

5. The defendant Ngetuberrai Antol or the defendant Sakuma, in accordance with their interests in the business premises, may keep and maintain the business premises, known as the Blue Gardenia Restaurant, without any obligation to plaintiff for a period of ninety (90) days, or until satisfactory arrangements have been made within that time with the plaintiff to continue occupancy of the premises, and if no agreement for continued use and occupancy is made, defendants shall remove their personal property, not including the cement block building, from Lot 1018 and any property remaining shall be treated as abandoned to the plaintiff.

6. No costs shall be assessed against either party.

SINTAU WONG, Plaintiff

v.

ROSANG SUNGIYAMA, Defendant

Civil Action No. 360

Trial Division of the High Court

Palau District

December 18, 1967

Action to determine rights of parties under equitable mortgage of land. A previous High Court suit for ejectment involving same property had been brought by individual who claimed under defendant-mortgagor in present case. The Court there held that mortgagee-plaintiff had right of possession only in that part of property occupied by mortgagee with consent of mortgagor or those claiming under her, and that mortgagor had right of redemption even in that portion. In present foreclosure suit, the Trial Division of the High Court, Associate Justice D. Kelly Turner, held that because of prior holding, mortgagee's security interest is limited to portion allowed by Court in previous ejectment action, as well as other portion of property not willingly released by mortgagee from mortgage debt.

1. Judgments-Res Judicata

Principle of res judicata rests upon ground that party bound by doctrine, or another party in privity with him, has litigated or had op-

portunity to litigate a question or issue or controversy in former action and may not litigate it again with same opponent or one claiming under him.

2. Judgments---Res Judicata

In order for doctrine of res judicata to be applied in any court action, it is necessary that same questions were litigated by same parties in prior action.

3. Judgments-Res Judicata

Where same parties litigated same questions in prior Court action court's rulings in that action are binding upon parties in subsequent action and only questions reserved for future decision may be considered in second suit.

4. Judgments-Res Judicata

Where court in former action between same parties involving same property limited mortgagee's security interest to certain portion of land in question, court in subsequent case must likewise limit mortgage security.

5. Mortgages-Tender

Tender of mortgage debt after maturity operates to discharge mortgage and constitutes a defense to foreclosure action.

6. Mortgages-Tender

Before a tender which is refused may discharge mortgage debt, tender must be for entire amount of mortgage debt and interest.

7. Mortgages---Tender

An offer by Mortgagor to "talk about" amount of money she is ready to give mortgagee, and offer that money would soon be available to repay unspecified amount of mortgage debt are not tenders in legal sense sufficient to extinguish mortgage.

8. Mortgages-Merger of Title

Where mortgagee and those claiming under him occupy portion of land subject to mortgage with consent and acquiescence of mortgagor, lien interest and legal title in property so occupied are merged, and to that extent mortgage is released.

9. Mortgages---Merger of Title

Although in general merger of legal and equitable interests occurs only when legal title to all land subject to mortgage liens vests in mortgagee, exception is recognized where parties intend to merge legal and security interests in only part of property subject to mortgage.

10. Mortgages---Redemption

Where mortgagee and mortgagor agree to extinguish mortgage debt by transfer of land, mortgagor's right of redemption is extinguished as to portion of land transferred.

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11. Mortgages-Redemption

Even if mortgagor and mortgagee evidence no express intent or agreement to extinguish right of redemption in mortgaged property, mortgagor loses such right by failing to pay mortgage debt for nine years after default and by acquiescing in mortgagee's use and occupancy of land during that period.

12. Mortgages-Foreclosure

Action to foreclose mortgage is dual in nature, whereby judgment is rendered for amount of money due mortgagee from mortgagor and property is then auctioned at foreclosure sale and amount of judgment paid out of proceeds.

13. Mortgages-Foreclosure-Sale

Where, at foreclosure sale there are no other bidders or other bidders are unwilling to pay amount of judgment awarded to mortgagee, latter may buy land by bidding amount of his money judgment.

14. Mortgages-Redemption

If anyone, including mortgagee, buys property at foreclosure sale, mortgagor has period of redemption by paying purchaser amount he paid at sale plus interest.

15. Mortgages-Redemption

Since Trust Territory law has no prOVISiOn relating to foreclosure of land mortgages, period of redemption should be reasonable time to be determined by court.

16. Mortgages-Foreclosure

Mortgagor may avoid foreclosure sale and subsequent exercise of right of redemption by paying amount of money judgment awarded to plaintiff before Sheriff's sale of land.

Interpreters:

JunGE PABLO RINGANG

Assessor:

HARUO I. REMELIK

BARENCHINO NGIRKIKLANG

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ITELBANG LUH

TURNER, *Associate Justice*

OPINION

This action is concerned with the rights of the parties under an equitable mortgage of land which has been in

default more than nine years. The debt, which the contract between the parties secured, has existed for nineteen years. This is the third time the issues between the parties have been tried, first in the District Court for debt, and twice in the High Court regarding the land; although the first High Court trial, in 1960, raised the question in a different proceeding than the present mortgage foreclosure.

The first trial and judgment in the High Court concerned an action in ejectment against plaintiff in the present case, who is the mortgagee, brought by an individual who claimed under the defendant-mortgagor in the present case. Although the defendant in this case also was named a defendant in the prior action, she was in fact only a nominal defendant and was the real party in interest. She testified at the present trial, "We brought the suit" against the plaintiff in the present case. *Mers Iyar v. Rosang Sungiyama and Sintau Wong*, 2 T.T.R. 154.

[1,2] This prior High Court case is important to the result in the present case because certain conclusions and holdings then made are binding now under the doctrine of res judicata. The principle of res judicata rests upon the ground that the party bound by the doctrine, or another party in privity with him, has litigated or had the opportunity to litigate, a question or issue or controversy in a former action and may not litigate it again with the same opponent or one claiming under him. The principal requirement to make this doctrine applicable is that the same questions were litigated between the same parties. *Barao Tuchurur v. Rechuld*, 2 T.T.R. 576.

[3] The parties in the present case were parties in Civil Action No. 151 [2 T.T.R. 154] and the questions now to be decided arose out of the holdings in the former case. The court's rulings in No. 151 [2 T.T.R. 154] are

binding upon the parties in this case and only the questions reserved for future decision in No. 151 [2 T.T.R. 154] now may be considered. The holdings in No. 151 [2 T.T.R. 154] with which we are now concerned follow:-

(1) "The court therefore holds that unless and until some other method or methods of foreclosure are provided by express written enactment, mortgages of land in the Palau District may still be foreclosed only through court action. Under present Code provisions this court action would have to be in the High Court. The court recognizes that substantially the same result might be obtained by voluntary agreement of all concerned, if this were entered into understandingly after the default occurred, but in the present case there is no indication of any such agreement."

(2) "The court therefore holds that since there has been no court action to foreclose the mortgage here in question, the defendant Sintau has no present right to possession of any part of Owang, beyond that to which Rosang and any involved claiming under her have consented, namely, the northern 'half' or part of lot 904, and that the defendant Rosang still has a right or equity of redemption even in that part of lot 904. The question of just what other parts of Owang the mortgage should be considered as applying to is left to be decided by the court when and if an action is brought to foreclose the mortgage."

Seven years after the foregoing holdings, the mortgage foreclosure action was heard and the following issues were raised: -

1. What part of Eang (the spelling reference in the mortgage but which was spelled Owang in Civil Action No. 151) does the two hundred (200) tsubo, subject of the mortgage lien, apply to in addition to that part of Lot 904 occupied by the mortgagee since 1958?
2. Has the defendant-mortgagor made tender of payment of the debt and interest legally sufficient to discharge the mortgage upon rejection of the tender by the mortgagee?
3. Does the mortgagor have right of redemption, by payment of the debt and interest, of that portion of the

mortgaged property which mortgagee has occupied with the mortgagor's consent since default of the mortgage March 31, 1958, the mortgage having been executed by the parties August 20, 1957, to secure repayment of a loan by mortgagee's father to mortgagor in 1948?

Before resolving any of these questions, we must first determine what the parties intended with reference to the land Eang when they entered into their 1957 mortgage contract.

The execution and recordation of the mortgage arose under rather unusual circumstances. In 1948, plaintiff's father loaned the defendant four hundred dollars (\$400.00) which she secured by what in effect was an oral mortgage on an entirely different property than the one now in question. Some time prior to 1957, despite the promise to hold the land as security, defendant sold it to another.

Plaintiff demanded payment of the debt and when defendant failed to pay, plaintiff sued in District Court on the debt, seeking in satisfaction of the debt transfer of a quonset hut and the parcel of land on which it was built. After obtaining the money judgment, plus a promise to have it satisfied by the property transfer, the defendant, according to the plaintiff, proposed that they "find another way" to satisfy the judgment by placing a mortgage on the two hundred tsubo of the property Eang.

Accordingly, the mortgage was executed in 1957. The mortgage specifically provided for a conveyance of the two hundred tsubo of Eang in the event of default of payment.

It provided : -

"If (Rosang) will not pay back said money up to the date (March 31, 1958), then (Sintau) will take over the land described in paragraph 2 herein to be his land." (Parenthetical matter added for clarity)

When defendant again failed to pay, plaintiff commenced construction on Lot 904 and asserted ownership in the area described in the survey sketch attached to the mortgage. Plaintiff testified defendant told him at the time of default, "The land is yours" and that she would pay him rent for the house in which she was living on the southern part of Lot 904 and within the area of mortgage sketch.

This, of course, did not occur and on April 2, 1959, a year after the default and plaintiff's entry on the land, Mers Iyar, a relative of the defendant to whom defendant had given the southern part of Lot 904 in 1950, brought a quiet title action alleging:-

"The defendant Sintau Wong with the consent of defendant Rosang Sungiyama and without the consent of or knowledge of plaintiff's family, entered and built his house on the northern part or northern half of the piece of land so described above (Lot 904) and furtherly and wrongfully claimed that title to the whole tract of land including the southern half where the plaintiff's family is occupying, he even unlawfully told the plaintiff and his family to move out from the property within a few months."

This court in Civil Action No. 151 [2 T.T.R. 154] held, in effect, the southern half of Lot 904, having been given to her relative in 1950 by the defendant was not subject to defendant's mortgage to plaintiff in 1957 and that some other portion of Eang, in addition to the northern part of Lot 904 was intended to be subject to the mortgage lien.

The land Eang, according to the survey sketch No. SK 281-67, made by the District Office of Land Management, comprises, in addition to Lot 904, a thirty-foot strip adjoining Lot 904 on the west and a triangular parcel adjoining the southern end of the strip and Lot 904 on the south. Lot 904 contains 201.7 tsubo, the strip on its west 100 tsubo, and the triangle on the south 125.6 tsubo.

The two hundred tsubo survey sketch attached to the mortgage is 96 feet in its east-west dimensions and 75 feet north and south while Lot 904 dimensions are 94 feet on the east-west boundary and 67 feet on the north-south boundaries.

Plaintiff-mortgagee attempted to occupy a rectangular area 60 feet on the east-west boundaries and 67 feet on the north-south boundaries. Because the 60-foot east-west boundaries of the area sought to be occupied by the mortgagee in 1958 extended southerly beyond the foundation wall, which approximately divides the lot, the court in Civil Action No. 151 [2 T.T.R. 154] limited the mortgagee's occupancy to the north of the "foundation wall" on the south and permitted continued occupancy of the northern "one-half" of Lot 904 with right of redemption remaining in mortgagor for his portion, in event of a mortgage foreclosure action.

At the present trial, there was a conflict of testimony about the mortgage sketch. Plaintiff stated the sketch was attached to the mortgage when the mortgagor executed it. The defendant-mortgagor said she had never seen the sketch, but she did admit she was notified that the survey was going to be made by plaintiff in 1957 but that she did not attend the survey but told Mel's Iyar to point out the boundaries. If it were not for the holding in Civil Action No. 151 [2 T.T.R. 154] the court would accept plaintiff's testimony and sketch as descriptive of the mortgaged property.

[4] Under the circumstances, we must limit plaintiff's mortgage security to the northern half of Lot 904 of slightly less than 100 tsubo and such other portion of Eang as may be available to foreclosure.

The southern portion of Lot 904 was treated as being alienated by the mortgagor in Civil Action No. 151 [2 T.T.R. 154] and the westerly extension of the mortgage

sketch thirty feet beyond the western boundary of Lot 904 was sold by the mortgagor in 1966 to the intervenor, Setsuko Techur. This parcel, upon the proof of the mortgage description, necessarily was sold subject to the plaintiff's mortgage and would have been subject to foreclosure by the plaintiff. However, the plaintiff stipulated with the intervenor that the one hundred tsubo strip sold to the intervenor would be considered as not being subject to the mortgage.

These two alienations leave only the 125.6 tsubo triangular parcel of Eang adjoining Lot 904 subject to the plaintiff's mortgage, in addition to the northern half-the portion north of the foundation wall-of Lot 904. These two parcels comprise approximately 95 tsubo of Lot 904 and 125.6 in the triangle, a total of 220 tsubo. The size of the northern part of Lot 904 is to be accurately determined by measurement. The parties only estimated the location of the foundation wall boundary on the Exhibit 1 sketch.

We hold, therefore, that because of the decision in Civil Action No. 151 [2 T.T.R. 154] and plaintiff's willingness to release the 100-tsubo strip from the mortgage, that the intention of the parties when they signed their agreement was to mortgage the northern portion of Lot 904, north from the foundation wall, and the triangular southern parcel. This answers the first question above.

[5] The second question relates to release of the mortgage by plaintiffs' purported tender of payment in 1961, in 1962, and against during the trial of the present case. The general rule is that a tender of the mortgage debt, after maturity, operates to discharge the mortgage and constitutes a defense to a foreclosure action. 36 Am. Jur., Mortgages, § 438. 93 A.L.R. 46. *Jones v. New York Guaranty Co.*, 101 U.S. 622, 25 L.Ed. 1030.

In *Jones*, the United States Supreme Court said:—
"... if the tender had been refused, it would have extinguished the mortgage, though not the debt."

[6] It also is the general rule of mortgage law that before a tender, which is refused, may discharge the mortgage, it must be for the entire amount of the mortgage debt and interest. In the present case, the evidence clearly shows there has not been a bona fide tender of the amount due the plaintiff.

[7] In 1961, defendant-mortgagor sent a relative to see the plaintiff-mortgagee to carry her message that she wanted to see him to "talk" about the money she was "ready to give him". The messenger testified he also told the plaintiff "how poor Rosang was". A second message was sent in 1962, apparently similar in content. The messenger did not know how much money the defendant had or how much she proposed to pay. The plaintiff declined the invitation to "talk" about payment and stated he wanted the land.

During the trial, the defendant testified she preferred to pay back the money but she did not know what amount was due. She said she knew the amount of the principal debt but not the amount of interest. It was further evidenced the money for repayment was not available but would be brought by someone on the next plane from Guam.

None of these were tenders in the legal sense sufficient to extinguish the mortgage.

As to the third question, what effect has the occupancy of a portion of the land subject to the mortgage by the plaintiff-mortgagee and those claiming under him with the admitted consent and acquiescence of the defendant-mortgagor upon the mortgage lien?

[8] The principle of law known as merger, the combining of both lien interest and legal title in the same

person, is applicable: We hold that by their conduct and statements, the parties intended a transfer of the northern half of Lot 904 to the mortgagee by the mortgagor in 1958 when he built a house and occupied the parcel. The plaintiff and those claiming under him have occupied it since then.

That the defendant intended the plaintiff to have the northern parcel of Lot 904 is evidenced by Civil Action No. 151 [2 T.T.R. 154] which sought only to eject the mortgagee from that portion of Lot 904 south of the foundation wall which was occupied by the defendant Rosang's relative. Defendant Rosang also testified that she would "make up" the additional 200 tsubo from the southern portion of Eang if the plaintiff would not take money in discharge of the mortgage.

Further matters evidencing intention of the parties comes from the holding in Civil Action No. 151 [2 T.T.R. 154] that Rosang consented to plaintiff's occupancy of the parcel and her testimony in the present case to the same effect.

[91] We hold the legal effect of the intent of the parties was to merge the fee and the mortgage lien for the portion of Lot 904 in question and to that extent, the mortgage was released. This gives effect to the express intention of the parties, and as such, constitutes an exception to the general rule that before a merger may occur the two estates—the mortgage interest and the fee transferred—must be equal. In other words, this is an exception, because of the evidenced intent of the parties, to the general rule a merger occurs generally when the legal title to all of the land subject to the mortgage lien vests in the mortgagee. Here there only was a merger of legal and security interests in part of the property. 36 Am. Jur., Mortgages, §§ 1190, 1193, and 1200.

[10] The court in Civil Action No. 151 [2 T.T.R. 154] recognized that the parties could agree to extinguish the mortgage debt by a transfer of land. But in that case, there was insufficient evidence of such an agreement. In the present trial, seven years later, the agreement is sufficiently certain to give it effect. It also must follow that by such agreement, the right of redemption by the mortgagor also was extinguished as to the portion of Lot 904 in question.

[11] Even if there were no express intent or agreement to extinguish the right of redemption, the defendant-mortgagor has lost that right by her laches in failing to pay the mortgage debt for nine years after default and by her acquiescence to mortgagee's use and occupancy during that period.

Although not presently available in Korol', 46 A.L.R. 1084, extensively annotates the loss of the right of redemption by a mortgagor's laches.

Since the court concludes part of the mortgage has been released by acceptance of a parcel of land, all that remains is to provide for the satisfaction of the balance of the mortgage debt and interest thereon by foreclosure of the only remaining portion of Eang available to foreclosure—the 125-tsubo triangular parcel adjoining Lot 904 and the 100-tsubo strip.

[12, 13] An action to foreclose a mortgage is dual in nature. The first part of the judgment is for an amount of money due the plaintiff from the defendant. This money judgment is then ordered to be satisfied by a foreclosure sale at which anyone, the mortgagee, the mortgagor or a member of the public at large may purchase at the Sheriff's auction. From the proceeds of this sale, the mortgagee is paid his judgment amount and if there is any balance remaining, it is paid to the mortgagor. If there are no other bidders, or if other bidders are un-

willing to pay the amount of the money judgment, the plaintiff-mortgagee may buy the land by bidding the amount of his money judgment.

[14] If anyone, including the mortgagee, buys the land at Sheriff's sale, the mortgagor has a period for redemption by paying the purchaser the amount he paid at the sale plus interest.

[15] Normally, this redemption period is fixed by statute. Our Code does not have any provision relating to foreclosure of land mortgages, the Code Sections 280 et seq. relating to enforcement of judgments not being appropriate, so in lieu thereof the period of redemption should be a reasonable time to be determined by the court.

[16] It also is suggested that the defendant may avoid the foreclosure sale and the subsequent exercise of the right of redemption, by paying the amount of the money judgment before the Sheriff's sale of the land.

JUDGMENT ORDER

It is ordered, adjudged, and decreed : -

1. That plaintiff shall convey by deed to be recorded with the Clerk of Courts, Palau District, that portion of Lot 904 from the northeast corner southerly to the center of the foundation wall, being fifty (50) feet, more or less, the exact distance to be measured by survey and included in the deed description; then westerly sixty-seven (67) feet to the intersection of the west boundary line of Lot 904; then northerly along the west boundary to the northwest corner of Lot 904; then easterly sixty-seven (67) feet along the northern boundary of said lot to the point of beginning.

2. That upon receipt of the aforesaid conveyance, plaintiff shall deliver to defendant in writing his partial release and discharge of that certain mortgage between the

parties recorded in Book 1, pages 37, 38, and 39, records of the Clerk of Courts, Palau District, and that said release and discharge of mortgage shall be coextensive with the aforesaid conveyance, and further that said debt secured by said mortgage shall be satisfied in the amount of two hundred dollars (\$200.00), together with all accrued interest on said sum.

3. That plaintiff shall have and hereby is awarded judgment against the defendant for the sum of two hundred (\$200.00), together with interest on said sum in the amount of three hundred eighty-four dollars (\$384.00), together with interest on the total at the rate of six percent (6%) per annum from date of judgment until paid.

4. That the triangular southern parcel of Eang as depicted by Sketch No. SK 281-67, District Land Management Office, dated November 30, 1967, being Exhibit 1 in evidence, be sold for cash at public auction to the highest bidder by the Sheriff, Palau District, upon written notice of sale posted in three public places, and further, that plaintiff may be a purchaser at said sale.

5. That the Sheriff shall disburse the proceeds from said sale first for his sale costs; secondly, in satisfaction of plaintiff's judgment in the amount of five hundred eighty-four dollars (\$584.00), together with interest on said judgment and costs as awarded herein; and thirdly, any balance remaining to the defendant.

6. That defendant and all persons claiming from and under her are hereby forever barred and foreclosed of and from any and all claim to said land described above and sold by the Sheriff at public auction save and except the right of redemption, to be exercised within thirty (30) days from date of sale, by payment of costs of sale and the amount of plaintiff's judgment with interest and costs awarded, and in the event of defendant's failure to re-

deem within thirty (30) days, the Sheriff shall execute and deliver his deed to the above-described property to the purchaser at said sale.

7. That in accordance with the stipulation of the parties, the plaintiff and defendant, in behalf of themselves and all persons claiming from and under them, shall release and extinguish any claim or interest they may have derived from the mortgage subject of the action, individual ownership or otherwise, in favor of the intervenor Setsuko Techur to that certain one hundred (100) tsubo parcel of land being thirty (30) feet in width and one hundred twenty (120) feet in length adjoining Lot 904 on its westerly boundary.

8. That plaintiff shall have his costs as provided by law upon filing itemized claim with the Clerk of Courts.

9. That this judgment and all deeds executed in accordance herewith shall be subject to any rights of way subsisting upon the parcels of land above-described.