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Creditor's Rights—Priority of Liens

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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.

enforced in equity as against his assignor, has no right at all against the former.[6] This rule applied by the lower courts[7] in reference to liquor license refunds has caused some confusion, first, as to whether this is the correct rule to be applied in such cases, and secondly, when, in terms of priority, the fund comes into existence.

In *City of New York v. Bedford Bar and Grill, Inc.*,[8] the appellant received as security for a note from Bedford an assignment of all monies due or to become due from the State Liquor Authority. Upon default on the note, appellant filed its assignment with the liquor authority and soon thereafter Bedford surrendered his license, rendering him eligible for a refund. Subsequent to these events the City of New York obtained a creditor's lien on the refund through supplementary proceedings resulting from a warrant for taxes due. Finally, the Authority approved the refund and the issue arose as to who had priority over the debt. The Court[9] held in favor of the City, adopting the rule stated above as applied by the courts in the Third Department.[10]

Recently the Court of Appeals, in *Capital Distributor's Corp. v. 2131 Eighth Ave.*,[11] held that an assignee of a possible refund upon the denial of a license application took priority over subsequent judgment creditor's liens, a result which the majority distinguished, terming that assignment "a present interest for a present consideration"[12] as opposed to a "yet to be created fund"[13] in the instant case. However it seems clear, as the dissent points out, that at the point of time of the surrender of the license for refund, the obligation of the liquor authority to the assignee is less speculative than the possibility of the denial of the license application and the resulting return of the money.

It has been held, in the case of an equitable assignee, that if the fund came into existence prior to the filing of the tax lien, the assignee takes priority.[14] And in a contest between judgment creditors, the Court has held that a judgment lien is effective upon surrender of the license, but before approval by the liquor

6. Titusville Iron Co. v. City of New York. 207 N.Y. 203, 100 N.E. 806 (1912); Zartman v. First National Bank, 189 N.Y. 267, 82 N.E. 127 (1907).

7. Alchar Realty Corp. v. Meredith Restaurant, 256 App. Div. 853, 8 N.Y.S.2d 733 (3rd Dep't 1939); Palmer v. Remaine, 259 App. Div. 951, 20 N.Y.S.2d 145 (3rd Dep't 1940); Atlas Advertising Agency v. Casa Cubana, 259 App. Div. 951, 19 N.Y.S.2d 900 (3rd Dep't 1940); Frank v. Lutton, 267 App. Div. 703, 48 N.Y.S.2d 137 (3rd Dep't 1944).

8. 3 N. Y.2d 429, 161 N.Y.S.2d 67 (1957).

9. *Ibid.*

10. See note 7 *supra*.

11. 1 N.Y.2d 842, 153 N.Y.S.2d 222 (1956).

12. 3 N.Y.2d at 431, 161 N.Y.S.2d at 69.

13. *Ibid.*

14. In re Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1946). On motion for reargument, the issue of priority was settled. In re Gruner's Estate, 4 Misc.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

authority, over a lien filed after approval, explicitly stating that the comptroller held an attachable debt at the date of the surrender of the license.[15]

In the instant case, the dissent questioned the applicability of the rule in regard to after-acquired chattels, stated above, since the fund necessarily arises out of a present property right, and the policy of that rule, the possibility of fraud on creditors is not applicable here. The general rule where the fund is to arise out of an existing relationship between the assignor and the potential source of the fund, is that such an assignment is valid against creditors of the assignor who acquire liens after the fund comes into existence.[16]

Nevertheless, a liquor license refund in New York is now deemed to come into existence at two different times; by authority of *Strand v. Piser*,[17] at the surrender of a judgment creditor, and, according to the instant case, on the approval of the refund in the case of an assignee acquiring his right before surrender of the license.

Damages On Lapse Of Mechanics' Liens

The grantee of a certain piece of real property orally promised to pay the contractor for improvements made while the grantor was in possession. When the contractor brought a suit to foreclose a mechanic's lien against the grantor and the grantee for these improvements he allowed the lien to lapse by failing to file a notice of pendency within one year from the date of the filing of the lien.[18]

In its consideration of this factual situation, the Court of Appeals[19] in a unanimous opinion, held that even though the lien had lapsed[20] and even though the complaint alleged a contract to make specific improvements[21] the plaintiff could recover a personal judgment against the grantor-lienee,[22] but he could recover nothing against the grantee.[23] Upon deciding these issues, the Court faced the central problem raised by this case: What constitutes an appropriate award under these circumstances? The Court decided that the personal judgment that

15. Strand v. Piser, 291 N.Y. 236, 52 N.E. 2d 111 (1943).
16. Niles v. Mathusa, 162 N.Y. 546, 57 N.E. 184 (1900); Bates v. Salt Springs Nat'l Bank, 157 N.Y. 322, 51 N.E. 1033 (1898); Fairbanks v. Sargent, 117 N.Y. 320, 22 N.E. 1039 (1889).
17. See note 15 *supra*.
18. N.Y. LIEN LAW §17; Danziger v. Simonson, 116 N.Y. 329, 22 N.E. 570 (1889).
19. Noce v. Kaufman, 2 N.Y.2d 347, 161 N.Y.S. 2d 1 (1957).
20. See note 18 *supra*.
21. As long as the defendants are not misled, the New York rule is that the variance between pleading and proof will not be considered. Sussdorff v. Schmidt, 55 N.Y. 319 (1873).
22. N.Y. LIEN LAW §§17, 54.
23. Under the Statute of Frauds an oral promise to assume the debt of another is unenforceable. N.Y. PERSONAL PROPERTY LAW §31(2).