the balance. The mortgagee was within his rights in demanding payment of the whole principal." However, the court relieved the mortgagor of the consequences of his mistaken belief, upon payment of the amounts due with interest thereon, because he had acted in good faith and had tendered payment within a short period after it was due and the mortgagee had suffered no damage by the delay.

This confusion regarding the allowance of days of grace has been obviated by the amendment which is to go into effect on July 1, 1946. The language of the statute being made more clear by the addition of the words "and interest" following the words "principal sum" and by a change in the punctuation of the clause (placing a colon after the word "mortgagee" and a semi-colon after "days"). In its amended form subdivision "4" will read:

4. That the whole of said principal sum *and interest* shall become due at the option of the mortgagee: after default in the payment of any installment of principal or of interest for . . . days; or after default in the payment of any tax, water rate or assessment for . . . days . . . .

This amendment brings the New York law into conformity in this respect with the Uniform Real Estate Mortgage Act and with the New Jersey law.

III. Covenant to Insure

Schedules M and N of Section 258 contain the following covenant:

2. That this mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.

Section 254, subdivision 4, construes this to mean that the mortgagor will keep the buildings insured and *assign and deliver* the policy to the mortgagee, and in default of so doing that the mortgagee may insure the said buildings and pay the premiums therefor; that the mortgagor must, on demand, reimburse the mortgagee for all such premiums paid, and that the mortgagee at his option may elect to accelerate the maturity of the whole principal sum in case of the

mortgagor's failure to assign and deliver the policies or to reimburse the mortgagee for any payments made by him for premiums.

It will be noted that nothing in the language of covenant "2" of Section 258 would inform a mortgagor signing the New York short form of mortgage that he was agreeing to a statutory acceleration of maturity of principal in the event that he so failed to reimburse the mortgagee or failed to assign and deliver the policies to him. Indeed the covenant does not even mention the fact that if the mortgagor fails to insure as agreed that the mortgagee may insure the buildings and pay the premiums and then look to the mortgagor for reimbursement.

To overcome the discrepancy at present existing between the language of this covenant "2" of Section 258 and its statutory construction as given in Section 254(4), the legislature added at the end of covenant "2" the following:

> that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.

A similar change has been made in the wording of Section 254, subdivision 4, so as to make it more clearly relate to the language of Section 258, clause "2".

The covenant in the mortgage providing for acceleration of maturity of the principal sum in the case of certain defaults, *i.e.*, covenant "4" of Section 258, has been enlarged to include also the statutory acceleration as construed by Section 254, subdivision 4, by the addition of the words:

> . . . or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

It was desirable that this amendment to the New York Real Property Law in relation to certain clauses in the statutory short form mortgages and mortgage bonds and the construction thereof should be made so that the language of the statute would not be misleading and that the grace period might be made to apply to defaults in the payment of installments of principal as well as to defaults in interest payments.

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IMPROVEMENT AND UNIFICATION OF PROVISIONS RELATING TO NOTICES OF CLAIM AGAINST PUBLIC CORPORATIONS.—As a matter of common law a municipal corporation when acting in its governmental or public capacity is not liable for its torts and when acting