1967

DÉVELOPPEMENT CENTRAL VILLE DE L'ISLE (*Defendant*) ..... APPELLANT;

*June 13
June 26

AND

SIDNEY LEIBOVITCH and EDWARD LEIBOVITCH (*Plaintiffs*) ..... RESPONDENTS;

AND

DÉVELOPPEMENT PLATEAU LASALLE LTÉE *et al.* ..... (MISE-EN-CAUSE).

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contracts—Loan secured by hypothec—Transfer of debt—Right of redemption—Incorporeal property—Whether sixty days notice required under art. 1040a of the Civil Code.

The words "an immoveable" and "the immoveable" as used in art. 1040a of the Civil Code refer only to corporeal property and the article has no application to incorporeal property such as the transfer of a debt.

Contrats—Créance hypothécaire—Cession de créance—Droit de rachat —Bien incorporel—Le préavis de soixante jours est-il requis sous l'article 1040a du Code Civil.

Les mots «un immeuble» et «l'immeuble» tels qu'employés dans l'article 1040a du Code Civil se réfèrent seulement à des biens corporels et l'article n'a pas d'application lorsqu'il s'agit de biens incorporels tels qu'une cession de créance.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Smith. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Smith J. Appeal dismissed.

Jean Filion, Q.C., and *André Bélanger,* for the defendant, appellant.

Harry Aronovitch, Q.C., and *Boris Berbrier,* for the plaintiffs, respondents.

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*PRESENT: Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1967] Que. Q.B. 419.

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DÉVELOPPEMENT CENTRAL VILLE DE L'ISLE INC. v. LEIBOVITCH *et al.*

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a majority judgment of the Court of Queen's Bench[1] dismissing an appeal from a judgment of Smith J. in the Superior Court, rendered May 11, 1965, which maintained respondents' action and declared cancelled and annulled appellant's right to redeem a sum of $798,269.97, transferred as security for the repayment of a loan of $80,000, made by respondents to appellant under a certain deed of loan executed before J. Bernard Billard, Notary, on March 6, 1962.

The facts, which are not in dispute, are fully set out in the judgments below. Shortly stated they are as follows.

1. On May 5, 1961, by deed before Robert Désy, Notary, the mise-en-cause Développement Plateau LaSalle Ltée acknowledged being indebted to appellant in the amount of $798,269.27, and obligated itself to pay the said amount on or before May 1, 1964. To secure the reimbursement of said sum, it hypothecated in favour of the appellant certain immoveable properties more fully described in the said deed.

2. On March 6, 1962, by deed before J. Bernard Billard, Notary, respondents loaned to the appellant a sum of $80,000 payable one year later on March 6, 1963, with interest at the rate of 2 per cent per month and also an additional indemnity of $16,000. To secure the reimbursement of the said sum of $80,000, interest and accessories, the appellant transferred and conveyed to respondents the sum of $798,269.97 due by the mise-en-cause under the deed of May 5, 1961, above referred to. This transfer reads in part as follows:

> To secure the reimbursement of the said sum of $80,000, the payment of the interest thereon, costs and accessories, ...the borrower has by these presents transferred and conveyed with warranty of fournir and faire valoir unto the said creditors Sidney and Edward Leibovitch ...the sum of $798,269.97 due by Développement Plateau LaSalle Limitée ...under the terms of a deed of obligation passed before Me Robert Désy, notary.

Under the terms of said deed of March 6, 1962, appellant had the right to redeem

> within ten days following the maturity of the present loan, any principal balance remaining due on the said sum of $798,269.97, by paying to the creditors the amount of the present loan plus interest, costs and accessories as hereinabove stipulated plus the sum of $1.00.

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It was also stipulated that should the appellant fail to fulfill its obligations, the respondents would have, *inter alia,* the following rights:

> Should the said Transferor-Borrower fail to fulfill any of the obligations herein stipulated, should he fail to pay at maturity any instalments of interest or should he fail to pay the amount of the present loan at maturity ... the Borrower-Transferor shall lose ipso facto without any notice or mise-en-demeure whatsoever, the right hereinabove stipulated to redeem the remainder of said sum of seven hundred and ninety-eight thousand two hundred and sixty-nine dollars and ninety-seven cents ($798,269.97) without any notice or mise-en-demeure whatsoever, and shall collect all interest accrued or to accrue, paid or to be paid on the said sum, and all instalments paid by the borrower on the loan hereinabove consented to him shall remain the property of the creditors as liquidated damages, without prejudice to any rights or recourse of the said creditors, in which case the said right to redeem shall become automatically, ipso facto, without any mise-en-demeure or notice whatsoever on the part of the said creditors-transferees, null and void.

3. On May 1, 1962, by deed before J. Bernard Billard, Notary, respondents and one Henry Marcovitz acting in Trust loaned to the mise-en-cause Développement Plateau LaSalle Ltée a sum of $340,000. To secure the reimbursement of the said sum of $340,000, the mise-en-cause Développement Plateau LaSalle Ltée hypothecated, in favour of the respondents and the said Marcovitz, the immoveable properties already hypothecated in favour of appellant in virtue of the deed of May 5, 1961, above referred to. This deed of May 1, 1962, also contained a *dation en paiement* clause. Appellant intervened in the said deed and granted priority of hypothec in favour of the lenders over the hypothecs securing its claims under the deed of May 5, 1961.

4. On June 19, 1963, the respondents and Marcovitz obtained before Tellier J. in the Superior Court a judgment by default declaring them to be owners of the immoveable properties hypothecated to secure the reimbursement of the said sum of $340,000.

5. The appellant defaulted on the payment of the $80,000 due to the respondents on March 6, 1963, and, some fifteen months later, on June 4, 1964, respondents served on appellant a notice of default, giving appellant the option of paying the said sum of $80,000 (which had become due on March 6, 1963) with interest and accesso-

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Abbott J.

ries, within a delay of seven days or of losing its right to redeem the sum due under the deed of loan to mise-en-cause dated March 5, 1962.

Payment was not made by appellant and on June 17, 1964, respondents instituted the present action and in their conclusions asked

> WHEREFORE plaintiffs, under reserve of all of their rights and recourses, and praying acte of their tender to defendant of its N.S.F. Cheque, Exhibit P-2, pray that by judgment of this Honourable Court to intervene, it be ordered and declared that defendant's right to redeem the remainder of the sum of $798,269.97 is cancelled and annulled and is null and void, and that plaintiffs are the sole and absolute owners of the sum of $798,269.97, or such balance remaining under terms as set forth in a deed of obligation registered at Montreal under No. 1532489 and under the terms of a deed of transfer registered at Montreal under No. 158763, affecting the following immoveable properties, namely: ... (here follows a description of the immoveable properties hypothecated).

Appellant's principal defence was that respondents' claim of $80,000 had been extinguished by compensation. Alternatively, appellant pleaded that respondents' action was premature because it had not been given the statutory notice required under art. 1040a of the *Civil Code*.

Dealing first with appellant's plea of compensation. Although under the judgment of Tellier J., to which I have referred, the respondents became the undivided owners —with Marcovitz—of the immoveable property on which the claim of $798,269.97 was secured by hypothec, they were never personally liable for that amount. It follows that, as all the learned judges in the Courts below have held, the respondents' claim of $80,000 against the appellant was not extinguished by compensation.

Appellant's second ground of defence was that respondents' action is premature because they did not give to appellant the sixty-day notice called for under art. 1040a of the *Civil Code*. That article was enacted in 1964 by the Statute 12-13, Eliz. II, c. 67. It reads as follows:

> Under a contract to guarantee the performance of an obligation, a creditor cannot exercise the right to become the absolute owner of an immoveable or the right to dispose thereof until sixty days after he has given and registered a notice of the omission or breach by reason of which he wishes to do so.
>
> Such notice must be registered with a designation of the immoveable and served on the person whose rights as holder of the immoveable as proprietor thereof are then registered; it takes effect against any other interested person to whom the creditor's rights are opposable.

The notice may be served on the holder or his heirs in the same manner as a summons under the Code of Civil Procedure.

The registrar must, by registered letter, inform each hypothecary creditor whose name appears in the register of addresses of the registration of the notice.

In my opinion the words "an immoveable" and "the immoveable" as used in the said article refer only to corporeal property and the article has no application to incorporeal property such as the debt transferred to the respondents under the deed of March 6, 1962, although the payment of that debt appears to have been secured by a third hypothec.

For the foregoing reasons as well as for those given by Smith and Rivard JJ. in the Courts below, with which I am in substantial agreement, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Filion, Lafontaine, Laurier & Bélanger, Montreal.

Attorney for the plaintiffs, respondents: Boris J. Berbrier, Montreal.