St. John's Law Review

Volume 10
Number 1 *Volume 10, December 1935, Number 1*

Article 23

May 2014

Mortgages--Right of Holder of Guaranteed Mortgage to Revoke Agency of Guarantee Company in Rehabilitation (Matter of People (Bond and Mortgage Guaranty Company), City Farmers Trust Company, 267 N.Y. 419 (1935))

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Thus, a single tortious act of the employee beyond the scope of his employment on the premises of the employer, yet without its knowledge or acquiescence or that of its authorized agent, absolved the corporation from liability.[9] In the instant case, had the defendant the means of control and notice of the necessity of using such means? It is clear that it did not. When the manager left the store to engage in the target practice, he temporarily stepped out of the bounds of his agency, and, *pro tempore,* the defendant was left without a manager. Through whom then could it receive notice of its employees' conduct? Through whom could it exercise control? The conclusion is inevitable that the defendant had no reasonable means of control over the situation which caused the injury.

D. G.

MORTGAGES—RIGHT OF HOLDER OF GUARANTEED MORTGAGE TO REVOKE AGENCY OF GUARANTEE COMPANY IN REHABILITATION.—The City Bank Farmers Trust Company was the owner of a bond and mortgage to secure the payment of $5,000.00 with interest at 6% which had been guaranteed by the respondent under a policy issued by the Bond and Mortgage Company providing that the guarantee company "is irrevocably the agent of the insured until the mortgage be paid." This policy contained the following conditions: (a) that the guarantee company was bound to continue the guarantee on the extension of the mortgage; (b) that the policyholder was bound to permit the guarantee company to collect all interest and principal so secured, and to enforce any payment which may come due under said mortgage; and (c) that the policyholder was bound to assign the bond and mortgage to the guarantee company, if requested to do so, upon receipt from it of the amount due the policyholder. The bond and mortgage was past due and the principal was unpaid. The interest had been paid and there were no arrears in taxes. The Superintendent of Insurance was appointed rehabilitator and took possession of the business and property of the respondent guarantee company. In an action by the appellant bank for release from its obligations under the policy, *held,* the appellant is entitled to judgment absolving it from the obligations of the contract upon its release of the guarantee company. *Matter of People (Bond and Mortgage Guaranty Company), City Bank Farmers Trust Company,* 267 N. Y. 419, 196 N. E. 313 (1935).

The guarantee company here has no power coupled with an interest, and the stipulation making it "irrevocably the agent" of the

[9] Walton v. New York Central Sleeping Car Co., 139 Mass. 556, 2 N. E. 101 (1885); Walker v. Hannibal and St. Joseph R. R. Co., 121 Mo. 575, 26 S. W. 360 (1894).

appellant with the "exclusive right" to collect interest on the bond and mortgage amounts to no more than an agreement to continue the agency for the life of the policy.[1] Furthermore, the parties to the policy never contemplated that by provision of law [2] the mortgage when due could not be collected nor that the guarantee company would go into the hands of a rehabilitator because of a decree declaring its affairs to be in such a condition that a continuancy would be hazardous to its policyholders. The basis on which the policy was entered into has been removed and the value of the guarantee impaired by the forces of these uncontrollable supervening events.[3] The bank should be absolved when the guarantee company is released.[4] In the instant case the statute was held to be retroactive which is not the general rule [5] but the court justifies its position on the ground that to rule the reverse would be detrimental to many.[6] Although courts do not modify, change or alter contracts [7] it is with interest that we note this decision in our present economic conditions and how our courts are tempering justice with humanity and sound economics.[8]

C. B. K.

NEGLIGENCE—MOTOR VEHICLES—RES IPSA LOQUITUR—BURDEN OF PROOF.—Plaintiff was injured while a guest in an automobile owned by her daughter, the defendant Sarah M. Galbraith, and operated under her direction by the defendant Busch. The automobile suddenly swerved from the highway and crashed into a tree. The evidence failed to show any cause for the sudden swerve. Plaintiff contended that under these circumstances a presumption of negligence was raised and that it was the duty of the defendant to go forward with their evidence and show why the car left the highway, and that it did so without any fault or negligence on the part of the driver, Busch. The defendant did not testify as to the cause of the

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[1] Farmers Loan & Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784 (1893); RESTATEMENT, AGENCY (1934) §138.

[2] N. Y. CIVIL PRACTICE ACT §§1077-a, 1077-f.

[3] *Supra* note 2; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595 (1891); Buffalo & Lancaster Land Co. v. Bellevue Land & Improvement Co., 165 N. Y. 247, 59 N. E. 5 (1901); Day v. United States, 245 U. S. 159, 38 Sup. Ct. 57 (1917).

[4] People by Van Schaick v. N. Y. Title & Mortgage Co., 241 App. Div. 351, 272 N. Y. Supp. 553 (1st Dept. 1934).

[5] Minsker v. John Hancock Mut. Life Ins. Co., 245 N. Y. 330, 38 N. E. 88 (1894).

[6] People by Van Schaick v. N. Y. Title & Mortgage Co., 241 App. Div. 351, 272 N. Y. Supp. 553 (1st Dept. 1934).

[7] See WILLISTON, CONTRACTS (3d ed. 1924) §1931.

[8] *Contra:* Hunt v. Rousmanier, 8 Wheat. 174 (U. S. 1823); Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40 (1906).