SUPREME COURT OF LOUISIANA

NO. 95-C-3058

SHIRLEY HARTMANN,
wife of/and RICHARD CARRIERE

V.

BANK OF LOUISIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIFTH CIRCUIT, STATE OF LOUISIANA

CALOGERO, Chief Justice, concurs.

I agree with the majority that plaintiffs are owed compensation for the Bank's use and enjoyment of the subject property, but I do not agree with the reasoning employed by the majority to award it. The majority holds that the Bank of Louisiana "stepped into" Occhipinti's shoes by purchasing the building and Occhipinti's leasehold interest. That holding unfortunately threatens a large number of modern financing arrangements grounded in the use of leaseholds as security with the lender-friendly option of "stepping into the lessee's shoes" upon the lessee's default. That lender's option, and option it was, was never taken by the Bank of Louisiana. I would instead cast the bank for damages in unjust enrichment, based on its use and enjoyment, without right, of the subject property for the period from the Bank's foreclosure and purchase at sheriff's sale on September 20, 1989 to the Bank's purchase of the land on July 12, 1996.

It is clear that the right of occupancy may be segregated from the obligation to pay rent, and that such right may properly be sold by itself. Walker v. Dohan, 2 So. 381 (La. 1887). However, that right is lost when the underlying rent obligation is unfulfilled. With all due respect to my colleague in dissent, Walker does not stand for the proposition that a naked right of occupancy in a leasehold setting may survive without satisfaction of the underlying rental obligation. In Walker, C.E. McVean & Co. held a lease of a storehouse ending September 30, 1886. Upon the death of C.E. McVean, and the insolvency and cessation of the firm, McVean's representatives sold "[t]he right of occupancy" of the leased premises from the date of the sale to the end of the lease's term. The defendant paid $50 for that "right of occupancy." The representatives paid the rent to the lessor of the property in full for the remaining lease term, then sued the purchaser of the "right of occupancy" for that amount. The Court held that the lessee had no remedy against defendants, because defendants purchased only the "right [to] occup[y]" the premises and did not expressly assume any

lease obligations.

The Walker Court's holding rested solely on the semantic mistake made by the representatives in selling only the "right [to] occup[y]" the premises for the remainder of the lease, rather than selling the lease itself. It had nothing to do with the right of the lessor to evict the holder of the right of occupancy. However, in dicta, the Court addresses that very issue, and cites a Mr. Hennen, "one of the most acute legal minds of his day," for the proposition that a lessee may "make a sale or donation of the right, retaining himself the obligation to pay the rent," but that the "non-fulfillment [of that obligation] might defeat the enjoyment of his vendee of the right transferred." 2 So. at 383. In other words, while a lessee may bargain away his own right to occupy the leased premises, that bargain has no effect whatsoever on the right of the lessor to evict the occupier upon the lessee's default.

Even if it were true, contrary to all logic, that a lessor could not evict one who purchases from his lessee the right to occupy the leased premises, in the instant case, Occhipinti's default caused this lease, and with it the right of occupancy, to terminate. As exemplified by the instant facts, using a lease as collateral for a mortgage is inherently dangerous for lenders: should the lessee/mortgagor default on its lease obligations and be evicted, the mortgagee is left without any collateral to secure its loan. To avoid that risk, lenders such as the Bank of Louisiana seek protective provisions in the underlying leases, such as the "step into the shoes" option in the lease at issue. In the instant case, the lessee/mortgagor Occhipinti defaulted on his lease obligations, resulting in plaintiffs' declaration on July 7, 1989 that the lease had terminated, and in plaintiffs' July 19, 1989 eviction proceeding. As correctly noted by Justice Kimball in her dissent, prior to these July, 1989 events, the Bank of Louisiana had not utilized the protective provision it bargained for with the Carrieres, i.e., it had not "stepped into" its defaulted mortgagor's shoes and expressly assumed his lease obligations. Rather, it chose to foreclose on the mortgage and sell the collateral at sheriff's sale. In so doing, the Bank of Louisiana subjected itself to the very danger it had previously sought to avoid in obtaining an option to take the lessee's place upon default: it foreclosed on a lease in which its mortgagor, the lessee, had already lost his rights. It therefore foreclosed on non-existent collateral, and the trial court's original order of eviction was correct.

From September 20, 1989 to July 12, 1996, the Bank of Louisiana occupied and enjoyed the land of the Carrieres without the right to do so.[1] The Bank should therefore compensate the

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[1]Even the dissent would have to acknowledge that the Bank had no right to occupy these premises after October 23, 1992, for on that date there expired the five-year option taken by Occhipinti on

Carrieres to the extent that it has been enriched, or to the extent the Carrieres have been impoverished, whichever is less. LA. CIV. CODE art. 2298; Minyard v. Curtis Products, Inc., 205 So. 2d 422 (La. 1967); Willis v. Ventrella, 95-1669 (La. App. 1st Cir. April 4, 1996), 674 So. 2d 991 (holding unjust enrichment proper where lease unenforceable). The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time judgment is rendered. LA. CIV. CODE ANN. art. 2298; Willis at 6-7, 674 So.2d at 995.

I therefore disagree with the majority's holding that the Bank "stepped into" Occhipinti's shoes and became liable for rent under Occhipinti's lease with plaintiffs. I would instead award plaintiffs quantum meruit for the Bank's use and enjoyment of the premises since its foreclosure and purchase at sheriff's sale on September 20, 1989, until the date of the Bank's purchase of the land on July 12, 1996.

October 23, 1987. Upon the lease term's expiration, the right of occupancy ceded to the Bank by the dissent ceased. To hold otherwise would be to hold that a party like the Bank of Louisiana may perpetually occupy and enjoy another's property without any underlying right to do so. That clearly illogical result is not mitigated by this particular Bank's purchase of this particular land on July 12, 1996. Even had it not purchased the land, the dissent would apparently have no difficulty allowing the Bank to remain on the Carrieres' land forever, as it expresses no outside limits whatsoever on the Bank's alleged right to occupy these premises.