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Real Property—Reopening Tax Foreclosure Defaults

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were sales "from" the main store and subject to percentage rent. However, some fur sales were not made "from" the main store, and these were not subject to percentage rent.

The dissent felt that removal of the fur department was a breach of faith even though the lease did not specifically require operation of a fur department. "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."[25]

Where a store was rented on a percentage of gross sales basis, the lessee was held liable for the percentage on total gross sales even though he moved two departments into an adjoining building.[26] It has been held that a tenant is not justified in removing its most lucrative departments to other premises in an effort to diminish rent which was based on percentage of gross sales.[27] In these cases, however, there appeared to be an intent to reduce the rent coupled with an actual reduction. In the instant case the tenant moved because it was necessary to expand, and in the lower court's decision[28] it was pointed out that sales actually increased, resulting in higher rent to the landlord.

Distinguishing between sales made as a result of referrals from salespeople on lower floors and other sales is more difficult to rationalize. The fur department was advertised downstairs, customers had to board the elevators on the lower floors, and furs were stored and prepared there. It would seem that these sales, also, were "from" the main store.

Reopening Tax Foreclosure Defaults

City of New York v. Nelson [29] presented the problem of whether relief may be afforded a party under section 108 of the Civil Practice Act[30] from a default judgment in an in rem tax foreclosure action obtained pursuant to the provisions of the Administrative Code of the City of New York.[31] The Court held that section 108 provided for no such relief, even though the city acquired properties assessed at $52,000 for a total tax arrearage of $887, and though it was no fault of the owner that the tax was unpaid. The Court felt, "the power to afford relief

25. *Wood v. Lucy, Lady Duff-Gordan,* 222 N. Y. 88, 91, 118 N. E. 214 (1917).
26. *Cissna Loan Co. v. Baron,* 149 Wash. 386, 270 Pac. 1022 (1928).
27. *Dunham & Co. v. 26 East State Street Realty Co.,* 134 N. J. Eq. 237, 35 A. 2d 40 (1943).
28. 123 N. Y. S. 2d 349 (1953).
29. 309 N. Y. 94, 127 N. E. 2d 827 (1955).
30. N. Y. CIV. PRAC. ACT § 108, allows a court to relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect."
31. Tit. D, c. 17.

here is not confided to the courts. The result suggests the need of legislation liberalizing the right of redemption, or giving to city officials the power to ameliorate such extreme hardships in appropriate cases."

The right of redemption in an in rem tax foreclosure action is exclusively statutory.[32] The Administrative Code of the City of New York provides that in the event of an owner's failure to redeem or answer by a prescribed date, he will be forever barred and foreclosed of all his right title and interest and equity of redemption in the land and a judgment of foreclosure may be taken by default.[33] The courts seem to consider the redemption provision under the State Tax Law,[34] which is in the nature of a statute of limitations,[35] analogous to that of the Administrative Code of the City of New York.[36] They will not, under either law, reopen a default judgment.[37] This is true though the property owner received no actual notice of the foreclosure action,[38] or was in fact incompetent.[39]. It appears that once the procedural requirements imposed upon the City of New York by the Administrative Code are substantially fulfilled and a default judgment obtained, that judgment is valid and no longer subject to attack.[40]

Foreclosure Expenses

Civil Practice Act §1087 provides that taxes and assessments which are liens upon the property sold at a foreclosure sale are deemed expenses of the sale. In *Wesselman v. Engel Co.*,[41] the guarantor of a mortgage had guaranteed payment of principal and interest of mortgage together with any and all "expenses of foreclosure." The Court held, the guarantee did not include back taxes paid by the mortgagee. The majority pointed out that §1087 refers to "expenses of the sale," not "expenses of foreclosure," and that the purpose of this section is to protect the purchaser on a foreclosure sale, who is entitled to a clear title, rather than the mortgagee. Therefore, it refers to *unpaid* taxes which are liens on the property. In no event can the statute control the meaning of a private guarantee;

32. *Keely v. Sanders*, 99 U. S. 441 (1878); *Levy v. Newman* 130 N. Y. 11, 28 N. E. 660 (1891).
33. Administrative Code of the City of New York, tit. D, c. 17-6.0.
34. N. Y. TAX LAW §§ 161-168-d.
35. *City of Peekskill v. Perry*, 272 App. Div. 940, 72 N. Y. S. 2d 351 (2nd Dept. 1947).
36. *City of New York v. Lynch*, 281 App. Div. 1038, 121 N. Y. S. 2d 392 (2nd Dept. 1953); *aff'd*, 306 N. Y. 809, 118 N. E. 2d 821 (1954).
37. *City of New York v. Jackson—140 Realty Corp.*, 279 App. Div. 668, 108 N. Y. S. 2d 986 (2d Dep't 1951); see also notes 35 and 36 *supra*.
38. See note 36 *supra*.
39. *Town of Somers v. Covey*, 283 App. Div. 883, 129 N. Y. S. 2d 537 (2nd Dept. 1954); *aff'd*, 308 N. Y. 798, 125 N. E. 2d 862 (1955); U. S. Supreme Court Appeal pending.
40. See note 36 *supra*.
41. 309 N. Y. 27, 127 N. E. 2d 736 (1955).