

SUN LIFE ASSURANCE COMPANY OF CANADA, PLAINTIFF AND APPELLEE, VS. FLORENCIO GONZALEZ DIEZ, DEFENDANT AND APPELLANT.*G.R. No. 29027. October 25, 1928*

Ponente: STREET, J.

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This case is supplemental to a mortgage foreclosure proceeding conducted by the same plaintiff, the Sun Life Assurance Company of Canada, as assignee of the original mortgagee under a first mortgage, against Joaquin Serna et al. (civil case No. 28009, of the Court of First Instance of Manila), a proceeding which has already been concluded by the sale of the mortgaged property and the purchase of the same by the plaintiff as mortgage creditor. The defendant in the present proceeding is Florencio Gonzalez Diez, holder of a second mortgage on the same property which was the subject of foreclosure in that case, but who was not there named as a defendant; and the purpose of the present proceeding is to foreclose the equity of redemption vested in Gonzalez Diez by the second mortgage.

Upon hearing the cause the trial court gave judgment in favor of the plaintiff, requiring the second mortgagee to pay the entire mortgage debt, with costs, otherwise to be debarred from any right as second mortgagee, with appropriate provision for the cancellation of the second mortgage. From this judgment the defendant appealed.

It appears that on May 17, 1920, one Joaquin Serna mortgaged the property which is the subject of this action to the Shanghai Life Insurance Company, Ltd., to secure a promissory note payable to said corporation in the amount of P20,000, subject to certain stipulations not necessary to be here specified. On the same day Serna executed a second mortgage on the same property in favor of the herein defendant, Florencio Gonzalez Diez, to secure a debt in the amount of P6,000. The promissory note secured by the first mortgage, together with the rights of the original first mortgagee, was afterwards transferred to the Sun Life Assurance Company of Canada, the plaintiff in this case. Also, after mortgaging the property, as above stated, Serna transferred the mortgaged property for a valuable consideration to Paulino Francisco. The note secured by the first mortgage was not paid at maturity; and the holder, the Sun Life Assurance Company of Canada, therefore instituted a proceeding (No. 28009 in the Court of First Instance of Manila) to foreclose said first mortgage. In this proceeding only Joaquin Serna and Paulino Francisco were named as defendants, no account being taken of Gonzalez Diez, the holder of the second mortgage. The action proceeded, however, to finality, and the property was ultimately sold in regular course and bought in by the plaintiff, the mortgage creditor.

After foreclosure had been effected, as above stated, the present proceeding was instituted by the plaintiff against Gonzalez Diez for the purpose of foreclosing the mortgage as against him in his character as second mortgagee. This proceeding appears to have been started by a supplemental motion in the original foreclosure case, but upon objection by the adversary party, the court required the plaintiff to pay the filing fee, and the proceeding was thus given the status of an independent proceeding. Upon hearing the cause the trial court declared the indebtedness

under the first mortgage to be in the total amount stated in its original decree of foreclosure, with interest and costs added, and entered an order to the effect that in case the defendant should not redeem from the first mortgage by paying the amount stated, within three months from the date of the decision, he would be debarred of all right as second mortgagee.

In the present appeal question is made as to the right of the first mortgage creditor to maintain this action. We are of the opinion, however, that the criticism directed against the appealed decision on this point is not well founded. A second mortgagee acquires only a mortgage lien upon what is called the equity of redemption vested in the mortgagor, and his rights are strictly subordinate to the superior lien of the first mortgagee. Having acquired this right the second mortgagee is a proper and in a sense even a necessary party to a foreclosure proceeding brought by the first mortgagee; for, in the closing words of section 255 of our Code of Civil Procedure, it is expressly provided that all persons having or claiming an interest in the mortgaged premises subordinate in right to that of the holder of the foreclosing mortgage creditor shall be made defendants in the foreclosure proceeding. Accordingly, if in the original foreclosure proceeding the attention of the court had been directed to the fact that a second mortgage had been executed in favor of Gonzalez Diez, it would have been peremptorily required that the second mortgagee should be made a party.

But the second mortgagee was not an indispensable party to the proceeding to foreclose the first mortgage, because appropriate relief could be granted by the court to the first mortgagee, in the original foreclosure proceeding, without affecting the rights of the second mortgagee. But the failure on the part of the first mortgagee to make the second mortgagee a defendant was that the decree entered in the original foreclosure proceeding did not have the effect of depriving the second mortgagee of his right of redemption. It is well recognized doctrine that a decree of foreclosure in a suit to which the holders of a second lien are not parties leaves the equity of redemption in favor of such lien holders unforeclosed and unaffected. (*Sioux City etc. R. Co. vs. Trust Co.*, 82 Fed., 124; 173 U. S., 99; 43 Law. ed., 628.) From this circumstance arises the necessity, which confronted the plaintiff in this case, of bringing an independent foreclosure proceeding against the second mortgagee; and the fact that the plaintiff, as first mortgagee, has already foreclosed as against the original debtor and his transferee, is no obstacle whatever to the maintenance of such action against the second mortgagee. The purpose of the second proceeding is not to obtain a second decree against the second mortgagee for the same relief covered by the first decree but to secure the foreclosure of an equity of redemption which was not touched by the first suit (*Curtis vs. Gooding*, 99 Ind., 45; *Shirk vs. Andrews*, 92 Ind., 509; *Morey vs. City of Duluth*, 69 Minn., 5). The right of a court to entertain such a proceeding as that now before us is recognized in a standard encyclopedic work in the following words: "After completed foreclosure under a senior mortgage, a junior encumbrancer may be given, by the court, the right to redeem the senior mortgage and protect his own lien. Where a junior encumbrancer has been given, by the court, the right to redeem after the completed foreclosure under a senior mortgage, he must exercise his right within the time limited or be barred thereof." (*Mortgages*, 42 C. J., 374.)

In the case before us the trial court conceded to the defendant the same period of time, i. e., three months, within which to redeem, as is allowed to any mortgage debtor; and the amount which the court fixed as necessary to effect redemption is that which was found to be the amount due to the creditor in the original foreclosure decree.

There being no error in the judgment appealed from, the same must be affirmed, and it is so ordered, with costs against the appellant.

Avanceña, C. J., Johnson, Malcolm, Villamor, Ostrand, and Villa-Real, JJ., concur.

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