

1. A demurrer to Count III is sustained.

2. A motion for a more specific pleading as to paragraphs 15 and 17 is granted as to those clauses of the paragraphs alleging agency as to "those who appear to be . . ."

The plaintiffs are granted leave to file an amended complaint pursuant to this Opinion and Order within twenty (20) days of this Order.

SHAW ESTATE V. SLAYTON, ET AL., NO. 2*, C.P. Franklin County Branch, A.D. 1983-172

Mortgage Payments - Defeasible Life Estate - Declaratory Judgment

1. Where a testator provides for a defeasible life estate and it is impossible to determine the happening of the event that will defeat it, the life tenant takes the property subject to any agreements which the testator made during his lifetime for the payment of the principal and interest on the mortgage.

2. Since some principal payments inure to the benefit of the remaindermen, such sums paid by the life tenant shall be a lien on the property against the remaindermen for their proportionate part of the sums paid.

3. The amount of the life tenant's lien against the remaindermen can only be determined upon termination of the life tenancy where a defeasible life estate is involved.

David C. Cleaver, Esquire, Counsel for plaintiff

William H. Kaye, Esquire, Counsel for defendant, Patricia A. Slayton

Denis M. Diloreto, Esquire, Counsel for additional defendants

ADJUDICATION AND DECREE NISI

EPPINGER, P.J. March 6, 1985:

* Editor's Note: Earlier report is 6 Franklin 231 (1984).



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This is an action for declaratory judgment brought to determine who should pay the principal and interest on a mortgage on the property of the decedent, James M. Shaw. The plaintiff is Maryann Strait, the executrix of the decedent's will, and the defendant is Patricia A. Slayton, who has a defeasible life in real estate and personal property left by the decedent. The condition in the decedent's will is that the life tenant must reside in the house as a sole, single adult. In paragraph three, the will provides:

"I give, devise, and bequeath a conditional life estate in my residential property and personal property contained therein to Patricia A. Slayton, conditioned upon her residing in my house as a sole, single adult. Upon her leaving the house to reside elsewhere, cohabiting in my house with another adult, or her marriage, whichever comes sooner, then the remainder of my interest in my house and personal property shall pass into the rest, residue and remainder of my estate."

Paragraph four of the will distributes the remainder to his heirs per stirpes.

The first time this matter came before us, we opined that the question of who should pay the interest on the mortgage was a question easily decided. We held that it is the life tenant. *Shaw Estate v. Slayton*, 6 Franklin L.J. 231 (1984), citing 14 P.L.E., Estates in Property, §69. But we held that we could not resolve the remaining issues presented to us because the remaindermen were indispensable parties to the action. Subsequent to the filing of that opinion and order, plaintiff moved to join the remaindermen as additional defendants. They are now before the court, and we have been asked to declare who must pay the principal on the mortgage.

Relief in the nature of a declaratory judgment is discretionary for the court and should be permitted when the parties hold antagonistic claims which if not resolved will result in inevitable litigation. *Smith v. County of York*, 37 Pa. Cmwlth. 47, 50, 388 A.2d 1149, 1151 (1978). When such a situation arises under the construction of a will or the disposition thereof, a declaratory judgment is appropriate. 42 Pa.C.S.A. §7533. This is a proper case for declaratory judgment because the executrix has been unable to settle the estate because of the dispute over who should pay the principal of the mortgage.

As indicated before, it seems clear that the life tenant has the duty to pay the interest accruing from the encumbrance placed on the property during the continuance of her life estate. *Estate of Shaw*, supra, at 232, citing 14 P.L.E. §75, Estates in Property. The life tenant argues that this, coupled with the upkeep of the property and the payment of taxes are her sole obligation. The executrix and the remaindermen contend that the life tenant also has the duty to pay the principal.

This matter was presented to us as a pure question of law. We were not told how old the life tenant is, nor the age of the remaindermen. ¹ Nor were we given any evidence about the debt itself, nor the amount of the payments and what portion of the payments was principal and what portion interest. This presents a difficult and unusual situation. However, it is our duty to resolve it in this declaratory judgment proceeding. See *Liftes Estate*, 377 Pa. 277, 229, 103 A.2d 670 (1954).

Our research has not revealed, nor has counsel provided us with reference to cases where there is a dispute like this one between the life tenant and the remaindermen as to who should pay the principal. Neither is the legislative authority clear. Section 214 of the Probate Code provides that

"a specific devise or bequest of real or personal property passes that property subject to any security interest therein existing at the time of the testator's death, without any right of exoneration out of any other estate of the testator,"

Section 8111, on the other hand provides that for an unproductive estate with no income "all ordinary expenses and charges . . . shall be paid out of principal." *Id.* §8111. We think it can be concluded that this is unproductive property. If we followed §8111 then the expenses would be paid out of the estate and thus diminish the remainder interest. If on the other hand we followed §2514, which the remaindermen contend is more specific and should be applied, then the property would be subject to the security interest. See Section 1933, Statutory Construction Act, 1 Pa.C.S.A. §1933, and it can be argued that the life tenant should pay the principal and interest while living in the testator's residence.

¹ Appearances led us to believe that they all may be in the same generation.

The Supreme Court of North Carolina, in *Thompson v. Watkins*, 207 S.E.2d 740, 744 (S. Ct. N.C. 1974), said that a life tenant had no duty to contribute from his assets to the payment of an encumbrance, but held he could be compelled to choose between giving up his estate for life and making a contribution from his other assets. *Id.*, at 744, citing Restatement of Property, §131, comment a., p. 13. But when the life tenant, in order to preserve his estate, pays off the mortgage, he is entitled to be reimbursed from the remaindermen, to the extent of their interest in the property. *Id.*, citing 51 Am. Jur. 2d, Life Tenants and Remaindermen, §275. In essence, then, when the life tenant pays on the principal he acquires a lien on the future interest for the amount which the remaindermen have a duty to pay. *Id.*

In addition to the uncertainty of the happening of the event which may divest Patricia's estate, that is her failure to reside in the house as a sole single adult, there is the uncertainty as to whether any of the remaindermen might disclaim his or her interest. See Probate Code, supra, §§6201-6205; *Zindel Estate*, 23 D.&C. 3d 282 (Beaver 1982); *Sousa Estate*, 14 D.&C. 3d 700 (Montg. 1980).

So we must consider the situation not only when the life estate ends or is defeated but also when the mortgage falls due, a matter that was not put in evidence. In *Thompson v. Watkins*, supra, it is said that the life tenant and remaindermen must each pay their due proportion on the principal if the mortgage comes due during the period of the life estate, based seemingly, on the respective values of the life estate and remainder. The cases, however, are not clear as to what a due proportion of the principal is. *Id.*, at 744 citing Simes and Simes, *The Law of Future Interests*, §1697 (2d Ed. 1956).

If we knew when Patricia's estate would terminate, we could calculate the proportionate contributions of the life estate and the remainder interest to the payment of the mortgage. This may be done by employing the mortality tables and rates of interest regularly employed in valuing an estate for life. Restatement of Property §132 comment e, p. 433, cited in *Thompson v. Watkins*, supra, at 744. But we do not know when her estate will terminate.

Finally, there is the question of the mortgagee's situation. The mortgagee, it seems to us, cannot be compelled to seek payments

on the mortgage from various sources. Generally a mortgage requires the mortgagor to keep up the premises, pay the taxes and insurance, pay interest and something on account of the principal. If we decided that the life tenant should pay all but the principal, then the mortgagee would have to look to the remaindermen for the principal. And what would happen if one did not pay? The mortgagor had undertaken to do all these things himself during his lifetime. Since the life tenant is enjoying the estate that the owner would have had, the mortgagee should be entitled to obtain payment from the one enjoying the property as the owner did.

Restatement of Property §132, p. 430, helps us. In the situation contemplated there, an owner of an estate for life may be compelled to choose between giving up her estate and paying the principal of the mortgage or the part that becomes due. If she does, then she has a lien on the future interest of the remaindermen for the remaindermen's proportionate share of the sum paid. See comment a, *Id.*, at 430. See also *Thompson v. Watkins*, supra, at 744.

We conclude that where a testator provides for a defeasible life estate and it is impossible to determine the happening of the event that will defeat it, the life tenant takes the property subject to any agreements which the testator made during his lifetime for the payment of principal and interest on the mortgage, taxes, insurance, repairs, and other current charges. Therefore, the life tenant is required to pay all these items as they become due.

However, since some of the payments inure to the benefit of the remaindermen, such sums paid by the life tenant shall be a lien on the property against the remaindermen for their proportionate part of the sums paid. It is apparent that the proportionate part of the life tenant and the remaindermen cannot be determined by reference to any tables and can only be calculated at the time of the termination of the life estate by the life tenant's death or by her violating the provisions of the will which would divest her of her life interest.

This conclusion is based on the realities of the situation. Apparently in this case the mortgage payments are overdue, a default has occurred, and the bank has not foreclosed. To require the life tenant to make the payments is to require her to do nothing more than the owner would have had to do if living. The

remaindermen are not at this time getting any benefit from the property at all and will not come into any enjoyment until the life estate is ended. The mortgagee has only to look to one source for payment and if the sums are not paid, it would appear the mortgagee can proceed to mortgage foreclosure or other appropriate remedy to protect its interest.

DECREE NISI

March 6, 1985, it is ordered that Patricia A. Slayton, life tenant, shall pay the principal and interest during the period of her tenancy on the bond and mortgage given by James M. Shaw, deceased, to the Chambersburg Trust Company.

Since these payments inure to the benefit of the remaindermen, James M. Shaw, Jr., David E. Shaw, Patricia Bradley and Carol Atherton, such sums paid by the life tenant shall be a lien on the property against the remaindermen for their proportionate part of the said payments, such proportionate part to be calculated at the time of the termination of the life estate by the life tenant's death or by her violating the provisions of the will which would divest her of her life interest. These values shall be determined by employing the normal methods used in valuing life estates.

The costs of these proceedings shall be paid by the estate of James M. Shaw, Sr.

This decree nisi shall become absolute unless exceptions are filed thereto within ten (10) days.

**BAYER, ET. AL. V. GREENCASTLE-ANTRIM FOUNDATION,
C.P. Franklin County Branch, A.D. 1983-15**

Summary Judgment - Landlord Tenant - Security of Common Area - Merger of Negotiation

1. Summary judgment is only granted in the clearest of cases, when the moving party proves there is no genuine issue of material fact and is entitled to judgment as a matter of law.

2. In areas under the control of the landlord, there is a duty to protect tenants from foreseeable criminal actions of third persons.

3. Merger of prior negotiations into a lease is a defense where fraud is alleged.

David S. Keller, Esquire, Counsel for plaintiffs

Virginia W. Hersperger, Esquire, Counsel for defendants

David C. Cleaver, Esquire, Counsel for defendants

OPINION AND ORDER

George C. Eppinger, P.J., March 14, 1985:

Jay D. Bayer and Larry F. Witmer, plaintiffs, were practicing medicine and dentistry, respectively, in the building owned by the defendant, Greencastle Antrim Foundation, called the John L. Grove Medical Center, when the medical center was destroyed by fire in 1981. Both claim that the individual defendant, Robert Crunkleton, an officer of the foundation, represented to them that the medical center's insurance policy would cover their personal property in the event of a fire. This assertion is denied.

The suit brought by the two doctors is for the loss of equipment, supplies, and for the cost of reconstructing patient charts. The doctors allege misrepresentation and breach of implied warranty in failing to provide fire insurance on their personal property and negligence in failing to provide for the physical security of their property.

The defendants have filed a motion for summary judgment which is only to be granted in the clearest of cases. *Dunn v. Teti*, 280 Pa. Super. 399, 402, 421 A.2d 782, 783 (1980), when the moving party proves there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Pa. P. U. C. Bar Association v. Thornburgh*, 62 Pa. Cmwlth. 88, 93, 434 A.2d 1327, affd. 498 Pa. 589, 450 A.2d 613 (1981). The record is viewed in a light most favorable to the nonmoving party. *Id.* Under this standard, we think the defendants are not entitled to summary judgment.

Defendants first argue that defendant Crunkleton may not be held individually liable for any representations made regarding fire insurance because he was acting at all times as president of the foundation. An agent is normally not liable on a contract between