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Mortgage Participation Certificates (Pink v. Thomas, 282 N.Y. 10 (1939))

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the United States Court of Claims,[23] have been held to be *res adjudicata.* Therefore, we have a court of record, very similar to the Supreme Court, and an appellate court, both having jurisdiction over the action and acting judicially, rendering final decisions dismissing the claim on the merits, and fully and finally determining the identical issues that are again presented in this action. The plaintiff has had his opportunity to prove his contentions[24] and so, on principle and on precedent, should not be permitted to try the identical issues twice.

A. A.

MORTGAGE PARTICIPATION CERTIFICATES.—A guarantee company owned a $42,300 mortgage and sold participating certificates therein, amounting to $40,475 to third parties, guaranteeing payment of principal and interest. It repurchased one $100 certificate and at all times retained an interest of $1,825 in the mortgage. The company is now in liquidation and the plaintiff, as liquidator, seeks to determine whether he is entitled to share *pro rata* with the third parties, in the proceeds of the mortgaged property. *Held,* two judges dissenting, judgment in favor of plaintiff reversed. The guarantee company issuing the certificates is not entitled to participate in the proceeds of the mortgaged property until all other holders of similar certificates have been paid in full. *Pink* v. *Thomas,* 282 N. Y. 10, 24 N. E. (2d) 724 (1939).

The problem of the priority of rights in the distribution of the proceeds of guaranteed mortgage certificate issues of companies now in liquidation has arisen in numerous instances between the certificate holders and the company [1] and the instant case is another example of a situation where the company owns an equity represented by an unsold portion of the mortgage and by a repurchased certificate.

It is well settled that a mortgagee who assigns an interest in his mortgage does not, in the absence of an agreement to the contrary, postpone his interest to that of his assignee.[2] To establish priority

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v. Cook, 24 N. M. 202, 173 Pac. 682 (1918); State v. Howard, 83 Vt. 6, 74 Atl. 392 (1909); see FREEMAN, JUDGMENTS (5th ed.) §§ 633, 1258.

[23] United States v. O'Grady, 22 Wall. 641 (U. S. 1875).

[24] Nor can plaintiff's contention, that he has been deprived of a jury trial, be upheld. When a plaintiff has at his disposal two forms of actions or two tribunals in which to commence it, and he elects the one which does not permit him a jury trial, he is bound by his election and he is estopped from complaining about it later. See Di Menna v. Cooper & Evans Co., 220 N. Y. 391, 115 N. E. 993 (1917); *In re* Pickard, 140 Misc. 541, 250 N. Y. Supp. 738 (1931).

[1] N. Y. L. J., June 14, 1938, p. 2866, col. 1.

[2] Domeyer v. O'Connell, 364 Ill. 467, 477, 4 N. E. (2d) 830, 835 (1936); Mechanics Bank v. Bank of Niagara, 9 Wend. 410 (N. Y. 1832); Title Guarantee and Trust Co. v. Mortgage Commission, 273 N. Y. 415, 7 N. E. (2d) 841 (1937).

it is necessary to ascertain the intention of the parties by contractual provisions in the certificate as such intention has always been regarded as determinative of their rights.[3] In the absence of an express or implied intention [4] the assignee will prevail when there is a relationship from which the courts will derive a special equity in his favor. So, where the sale of a certificate is accompanied by a guarantee, the certificate holder has been generally accorded priority on the theory that a relationship of debtor and creditor exists between the parties and that a contrary holding would be inequitable as it would permit the debtor to divert part of the security available to pay the certificate holder.[5]

The courts in this state have not had much difficulty in finding a special equity in favor of the assignee or in applying the familiar axiom that a contract will be construed strictly against the person writing it.[6] In the present case the certificate provided that it was "equal and coordinate with all other shares assigned or retained by the company." Any determination of actual intent to be gathered

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[3] Wuennecke v. Hausmann, 216 Iowa 725, 247 N. W. 531 (1933); Mechanics Bank v. Bank of Niagara, 9 Wend. 410 (N. Y. 1832); Matter of Lawyers Mortgage Co., 151 Misc. 744, 272 N. Y. Supp. 390 (1934), *aff'd*, 242 App. Div. 617, 271 N. Y. Supp. 1074 (1st Dept. 1934), *leave to appeal denied*, 265 N. Y. 508, 193 N. E. 294 (1934).

[4] Matter of Lawyers Mortgage Co. (545 West End Ave.), 157 Misc. 813, 284 N. Y. Supp. 740 (1936), *aff'd*, 248 App. Div. 715, 290 N. Y. Supp. 129 (1st Dept. 1936), *aff'd*, 272 N. Y. 554, 4 N. E. (2d) 733 (1936); Walcott v. Carpenter, 63 Tex. Civ. App. 108, 132 S. W. 981 (1910). *Contra:* Kelly v. Middlesex Title Guarantee and Trust Co., 115 N. J. Eq. 592, 171 Atl. 823 (1934), *aff'd*, 116 N. J. Eq. 574, 174 Atl. 706 (1934).

[5] Matter of Lawyers Mortgage Co. (Simon Borg), 151 Misc. 744, 272 N. Y. Supp. 390 (1934), *aff'd*, 242 App. Div. 617, 271 N. Y. Supp. 1074 (1st Dept. 1934), *aff'd*, 265 N. Y. 508, 193 N. E. 294 (1934); Matter of Lawyers Mortgage Co. (545 West End Ave.), 157 Misc. 813, 284 N. Y. Supp. 740 (1936), *aff'd*, 248 App. Div. 715, 290 N. Y. Supp. 129 (1st Dept. 1936), *aff'd*, 272 N. Y. 554, 4 N. E. (2d) 733 (1936).

[6] Matter of Lawyers Title & Guarantee Co. (236 W. 70th St.), 164 Misc. 292, 298 N. Y. Supp. 666 (1938), where a certificate contained the provision that it "is equal and co-ordinate with all other shares assigned or retained by the company" and no language indicating that the company might own or hold certificates with the same rights as other holders, a certificate repurchased by the company was held subordinate to the interest of the other certificate holders in the issue. Matter of Bond and Mortgage Guarantee Co. (223 Second Ave.), 169 Misc. 196, 7 N. Y. S. (2d) 254 (1937), *aff'd*, 255 App. Div. 765, 7 N. Y. S. (2d) 255 (1st Dept. 1938). Again certificates issued by a title company and guaranteed by a subsidiary company provided that "the Company may, for its own account, hold similar shares in the bond and mortgage". Because the certificate contained no provision for the guaranteeing company to hold the certificates, it was held that certificates acquired by the guarantee company were subordinate to those of other certificate holders. Matter of New York Title and Mortgage Co., 163 Misc. 196, 296 N. Y. Supp. 273 (1936). The same result was reached where the certificate provided that "there shall be no priority of preference in favor of any share in the mortgage". The court found that the meaning of the word "share" was doubtful and since the certificates were prepared by the title company any doubts or ambiguities must be resolved against it.

from these terms would seem to be in favor of *pro rata* distribution. Yet the court held that the certificates retained and repurchased by the company were subordinate to those held by third parties. It construed the words "equal and coordinate" to mean that the date of the sale of different shares should not constitute a preference, and the shares retained by the company should, when sold, be equal and coordinate with all other shares previously sold. As the court makes no distinction between "retained" and "repurchased" certificates it appears to be settled that both classes of certificates are subordinate to those held by third parties.

Since the investing public placed considerable reliance on the companies in the purchase of these certificates,[7] it would, at first impression, seem reasonable to place on the vendor the burden of proving the absence of special equities in favor of the purchaser of the certificate. However, unless the "coordinate lien" clause is construed to place the company's share of the bond and mortgage on a parity with all others, it is rendered superfluous and meaningless.[8] The holdings in other jurisdictions to the effect that, if the certificate does not provide a clear and unambiguous solution of the problem, then a *pro rata* distribution of the proceeds should be made, appear to be the most equitable.[9] Since the assignor has power to issue other certificates of coordinate lien up to the amount of the principal sum secured by the mortgage, the assignee cannot reasonably expect to be secured beyond the amount of his *pro rata* share of the proceeds and there is no reason why his position should be made more secure because the company happened to retain part of the mortgage.[10]

It is, perhaps, sound in principle to accord the assignee priority when the assignor-guarantor is solvent, in order to avoid circuity of action.[11] But, giving such priority to the assignee is merely a device for enforcing the obligation of a solvent obligor without the necessity of a separate suit, the priority not being based on any substantive right of the certificate holder. Where the assignor is insolvent, however, the situation changes. Granting the assignee a priority for which he has not clearly contracted is to prefer him over two interested groups. His preference is, at the expense of the unsecured creditors of the assignor and holders of certificates in a single bond

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[7] See ALGER, MORTGAGE COMPANIES' INVESTIGATION REPORT (1934) 2, 103, 110.

[8] Matter of Lawyers Mortgage Co. (Simon Borg), 151 Misc. 744, 272 N. Y. Supp. 390 (1934), *aff'd*, 242 App. Div. 617, 271 N. Y. Supp. 1074 (1st Dept. 1934), *aff'd*, 265 N. Y. 508, 193 N. E. 294 (1934). See RESTATEMENT, CONTRACTS (1932) § 236a.

[9] Kelly v. Middlesex Title Guarantee and Trust Co., 115 N. J. Eq. 592, 171 Atl. 823, *aff'd*, 116 N. J. Eq. 574, 174 Atl. 706 (1934). *Contra:* Louisville Title Co. v. Crab Orchard Banking Co., 249 Ky. 736, 61 S. W. (2d) 615 (1933).

[10] Domeyer v. O'Connell, 364 Ill. 467, 477, 4 N. E. (2d) 830, 835 (1936); (1937) 37 COL. L. REV. 1010.

[11] Kelly v. Middlesex Title Guarantee and Trust Co., 115 N. J. Eq. 592, 171 Atl. 823, *aff'd*, 116 N. J. Eq. 574, 174 Atl. 706 (1934); *cf.* Presto v. Morsman, 75 Neb. 358, 372, 106 N. W. 320, 325 (1905).

and mortgage in which the company holds a large share at the time of liquidation, preferred over holders of certificates in other bonds and mortgages in which the company held a smaller share or none at all.[12] Since the purchasers of all guaranteed mortgage certificates relied on the credit standing of the company,[13] and since a substantial part of the company's assets consisted of retained shares,[14] all certificate holders should have equal rights of satisfaction of their deficiency claims.

F. D. M.

NEGLIGENCE—THEATRES—FAULTY CONSTRUCTION—SAFE USE NEGATIVES NEGLIGENCE CLAIMED THEREFROM.—The defendant-appellant maintains the Strand Theatre on Broadway in the city of New York. The plans of this theatre were drawn by a competent architect and were approved by the Building Department. Thereafter, the theatre was inspected annually and its conditions were approved by the said department. On the mezzanine floor, above the rear section of the orchestra, there was an oval opening surrounded by a railing thirty-two inches high and five and one-half inches wide. Two patrons, walking on the mezzanine, were jostled by an unnamed person and fell over the balustrade onto persons beneath. Three actions ensued against the defendant, by a person who fell [1] and two occupants of the orchestra seats who were struck,[2] for the injuries sustained. From the date of construction to this event, an interval of about twenty-three years, numerous patrons had passed by the opening and railing without being injured. Several other theatres similarly built had been safely used by the public for a period of time. The theory of the complaints was that the balustrade was insufficient and that the defendant should have reasonably foreseen the danger. The Appellate Division affirmed the judgment for the plaintiff on each action with a modification in the amount of damages recoverable in one.[3] On appeal, *held,* reversed, complaints dismissed. The mere occurrence of the avoidable accident was inadequate to hold the owner liable for faulty construction, and the constant safe use of the prem-

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[12] N. Y. INSURANCE LAW § 173 as amended by N. Y. Laws 1933, c. 318; see ALGER, *op. cit. supra* note 7, at 18, 131.

[13] ALGER, *op. cit. supra* note 7, at 94, 103, 110.

[14] *Id.* at 15; (1938) 47 YALE L. J. 480.

[1] Duckowitz v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 281 (1st Dept. 1939).

[2] De Salvo v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 102 (1st Dept. 1939); Zussman v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 104 (1st Dept. 1939).

[3] De Salvo v. Stanley-Mark-Strand Corp., 257 App. Div. 941, 13 N. Y. S. (2d) 102 (1st Dept. 1939).