UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BARBARA A. YAGERIC Case No. 97-13443 K

Debtor

The Debtor in this case has objected to a claim filed by William Liesing. The claim is filed as secured and contains two elements. The first element is the balance due on a second mortgage on the Debtor's home, which mortgage Liesing purchased from Key Bank in 1995. The second element is attributable to an amount slightly in excess of $9,000 that Liesing paid directly to the taxing authority in 1992 in order to satisfy tax liens on the Debtor's home.

As to the amount due on the mortgage debt, the Debtor argued that Liesing's secured claim should be limited to the $9,000 that he paid to Key Bank to obtain the mortgage rather than the outstanding mortgage balance of almost $19,000. The Court rejected that argument on the record in open court on February 24, 1998, on the ground that there is simply no authority to limit a mortgage assignee's rights to the dollar amount paid for the assignment. The Court found that it had no authority to so limit the scope of the secured claim (equitable authority or otherwise), and even if it had such authority, it would not exercise it because examining the equities in such a manner would throw the secondary mortgage market into chaos and turmoil. This decision reaffirms that holding.

As to the real property taxes paid by Liesing, the Debtor argues that the claim is unsecured because Liesing was not a mortgagee at the time he paid the taxes, nor were there any

circumstances under which he should be subrogated to the lien rights of the taxing entity. Evidence was taken in this regard. Documents were stipulated into evidence and the testimony of Liesing was taken. (The Debtor did not appear at hearing other than through counsel.)

Liesing's argument is that he is entitled to be subrogated to the rights of the taxing entity under the general principle that one who pays real property taxes owed by another has a secured claim for the amounts paid.[1] The Court would have no quarrel with this principle under appropriate circumstances. But under the facts at Bar, the principle does not apply because, as explained below, it requires that there have been an agreement between the payor and the party for whom the taxes were paid, that the payor would be subrogated to the rights of the taxing entity. No such agreement is evidenced here. Rather, Liesing's own testimony is that he expected to be repaid "when the property was sold." No evidence was presented regarding any contemplated sale, nor any contemplated acquisition by Liesing of any mortgage on the property. Instead, he first acquired an interest in the property when he became a mortgagee by acquiring the second mortgage from Key Bank (at a discount) three years later.

Liesing is an attorney, a licensed real estate broker and licensed insurance broker, a real estate manager, and an occasional purchaser of mortgages. He is clearly skilled in real estate law and is fully aware of how to obtain a security interest in real estate in the state of New York. But he did not take a mortgage to secure his payment of the Debtor's tax delinquencies and he did not reach an agreement with the Debtor that he would be subrogated to the tax lien.

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[1] To the extent, if any, that Liesing's position is based on the fact that he subsequently became a mortgagee, and a mortgagee clearly has a secured claim (under the mortgage) for taxes paid, that basis is rejected. At the time he paid the taxes he had no protectable interest in the property.

It has long been a rule in the federal courts in the state of New York that "one who pays a tax, even though without any interest to protect, *but under express agreement that he be subrogated*, has a lien." *East Side Packing v. Fahy*, 24 F.2d 644, 646 (2d Cir. 1928) (citing several United States Supreme Court and United States Circuit Court of Appeals cases) (emphasis added). Liesing was merely a volunteer, and "a mere volunteer, who pays a tax, cannot be subrogated to a tax lien." *Id.*[2]

The portion of Liesing's claim attributable to the payment of real property taxes in 1992 is an unsecured claim only. The claim for the amount due on the second mortgage is allowed as a secured claim.

SO ORDERED.

Dated: Buffalo, New York
March 3, 1998

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.

[2] Although the *Fahy* case antedated the New York Court of Appeals' decision ruling that tax liens are no different than other liens for subrogation purposes, there is no reason to believe that that ruling obviated the need for an agreement for subrogation, before the payor could be so subrogated. Even the statement in *Tishman Realty's Constr. v. Schmitt*, 330 N.Y.S.2d 174, 178 (Civ. Ct., N.Y. 1972), that the "right of subrogation is independent of any agreement between the parties and rests upon principles of natural justice and equity" must be taken in context. In that case, the relationship of the payor to the principal obligor was that of a surety. Clearly, a subrogation agreement is not necessary when there is some other agreed relationship such as that of suretyship, in which a right of subrogation is logically or equitably implicit.