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Private Law: Security Devices

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SECURITY DEVICES

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ASSIGNMENT OF ACCOUNTS

In *Bossier Bank & Trust Company v. Natchitoches Development Co.*,[1] the defendant, a general contractor on a low income housing project, subcontracted a portion of the work to Tecton, Inc. The subcontract apparently contained the customary provisions for "progress payments" pursuant to which the subcontractor would be paid a portion of the contract price as it completed specified stages of the work, with the contractor retaining part of the price until satisfactory completion of the entire work. Tecton had previously agreed to assign its accounts to secure loans to be made by the plaintiff bank. Notice that such assignments were contemplated had been filed as required by the Louisiana Assignment of Accounts Receivables Law.[2] Tecton thereafter completed the first stages of its contract and became apparently entitled to receive a portion of the contract price. It then specifically assigned this "account" to the bank. The bank served a written notice of the assignment upon the defendant and, at the bank's request, a representative of the defendant signed and returned a copy of the notice in which he not only acknowledged receipt of the notice but expressly confirmed the correctness of the amount assigned, acknowledged that the amount was then due to Tecton and affirmed that the account "now owed" to Tecton would be paid to the bank. Shortly thereafter it was discovered that Tecton was in serious financial straits and would be unable to complete the work required by the subcontract. Furthermore, Tecton had failed to pay a number of firms supplying materials to the job who were threatening to file liens against the property. To prevent this from happening, the defendant paid a number of the claimants (including one who actually filed such a privilege) and agreed with Tecton to the cancellation of the subcontract. The defendant refused to pay the assigned claim to the bank and the latter filed suit to collect it. The contractor defended on the ground that the type of indebtedness involved was not an "account" but an obligation arising out of a written contract and was therefore not within the purview of the Louisiana Assignment of Accounts Receivables Act and that it was in any event entitled to "offset" against the claim assigned to the bank the debts of Tecton to the suppliers of materials whom it had paid to prevent

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1. 272 So. 2d 731 (La. App. 3d Cir. 1973).

2. LA. R.S. 9:3101-10 (Supp. 1964).

privileges from being filed against the property.

The court, in response to the first argument, held the definition of an "account" as contained in the Act clearly comprehends not only accounts receivable in the classic sense, but any obligation or indebtedness arising out of the business, profession or undertaking of the assignor except those arising out of a tort, or those evidenced by a promissory note or other instrument creating a security right in the indebtedness and that the type of debt involved in the case was clearly one included within such a definition.[3]

The second plea was also rejected. The court held that since the defendant had acknowledged the assignment in writing and the bank had acted to its detriment thereon, the defendant was liable to the bank and should not be permitted to offset against such liability debts owed by Tecton "that defendant absorbed for business reasons of its own."

The defendant of course committed a serious error in not only acknowledging it had received notice of the assignment but in independently affirming to the bank that the amount assigned was owed and would be paid to the bank. If the decision of the court were based solely upon the fact that there had been an independent undertaking by the defendant to pay the amount in question to the bank, who thereafter relied upon such undertaking to its detriment, the case would be noteworthy primarily as an object lesson of what a debtor whose debt has been assigned by his creditor ought not to do. However, the court seems to go further in its opinion and strongly intimates that after the assignment was perfected the assignee would be immune from any assertion by the contractor that it was released from responsibility because of the breach of the contract by the subcontractor.[4] This is a much more doubtful proposition. Certainly the obligation to pay the price was dependent upon performance by the subcontractor. The fact that it was payable in installments and that one of these was assigned should not prevent the obligor from setting

3. Although the court properly decided this point, it would appear that the question was in reality of no consequence since the "assignment" would undoubtedly be valid as the pledge of a particular obligation under LA. R.S. 9:4321-23 (1950), if it did not fall within the purview of the Accounts Receivable Law.

4. The court does not clearly articulate its views concerning this aspect of the case. For some reason not apparent in the opinion, the contractor did not argue that the breach of contract by Tecton excused it from performance but instead the contractor argued it was entitled to "offset" the claims of the materialmen against what it owed Tecton. The court rejected this claim partly on the basis of R.S. 9:3102 which provides that after filing of the notice of assignment "no subsequent creditor of the assignor" shall have a right superior to the assignee and placed the lien claimants in this category.

up, as against the assignee, any defense he might have against the payment arising out of a default under the contract, even though the failure to perform occurred subsequent to the assignment. There is but one obligation and if under the terms of the agreement between the parties one party is not obligated to perform because of the default of the other, the assignee of the defaulting party should not have any greater rights.[5]

VENDOR'S PRIVILEGE

Queen City Broadcasting Co., Inc. v. Wagenwest, Inc.,[6] presented an interesting situation. The defendant purchased a radio station including its equipment by an act which declared the sale was made subject to all existing privileges and mortgages. The plaintiff had originally sold some of the equipment to the seller and enjoyed a vendor's privilege upon it.[7] The debt was not paid and the plaintiff attempted to assert its privilege against the equipment in the hands of the defendant-purchaser, relying upon the statement in the act of sale as evidencing an intention by the purchaser to recognize and preserve the privilege. The court rejected the argument pointing out that there is a difference between a purchaser who expressly assumes payment of an obligation secured by a mortgage or privilege upon the property and one who purchases by an act in which the sale is only made subject to such claims. The court further emphasized that the particular privilege was not identified in the sale and it could not be said that the purchaser had specifically recognized the rights of the plaintiff. The distinction made by the court is of course valid. A sale made subject to a privilege or mortgage is a limitation or disclaimer by the seller of his warranty and does not imply any promise by the purchaser that he will satisfy the debt which it secures. However, a privilege exists solely by virtue of the provisions of the law creating it and the parties to a transaction cannot by contract create such a privilege where none is given.[8] Accordingly, it does not appear that a different result would have been called for even had the purchaser specifically recognized the existence of the particular privilege. The

5. R.S. 9:3101(1) defines an account as "any indebtedness or *part thereof* due to . . . the assignor. . . ." Whether a part of a debt can be assigned without consent of the debtor is not entirely clear, but the act seems to provide that it can.

6. 264 So. 2d 336 (La. App. 4th Cir. 1972).

7. Plaintiff also held a chattel mortgage which was ineffective against the defendant.

8. Econo-Car Inter., Inc. v. Zimmermann, 201 So. 2d 188 (La. App. 4th Cir. 1967); Citizens Bank v. Maureau, 37 La. Ann. 857 (1855).

transfer of possession extinguishes a vendor's privilege upon movables and the parties cannot agree it will continue after such a transfer.[9] Of course if a purchaser assumes the obligation secured by such a privilege, his agreement to pay the debt is in itself part of the price he agrees to pay for the property and would be secured by a new (and distinct) privilege in favor of his vendor. Furthermore, the courts have held that such an assumption is also made for the benefit of the original creditor and may be directly enforced by him and that he is also entitled to the benefits of any privilege so created (since he is in substance merely enforcing the obligation stipulated in favor of the seller).[10] In most instances this would appear to be a distinction without a difference since the original obligor can enforce his debt and enjoy a privilege against the property. However, the distinction might be of utmost importance if the rights of third persons have intervened during the interval between the two sales. Thus if the original purchaser has placed a chattel mortgage upon the property after acquiring it from his vendor, it would seem to follow that upon a sale of the property to a new purchaser who assumes the debt to the original vendor the chattel mortgage would then prime the vendor's privilege securing this assumption and even, as to the original vendor, the chattel mortgage holder's rights would constitute a superior claim against the movable.

PLEDGE

Two cases involving the pledge of stock are worthy of passing note. In the first[11] the court held that a pledgee holding stock with blank stock powers attached, was without power to cause the stock to be transferred to his name on the books of the corporation or to exercise any "other rights of ownership" with respect thereto upon default of the pledgor. The pledgee argued that R.S. 12:75(d) expressly permits such a transfer but the court rejected the argument.[12] Whether a pledgee in an act of pledge could expressly authorize such a transfer to confirm the pledgee's rights was not discussed, but the basis for the court's opinion would seem to preclude it. However, under the provisions of the Civil Code the pledgee is entitled to receive, during the term of the pledge, the fruits of the thing pledged.[13]

9. Dreyfous v. Cade, 138 La. 297, 70 So. 231 (1915).

10. Levy v. Desposito, 133 La. 126, 62 So. 599 (1913).

11. Emile M. Babst Co., Inc. v. Commercial Enter., Inc., 274 So. 2d 742 (La. App. 4th Cir. 1973).

12. An earlier case to the same effect, but decided prior to amendment of the current Corporations Act is *Chappuis v. Spencer*, 167 La. 527, 119 So. 697 (1929).

13. LA. CIV. CODE art. 3168.

It is difficult to see how the pledgee could effectively enjoy these rights if he is not the registered owner of the stock. So long as the pledgor remains the record owner of the stock he may vote for the liquidation, merger or sale of the assets of the corporation, exercise warrants received as an incident to it, and receive all dividends including stock and ordinary dividends declared. In the case under consideration the pledgee was obviously attempting to make a transfer not for the purpose of perfecting his rights as pledgee, but to collect the obligation for which the stock was pledged after default, and during the time prior to the default he had apparently been content to permit the stock to remain registered in the name of the pledgor. The pledgee possesses only a privilege upon the thing pledged, and the courts have quite properly struck down all attempts by the pledgee to equate possession of the property with ownership or to exercise the rights of an owner without following the procedures required by law to execute upon his privilege. However, the pledge of a credit, such as a negotiable instrument, is ordinarily not even valid unless the pledgee is invested with the rights of the pledgor in such a manner as to be equivalent to ownership. The fact that the pledgee possesses such rights as to the world does not diminish his obligations to the pledgor to act in this capacity as a fiduciary. The transfer of stock to the name of the pledgee is not necessarily inconsistent with his position as a pledgee for the reasons mentioned any more than is the case when the pledgee of a negotiable instrument is invested with the rights of holder. An agreement specifically authorizing such a transfer in a pledge should be valid, if it clearly regulates the rights of the pledgee with respect to such matters as voting and the receipt of dividends and prohibits him or at least does not permit him to exercise such rights for his personal benefit.

In the other case[14] the pledgor of stock authorized the pledgees in the event of default "to assign, transfer and deliver said . . . [stock] for such considerations and on such terms as they may see fit."[15] The pledgor defaulted and the pledgees, without notice to the pledgor, sold the stock in accordance with the apparent terms of the agreement. The court noted that:

> Our jurisprudence is settled that in the absence of an express waiver of the right to notice the pledgor is entitled, after demand for and default in payment, to reasonable notice of the intention of the pledgee to sell the pledged property. The pledgor is presumed to have waived nothing except what is specifically waived.

14. Broussard v. O'Bryan, 270 So. 2d 127 (La. App. 3d Cir. 1972).
15. 270 So. 2d at 131.

Smith v. Shippers' Oil Company, 120 La. 640, 45 So. 533 (1907); Elmer v. Elmer, 203 So.2d 391 (La. App. 4 Cir. 1967); 33 Tul. L. Rev. 59, 117.[16]

Since notice was not expressly waived and none was given, the sale was held to be invalid.

Because of the obvious possibilities of abuse and in light of the perhaps not uncommon tendency of a creditor whose debtor has defaulted to assume he should to be able to simply keep what has been given to him in pledge, the courts have clearly (and correctly) announced they will hold the pledgee who has the right to sell property by private sale to the highest degree of good faith and that they will limit his rights to an extra-judicial sale to the clear terms of his agreement. Both cases discussed obviously reflect this position.

PRIVATE WORKS

Although the subject of laborers' and materialmens' lienes provided by R.S. 9:4801 *et seq.* continued to occupy an inordinate amount of the court's time, the cases generally contain little more than the application of well established principles to sometimes admittedly difficult factual situations. Mention, however, should perhaps be made of *Express Ready Mix Inc. v. Evans*,[17] in which the owner of an undivided one-half interest in a tract of land and who also enjoyed the usufruct of the remaining one-half (which was owned by her two minor children) entered into a contract for the improvement of the property and did not require the contractor to file the contract or give a bond. The contractor defaulted and the plaintiffs who had delivered materials to the job filed their privileges and instituted suit against the three owners of the property including not only the defendant but also the two children. The claims against the children were voluntarily dismissed. The lower court held the privilege and claim invalid because the defendant was not the "owner" of the property. On appeal the court concluded there was nothing in the act to restrict the right of the owner of a partial interest in property from contracting for its improvement and when he does so neither he, nor his interest in the property should be permitted to escape the responsibility placed upon him if he does not cause the contractor to comply with the recording and bonding provisions of the act. The decision of the court seems to be the most practical and reasonable solution to the problem and is consistent with prior jurisprudence. Certainly one

16. *Id.*

17. 266 So. 2d 257 (La. App. 2d Cir. 1972).

who contracts for the construction of work upon property should not be permitted to escape the responsibility the law places upon him by contending that, after all, he really had no business entering into the contract in the first place because he did not own the property he is improving.

The dismissal of the claims against the children eliminated any consideration of the position of the lien claimants who performed work for the usufructuary as against the naked owners. The court seems to consider the word "owner" as used in R.S. 9:4811 to be equivalent to the term "owner of the usufruct."[18] However, Civil Code articles 596 through 598 appear to make the owner of the property subject to the usufruct (the "naked owner") responsible for repairs done by the usufructuary and to recognize that suppliers of materials or workmen who have performed such have a privilege upon the immovable, not just the usufruct, for the value of the work. Whether or not these provisions have been superseded by the provisions of R.S. 4801 *et seq.* is by no means clear. It could be said that, in the case of repairs at least, the usufructuary represents the owner and is entitled to reimbursement from him for the cost of needful repairs. To this extent, giving a lien would impose no greater burden on the owner than he already has to the usufructuary. As a practical matter however, it is one thing to say that the one who improves or repairs property should be entitled to enjoy a privilege upon it where the usufructuary authorizes such repairs and quite another to say, as does the Private Works Act, that personal responsibility should be imposed upon the owner for the price of such repairs or improvements where he had nothing to do with the negotiation of the contract and could not, as a practical matter, have prevented the work.

In *Brunet v. Justice*,[19] the court quite properly held that the posting of a bond in lieu of the privilege under the provisions of R.S. 9:9842 does not extend the time for the lien claimant to file his suit to establish the lien and that upon his failure to do so within one year from the date his privilege is filed the bond can be cancelled. The decision is correct, for the giving of the bond is at the option of the contractor or owner and stands for the lien. Filing it should neither enlarge nor diminish the substantive rights of the claimant.

18. This is also consistent with the provisions of R.S. 9:4811 which expressly provides that where the work is done at the instance of one who is not the owner of the land he shall none the less be subject to "all of the obligations that are made incumbent upon the owner."

19. 264 So. 2d 743 (La. App. 4th Cir.), *writ denied*, 262 La. 1178, 266 So. 2d 451 (1972).