Mortgages - Moratorium Legislation - Protection to Mortgagee

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or officer is under no duty to disclose any information which he has of those facts. *Waller v. Hodge*, 214 Ky. 705, 283 S.W. 1047 (1926); *Bollstrom v. Duplex Power Car Co.*, 208 Mich. 15, 175 N.W. 492 (1919). If a director has knowledge of a proposed sale of corporate assets which will enhance the value of the stock, and such knowledge is not generally available, he is under obligation to disclose the possibility for the sale to the seller. *Strong v. Repide*, 213 U.S. 419, 53 L.Ed. 853, 29 Sup. Ct. 521 (1908); *Oliver v. Oliver*, supra; *Gammon v. Dain*, 238 Mich. 30, 212 N.W. 957 (1927). But cf. *Hooker v. Midland Steel Co.*, supra; *Bauden v. Taylor*, 254 Ill. 464, 98 N.E. 941 (1912). Of course, if the director or officer makes actual misrepresentations as to the status of the corporation or is guilty of actual fraud, he will be held liable to the stockholder. *Lightner v. Hill*, 258 Mich. 50, 242 N.W. 218 (1932); *Fisher v. Budlong*, 10 R.I. 525 (1873); *Black v. Simpson*, 94 S.C. 312, 77 S.E. 1023 (1913); *Saville v. Sweet*, 234 App. Div. 236, 254 N.Y.S. 768 (1932). If a director or officer is questioned by the stockholder and he falsely denies knowledge affecting the value of the stock, his concealment of pertinent facts makes him liable. *Schroeder v. Carroll*, 192 Wis. 460, 212 N.W. 299 (1927). Once a director or officer undertakes to make a disclosure of facts, whether such was his duty or not, he is obliged to make full disclosure of all facts, and his partial concealment of material facts affecting the value of the stock will subject him to liability. *Poole v. Camden*, 79 W. Va. 310, 92 S.E. 454 (1916); see *Waller v. Hodge*, supra, 283 S.W. 1047, 1050. Where a director purchases the stock with the view of getting control of the corporation so as to enable him to sell a majority of the stock to one wishing to purchase some of the corporation property and thus the director makes a personal profit, he is liable to the stockholders who sold to him. *Commonwealth Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77 (1910).

The Wisconsin court adopts neither the majority nor the minority rule, but it has recognized special circumstances under which relief will be given to the stockholder who is seeking damages or the return of the stock from the director or who is seeking a recission of the contract to sell. A trust agreement was the basis for declaring that a fiduciary relationship existed between the stockholder and director in *Bray v. Jones*, 190 Wis. 578, 209 N.W. 675 (1926). False financial statements furnished by the director to the stockholder were sufficient to give the stockholder relief in *McMynn v. Peterson*, 186 Wis. 442, 201 N.W. 272 (1925). In the instant case the deposit agreement was made the basis for the declaration of a fiduciary relationship.

ROBERT J. BUER, WILLIAM J. NUSS.

Mortgages—Moratorium Legislation—Protection to Mortgagee.—Judgment of foreclosure was entered against the debtor-mortgagor and the real estate encumbered by the mortgage was ordered to be sold. The mortgagor was occupying the premises and conducting thereon a public garage. There were also tenants on the premises occupying a part of the building. After the expiration of the usual statutory period before sale, the creditor served notice of application to fix the time and place of the sale, contending that the mortgagor had not paid the taxes and interest accrued since foreclosure. Thereafter the mortgagor filed a petition under Section 278.106 [Wis. Stat. (1933)] to secure an additional year in which to redeem before sale. It appeared that the mortgagor had been collecting rents from the tenants but that he had paid no accrued taxes or interest. It appeared, too, that gross income from his business, including rent, was just
enough to cover expenses without taxes or interest. The circuit court extended the period to redeem on condition that the mortgagor pay current taxes and interest. On appeal, held, order reversed; the statutory provision must be construed to mean payment of all accrued taxes or interest or both and not merely the payment of current taxes accruing during the period of extension. Banking Commission of Wisconsin v. Wutschel, (Wis. 1935) 263 N.W. 182.

The moratorium statute is emergency legislation. The debtor may be permitted a longer period to redeem than the parties had originally anticipated. Wis. Stat. (1933) § 278.106; repealed, Wis. Laws (1935) c. 319, § 1. [See Wis. Laws (1935) c. 482 § 1 (2) wherein the language is comparable to the language in § 278.106, supra, and which pertains to the foreclosure of mortgages on real estate other than homes.] The debtor is not entitled to an extension as a matter of right. The discretion of the trial court, with reference to the propriety of granting such extension, is to be exercised in the light of the express purpose of the statute and particularly that portion of it which sets forth the kind of showing an applicant must make to the court as a ground for extension. Foelske v. Stockhausen, 215 Wis. 104, 254 N.W. 349 (1934). While in the instant case the court's interpretation of the meaning of the language in Section 278.106, supra, about payment of interest and taxes, may not be literally incontestable, it is apparent that to interpret this provision as requiring the payment of current taxes only or interest during the extension would raise a constitutional question. The United States Supreme Court has prescribed the conditions which must attend generally the carrying out of any state moratorium scheme of this kind. See Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 444, 54 Sup. Ct. 231, 78 L.ed. 255 (1934). To permit the enforcement of such legislation there must be some concern on the part of the local courts for the position of the mortgagee. The scheme must not be one-sided. The state courts must be conscious of the limitations on the powers of the local legislatures and on their own discretionary powers as local magistrates. Note.-(1935) 19 Minn. L. Rev. 210. The payment of a stipulated “rental” during the extension period by the mortgagee, when the court in its discretion fixed the amount of the rental, has been held to be a valid exercise of discretionary powers under a moratorium law. Union Mutual Life Co. v. Waddle, 218 Iowa 1367, 257 N.W. 319 (1934). A refusal to grant the extension if it would hurt the mortgagee’s position and confer in fact no benefit upon the mortgagor is not erroneous. First Nat. Bank of Shakopee v. Hammill, (Minn. 1935) 262 N.W. 160. Where the mortgagor has a substantial equity in the property and is required to make comparatively moderate monthly payments, the extension is justified, although the net income from the property is a sum less than the payments required. Nat. Bank of Aitkin v. Showell, (Minn. 1935) 262 N.W. 689. No extension was granted to a mortgagor who waited until the regular statutory period for redemption had almost expired before he acted to obtain further time to redeem, when it was shown that income obtained during the regular period of redemption was not applied on the mortgage indebtedness or accrued taxes. Tuxedo Enterprises v. Detroit Trust Co., 272 Mich. 160, 261 N.W. 283 (1935). A failure to show on an application for an extension what she had done with insurance money received after the death of her husband was enough to bar a wife from obtaining the extension. Foelske v. Stockhausen, supra. If the extension as ordered by the circuit court had been confirmed the mortgagee’s interest would not have been adequately protected. The property was bringing some return to the debtor. It was not homestead property. The unpaid taxes of 1932 and 1933 would remain as an encumbrance on the property which would endanger the mortgagee’s security without some further investment on
his part. It is submitted that the decision of the appellate court is consistent with the constitutional limitations which do very definitely affect the administration of relief by the courts under moratorium statutes.

OLIVER H. Bassuener.

Principal and Surety—Statutory Bonds—Subrogation.—The petitioner, a surety company, gave a bond, required by statute, for the protection of materialmen and laborers participating in the drilling of a well for the United States government. The latter's contracting officer was required to retain 10 per cent of the estimated amount until completion and acceptance of the work. The contractor finished the project, but he did not pay all the materialmen. The surety paid into court the full amount of its bond, several thousand dollars less than the contract price and inadequate to satisfy the claims of all materialmen. The unpaid materialmen seek the retained percentage by virtue of an alleged equity afforded by statute. The surety, by right of subrogation, lays claim as a general creditor at least to the same fund for all of it or for a pro rata share. The contractor having been adjudged a bankrupt, the government turned over the sum to the trustee to abide the order of the court. The District Court gave priority to the materialmen, which decision was affirmed by the Circuit Court of Appeals. 75 F. (2d) 377, (C.C.A. 2nd, 1935). On writ of certiorari, held, judgment affirmed; acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal while any materialmen were unpaid. American Surety Co. of New York v. Westinghouse Electric Mfg. Co., 56 Sup. Ct. 9 (1935).

Subrogation must be enforced with a due regard to the equitable rights of others and cannot be invoked to overthrow a superior or equal equity. Fraser v. Fleming, 190 Mich. 238, 157 N.W. 269 (1916); Defiance Machine Works v. Gill, 170 Wis. 477, 175 N.W. 940 (1920). In New Amsterdam Casualty Co. v. City of Astoria, 256 Fed. 560 (D.C. Or. 1919), the surety was denied recourse to the retained percentages because labor claims were not fully paid. To grant the surety access to the fund would result in a reduction of the protection of the bond to the extent of the surety's dividend in the assets of the debtor. Hamill v. Kuchler, 203 Wis. 414, 234 N.W. 879 (1931). Statutes making mandatory a bond to insure compensation to materialmen on public contract jobs were enacted as a substitute for the ordinary materialmen's lien on private jobs. Wisconsin Brick Co. v. National Surety Co., 164 Wis. 585, 160 N.W. 1044 (1917); National Surety Co. v. Bratnober, 67 Wash. 601, 122 Pac. 337 (1912). It is against public policy that the instrumentalities for carrying on the government should be the subject of seizure and sale for debt. National Fireproofing Co. v. Huntington, 81 Conn. 632, 71 Atl. 911 (1909). The security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished. See Equitable Surety Co. v. McMullan, 234 U. S. 448, 34 Sup. Ct. 803, 58 L.Ed. 1394 (1914). It has been held traditionally that a material alteration of a contract without the consent of the surety discharges the latter. Woodruff v. Schultz, 155 Mich. 1, 118 N.W. 579, 16 Ann. Cas. 346 (1908); Lonergan v. San Antonio Loan Co., 101 Tex. 63, 104 S.W. 1061, 22 L.R.A. (n.s.) 364 (1907). And failure of the owner to retain percentages when required by contract on a private building project has been deemed a material alteration. Kunz v. Boll, 140 Wis. 69, 121 N.W. 601 (1909). But departures from the contract by the builder are not available to the surety as a defense against the claims of materialmen when they