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Creditor's Rights—Unavailability of New York Lien Law to out of State Realty

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in this context was not dependent on notions "of intrinsic fairness of price," and that to render an option invalid it was necessary to show more than a mere disparity between the current value and the option price.

Plaintiff also contended that the requirements of section 176 of the Personal Property Law[22] had not been complied with in that the restriction had not been printed on the stock certificate. Here the Court held that a notation on the stock certificate that it was held subject to restrictions contained in certain enumerated by-laws satisfied the statutory requirement.

The decision in this case indicates that the Court is unwilling to make a careful study of the ultimate fairness of a price arrived at by the use of a formula specified in this type of option. Rather, the scope of inquiry will be limited to testing the reasonableness of the formula itself, and weighing heavily in favor of an ultimate determination of validity is the fact that the parties involved, in a sense, voluntarily agreed to its use.

CREDITOR'S RIGHTS

Unavailability Of New York Lien Law To Out Of State Realty

Section 36-b of the New York Lien Law provides that funds received from an owner by a subcontractor for the improvement of real property are to be held in trust, to be applied first to the payment of materialmen and laborers who contributed to the improvement. In *Allied Thermal Corporation v. James Talcott Inc.,* [1] materialmen attempted to use the trust provision of 36-b to compel factor to subcontractor to account for funds allegedly diverted by the subcontractor. The only issue before the Court was whether plaintiff-materialmen could use section 36-b, when the situs of the improved realty was out of state.

The Court held (5-2), without citing authority, that plaintiffs could not avail themselves of the protective trust provisions of the statute. The majority determined that section 36-b must not be construed independently, but as an integral part of the whole statutory scheme of the Lien Law, which by its very nature is circumscribed by the state's boundaries. The majority regarded the absence of any expressed reference to "New York" anywhere in the Lien Law as

22. N.Y. PERS. PROP. LAW §176 provides:
There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated on the certificate.

1. 3 N.Y.2d 302, 165 N.Y.S.2d 91 (1957).

an obvious indication that section 36-b should not receive any special jurisdictional distinction from the rest of the Lien Law.

The dissent argued that section 36-b did not confer any lien rights whatsoever; that the gravamen of plaintiffs action is the funds diverted, not the real property; that this was a right in personam to impress a trust upon the funds diverted, and thus should not be restricted by the in rem lien concept adhering to real property.

To the assumption of the majority that "real property" in the Lien Law must be restricted to New York because of no contrary expressed intention of the Legislature, the dissent pointed out that a similar argument had been rejected in *Mallory Associates v. Barving Realty Co.*[2] In that case the Court determined that section 233 of the Real Property Law (providing that moneys, deposited as security for performance of realty contracts, are to constitute trust funds in the hands of depositee) was applicable to a deposit made in New York, even though the lease affected real property located in Virginia. "The Legislature did not expressly limit the statute to deposits made under a contract for the use or rental of real property situated in New York, and we do not think it should be thus limited by judicial construction."[3]

The dissent further pointed out that now New York materialmen and laborers could be defrauded with impunity, whenever the realty to be improved was outside the state, since the foreign state would also lack jurisdiction to impress a trust upon the funds diverted in New York. In *Ridgefield Supply Co. v. Rosen,*[4] a similar situation to the instant case, the Court was of the same opinion.

The reasoning of the majority appears unduly mechanical. It is difficult to conceive that the Legislature intended to protect and benefit only those materialmen and laborers who contribute to the improvement of domestic realty.[5] Since the *Mallory* case and the instant case have come to different results, there exists minimal stability in this area. An official word from the Legislature indicating the jurisdictional limits of statutes in this field, would go far in obviating confusion and probable future litigation.

Priority Of Liens

As between a judgment creditor's lien and the equitable lien of an assignee of property subsequently to be acquired, the latter, while his rights will be

2. 300 N.Y. 297, 90 N.E.2d 468 (1949).
3. *Id.* at 302, 90 N.E.2d at 471.
4. 1 Misc.2d 675, 679, 147 N.Y.S.2d 337, 340 (Sup. Ct. 1955).
5. See ANNUAL REPORT OF THE LAW REVISION COMMISSION, 1942, p. 283.