

BENITO TAN CHAT, PLAINTIFF AND APPELLEE, VS. C. N. HODGES, ET AL., DEFENDANTS; C. N. HODGES, DEFENDANT AND APPELLANT.*G.R. No. L-8219. April 28, 1956*

Ponente: PARAS, C.J.

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The defendant-appellant, C. N. Hodges, was the owner of three lots which he sold on July 6, 1941 to the plaintiff-appellee, Benito Tan Chat,, for P15,105. The latter paid PS,105 in cash and mortgaged the lots in favor of the appellant to secure the payment of the balance of P12,000. The appellant handed over to the appellee a printed form of mortgage contract which the appellee more or less followed in drafting the deed of mortgage actually executed and signed by him. In view of appellee's failure to comply with its conditions, the appellant filed a petition with the sheriff of Iloilo City for the sale of the mortgaged lots in accordance with the provisions of Act No. 3155 as amended. The corresponding notice was , made and the sale at public auction was set for November 23, 1953. Whereupon the appellee filed in the Court of First Instance of Iloilo a petition for prohibition with injunction. After trial the court rendered a decision granting the petition and ordering the defendants C. N. Hodges and the sheriff of Iloilo City to desist from carrying out the scheduled sale. The defendant C. N. Hodges has appealed.

The main issue to be decided is whether or not the deed of mortgage contains a special power to foreclose extra-judicially. The model printed form, Exhibit E, contains in paragraph 7 of the condition that "this mortgage shall, after notice to the mortgagor, be considered automatically foreclosed, without the necessity of any judicial proceedings upon the failure of the mortgagor (to comply with the conditions therein specified)"; and, in paragraph 8, the condition that "when this mortgage is automatically foreclosed for any of the causes or reasons enumerated in the next preceding paragraph, the mortgagee is hereby authorized by the mortgagor to take possession of the property herein mortgage without the necessity of resorting to any court proceeding's, or any other judicial action." These provisions were omitted in the deed of mortgage, Exhibit D, actually executed by the appellee in favor of the appellant, although this contains the following conditions:

"3. It is also stipulated that the mortgagee, in selling the property at public auction, shall follow the procedure provided for in Act No. 3135, the MORTGAGOR in any case to be notified by the MORTGAGEE in writing by registered mail of the sale.

"4. It is further agreed and stipulated that the conditions and stipulations set forth in the preceding paragraphs shall not be construed as depriving the mortgagee of his right to institute the corresponding judicial proceedings to foreclose this mortgage if, in the opinion of the mortgagee, Ms interests require such an action."

It is contended for the appellee that the elimination from Exhibit D of the conditions contained in paragraphs 7 and 8 of Exhibit E shows a clear intention on his part to disauthorize extra-judicial foreclosure; and that, in any event, the special power to foreclose extra-judicially referred to in Act No. 3185 should be specific and unequivocal.

Upon the other hand, it is the theory of the appellant that while the provisions contained in paragraphs 3 and 4 of the deed of mortgage, Exhibit D, do not contain direct phraseology, they nevertheless amount to an express authority to foreclose extra-judicially.

We are inclined to rule in favor of appellant's contention. Section 1 of Act No. 3135, as amended by Act No. 4118, provides that "when a sale is made under a special power inserted in or attached to any real estate mortgage hereafter made as security for the payment of money or the fulfillment of any other obligations, the provisions of the following sections shall govern as to the manner in which the sale and redemption shall be effected, whether or not provisions for the same is made in the power." The sale spoken of is extra-judicial. Paragraphs 3 and 4 of the deed of mortgage, Exhibit D, taken together, is plainly an express authority for the mortgagee to foreclose extra-judicially. It is noteworthy that paragraph 3 is to the effect that the mortgagee, in selling the property at public auction, shall follow the procedure prescribed in Act No. 3135, the mortgagor to be notified by the mortgagee in writing by registered mail of the date of the sale; and paragraph 4 reserves to the mortgagee the right to foreclose judicially. If these were not intended to allow extra-judicial foreclosure, the procedure prescribed in Act No. 3135 would not have been mentioned and the mortgagee would not have been required to notify the mortgagor in writing by registered mail of the sale; and the right would not be reserved to the mortgagee to institute judicial foreclosure proceedings. This reservation necessarily implies the existence of another right, namely, the only remaining remedy of extra-judicial foreclosure. The omission in Exhibit D of paragraphs 7 and 8 contained in the printed form, Exhibit E is of no moment since paragraphs 3 and 4 of the deed of mortgage are already sufficient.

"While it has been held that a power of sale will not be recognized as contained in a mortgage unless it is given by express grant and in clear and explicit terms, and that there can be no implied power of sale where a mortgage holds by a deed absolute In form, it is generally held that no particular formality is required in the creation, of the power of sale. Any words are sufficient which evince an intention that the sale may be made upon default or other contingency," (41 Corpus Juris, p. 926.)

We are not inclined, however, to render judgment in favor of the appellant with reference to his claim for expenses, attorney's fees,, and damages.

Wherefore, the appealed decision is reversed and the petition for prohibition with injunction filed in the court. below dismissed. So ordered, with costs of both instances against, the plaintiff-appellee.

Reyes, A. Jugo, Bautista Angelo, Concepcion, and Reyes, J. B. L., JJ., concur.

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