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Mortgage Foreclosure--Statute Restricting Right to Deficiency Judgment Not Unconstitutional (Gelfert v. National City Bank of N.Y., 313 U.S. 221 (1941))

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court stated that there is no sign on the face of the complaint that the purpose of the defendant union is a labor objective which reasonably connects itself with the conditions of employment. The court in a 4 to 2 decision seems to have based its conclusion upon the statement in the demand to the plaintiffs, that the reason why the union never interfered with the artists was because they felt "that they were in a position to take care of themselves and were not in competition with the members of the American Federation of Musicians." The majority of the court construed this to mean that the present controversy between the litigants has no relationship to standards of wages or conditions of employment and does not therefore constitute a labor dispute.[7] Chief Judge Lehman and Judge Desmond in separate dissenting opinions felt that this controversy does constitute a labor dispute within the purview of the statute [8] and that therefore an injunction should not be granted.

J. A. S.

MORTGAGE FORECLOSURE—STATUTE RESTRICTING RIGHT TO DEFICIENCY JUDGMENT NOT UNCONSTITUTIONAL.—Deceased executed a mortgage to respondent bank in 1932. Under the statute in force at that time, if the mortgagor defaulted and the sale of the property did not realize enough to satisfy the mortgage debt, the mortgagee was entitled to a deficiency judgment measured by the difference between the sale price and the amount of the debt.[1] In an action brought to foreclose the mortgage a judgment of foreclosure and sale was entered for $18,401.25 in November, 1938, and the property was purchased by the bank's nominee for $4,000 in December, 1938. A deficiency computed at $16,162.12, remained outstanding. Under Section 1083 of the New York Civil Practice Act, in force at the

[7] Stolper v. Straughn, 175 Misc. 87, 23 N. Y. S. (2d) 604 (1940). A "labor dispute" within the purview of the above section [see note 3, *supra*] is not involved where it appears that the defendant which is picketing plaintiff's business is not a labor union or a labor organization of any kind; that it is not a member of any single trade or class of trades; that its demands are unconnected with any specific industry and that the picketing sought to be enjoined is unrelated to any questions of wages, hours of labor, unionization or betterment of working conditions; Opera on Tour, Inc. v. Weber, as president of American Federation of Musicians, *et al.*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), p. 240, *supra*. An injunction was granted when members of the musicians' union refused to cease intimidating employees of an opera company in order to have them discontinue the use of recorded music. The court stated that the union's interest did not grow out of or have some relationship to employment.

[8] See note 3, *supra*.

[1] N. Y. CIV. PRAC. ACT § 1083 before it was amended in 1938. The moratory deficiency judgment act ceased to be effective on July 1st, 1932. The mortgage in the instant case was executed the following December.

time the mortgage was executed, the respondent was entitled to judgment in this amount. However, effective April 7, 1938, some eight months before the sale, a new Section 1083 was passed [2] which provided that in ascertaining the amount of a deficiency judgment the court should on appropriate motion by the mortgagee and cross-motion by the mortgagor first determine the fair market value of the property and then deduct from the amount of the debt either the market value or the sale price, whichever is higher. An affidavit of a real estate broker submitted by the petitioner in support of his cross-motion stated that in his opinion the fair market value of the property was $11,000. Other affidavits gave the fair market value as $16,500 and the assessed value as $15,000.

The Court of Appeals of New York held that the new Section 1083 as applied to mortgage contracts previously made violated the contract clause of the Federal Constitution.[3] On writ of certiorari to the Supreme Court of the United States by petition of the mortgagor's executor, *held,* for the petitioner. A mortgagee, being entitled only to payment in full, is not deprived of any contract right by a statute which prevents him from obtaining more than he justly should. *Gelfert* v. *National City Bank of N. Y.,* 313 U. S. 221, 61 Sup. Ct. 898 (1941).

This decision in the instant case reversed the ruling of the Court of Appeals of New York State in favor of the respondent,[4] in so far as that court grounded its holding of unconstitutionality on the impossibility of constitutionally restricting the mortgagee's unlimited right to a deficiency judgment. But this decision also held that whether another sufficient remedy has been substituted for the one that was removed is not a federal question. And since removal of a remedy without leaving an alternative is also unconstitutional under the contract clause, a New York court may still hold the statute unavailable to the petitioner on this ground.[5]

Mr. Justice Douglas, who delivered the opinion, expressly stated that the court was concerned "solely with the application of this statute to a situation where the mortgagee purchased the property at a foreclosure sale." And no opinion was intimated as to situations where the purchaser is someone other than the mortgagee. Whether the statute would be constitutional in such case is questionable. Its provisions are so broad as to include the situation where at a foreclosure sale the property is sold to a third person.[6] Under the stat-

[2] N. Y. CIV. PRAC. ACT § 1083 as amended by L. 1938, c. 510.

[3] U. S. CONST. Art. I, § 10; Home Owner's Loan Corp. v. Margolis, 186 Misc. 954, 6 N. Y. S. (2d) 432 (1938).

[4] National City Bank of N. Y. v. Gelfert, 284 N. Y. 13, 29 N. E. (2d) 449 (1940).

[5] Sliosberg v. N. Y. Life Ins. Co., 244 N. Y. 482, 155 N. E. 749 (1927) ("Substantial impairment of means of enforcement of contract is impairment of contractual obligation * * *").

[6] The wording of the statute does not restrict the purchaser to any par-

ute, where the mortgage is $8,000, for example, if the court were to find that the fair market value of the property was $10,000, the mortgagee would not be entitled to a deficiency judgment even if the property were sold to a stranger for only $5,000. In such event the mortgagee would be prevented by the statute from receiving payment in full; and it seems that the contract clause of the Federal Constitution would be violated. But this question—the effect of the statute where the property is sold to a stranger—is expressly left open by the Supreme Court.

J. H.

PHYSICIANS AND SURGEONS — LICENSES — CONSTRUCTION OF EDUCATION LAW § 1259—ABUSE OF DISCRETION.—The applicant, an Austrian physician who in 1938 came to this country as a result of the political upheaval in Austria, brought these proceedings under Article 78 of the Civil Practice Act of New York, to direct the Commissioner of Education and the state university Board of Regents to indorse his Austrian physician's license or diploma under Section 1259 of the Education Law,[1] and thereby make it possible for him to practice his profession in this state. The indorsement was denied in spite of petitioner's uncontradicted evidence as to his preeminence and authority in the field of medicine.[2] Upon application to the courts, Spe-

ticular class. Although it may be interpreted not to include purchases by strangers, there seem to be no decisions on the subject as yet.

[1] N. Y. EDUCATION LAW § 1259. Licenses. "* * * The commissioner of education may in his discretion on the approval of the board of regents indorse a license or diploma of a physician from another state, or country, provided the applicant has met all the preliminary and professional qualifications required for earning a license on examination in this state, has been in reputable practice for a period of ten years, and has reached a position of conceded eminence and authority in his profession." Besides taking the necessary licensing examination, available to a proper applicant, N. Y. EDUCATION LAW § 1256 (3, 4), petitioner had two alternatives to enable him to practice medicine in this state. Firstly, he could have obtained an indorsement of his foreign license from the Board of Regents of the University of the State of New York by satisfactorily showing "that the requirements for the issuance of such license were substantially the equivalent of the requirements in force in this state when such license was issued, and that the applicant had been in the lawful and reputable practice of his profession for a period of not less than five years prior to his making application for such indorsement," N. Y. EDUCATION LAW § 51(3), or secondly, obtain an indorsement of his foreign license by coming within the provisions of N. Y. EDUCATION LAW § 1259.

[2] Dr. Marburg's active practice began in Vienna in 1905 since which time he has published some 200 scientific papers and books, edited several encyclopedias on medicine and was accorded membership in leading neurological societies of the world, including the American Neurological Society. From 1919 to 1938 he was director of the Neurological Institute at the University of Vienna, where he gave post-graduate instruction to students who came to him from every part of the world. In 1939 he was appointed clinical