

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW and EQUITY DIVISION**

**2015/CLE/gen/01149**

**BETWEEN:**

**FINANCE CORPORATION OF BAHAMAS LIMITED**

**Plaintiff**

**AND**

**TERRESITTA SHENA JOHNSON**

**Defendant**

**Appearances:** Audley Hanna, of Counsel for the Plaintiff  
Michael Saunders, of Counsel for the Defendant (on record)  
Terresitta Johnson Pro Se

**Before:** The Honourable Mr. Justice Keith Thompson

**Dates of Hearing:** March 13<sup>th</sup>, 2019  
June 25<sup>th</sup>, 2019  
August 6<sup>th</sup>, 2019  
November 8<sup>th</sup>, 2019

**GENESIS OF THIS MATTER:**

Striking out – Order 18 rule 19 – Duty of Mortgagee on sale of property.

- [1] This matter was commenced by a specially endorsed Writ of Summons filed August 05<sup>th</sup>, 2015 by the Plaintiff. The Plaintiff claims;
1. The said total principal sum of \$13,472.47;
  2. Interest on the outstanding principal sum of \$13,472.47, pursuant to the Civil Procedure (Award of Interest) Act 1992 from the 30<sup>th</sup> day of July A.D., 2015 until payment or judgment.
  3. Alternatively damages;
  4. Costs; and
  5. Further or other relief as the Court may deem just.
- [2] A summons for leave to enter judgment in default of appearance/defence was filed 07<sup>th</sup> November, 2017. Despite the fact that the Defendant was initially represented by counsel, the Defendant appeared pro se.
- [3] The Defendant was successful in having the summons for judgment in default of appearance/defence dismissed without prejudice to the Plaintiff to refile.
- [4] An Amended Writ of Summons was filed November 11<sup>th</sup>, 2015. Subsequently, the summons filed 07<sup>th</sup> November, 2017 was served. A Defence was filed October 23<sup>rd</sup>, 2015.
- [5] Arguments were presented on appeal by the Plaintiff and the Plaintiff succeeded in setting aside the Deputy Registrar's decision and the hearing for the striking out commenced.

- [6] Ultimately, the matter now stands as an application to strikeout the defence filed on 23<sup>rd</sup> October, 2015 and an application for summary judgment.
- [7] An amended defence was filed and a re-amended defence also filed on July 04<sup>th</sup>, 2019 and July 31<sup>st</sup>, 2019 (with counter-claim) respectively. No leave to amend or re-amend was obtained.
- [8] The main issue of the Defendant appears to be that the Plaintiff, having obtained an appraisal of the subject property which pegged the market value at \$105,000.00 only sold the subject property for \$70,000.00.

#### **THE DEFENCE:**

- [9] The relevant defence filed October 23<sup>rd</sup>, 2015 sets out bare denials to the statement of Claim.
- [10] What is ironic is that during the hearing of the summons to strikeout, the Defendant admitted that she discontinued payments from in or about 2011 due to being unemployed. However, in her defence she denies paragraph 5 of the Amended Statement of Claim which provides;

“5. In breach of the terms of the mortgage, the Defendant failed to repay the loan to the Plaintiff in the agreed terms and fell into arrears under the mortgage.

[11] The Defendant's position was that the initial Writ of Summons did not comply with Order 73 rule 2. The Writ of Summons having been amended, I am therefore of the opinion that the Amended Writ of Summons, satisfies the requirements of Order 73 rule 2 which provides;

"Every statement of claim in a money lender's action, (whether indorsed on the Writ or not) must state:-

- (a) the date on which the loan was made;
- (b) the amount actually lent to the borrower;
- (c) the rate per cent per annum of interest charged;
- (d) the date when the contract for repayment was made;
- (e) the fact that a note or memorandum of the contract was made and signed by the borrower;
- (f) the date when a copy of the note or memorandum was delivered or sent to the borrower;
- (g) the amount repaid;
- (h) the amount due but unpaid;
- (i) the date upon which such sum or sums became due; and
- (j) the amount of interest accrued due and unpaid on every such sum."

[12] The application is pursuant to Order 18 rule 19 of the Rules of the Supreme Court which provide;

Order 18 rule 19:-

"The Court may at any stage of proceedings order to be struck out or amended any pleading ..... on the ground that –

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court

#### **THE LAW:**

[13] It is the courts' opinion that it is trite law that in striking out applications the starting point should be as set out in Order 18 rule 19/3 which provides;

"The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable."

[14] It is also trite law on strike out applications that the court is to look at the pleadings only and not seek to try the substantive issues.

[15] In the case of **BARCLAYS BANK plc V CLARKE BAHAMAS SUP CT – 1998** Sep. 24, BHSJ33108, Dunkley J (Acting) stated;

**“But the Defendant must condescend upon the particulars in their evidence and should deal specifically with the plaintiff’s claim and affidavits and state clearly and concisely what facts are relied upon in support of their defense. A GENERAL DENIAL WILL NOT SUFFICE. Sufficient facts and particulars must be given in the affidavit evidence of the Defendants to show that there is a triable issue.”**

[16] In the case of **GUANO BERRY INVESTMENTS LIMITED Vs. FARMILOE and ANOTHER (2005) 1 BHS J. NO. 14 LYONS J.** stated at paragraph 25;

**“I appreciate that the older cases say that a great deal of circumspection should be applied to these applications, and that a pleading should not be struck out unless it is perfectly clear it cannot succeed (See e.g. LAURENCE V. LORD NORREYS 15 App Case 210).” More recently the “new culture” permits courts, in the overall public interest of having efficient court systems, to be more aggressive in striking out offending pleadings (See ARBUTHNOT LATHAN BANK Ltd. Vs. TRAFALGAR HOLDINGS Ltd. [1987] 1 WLR 1426 and CHORARIA Vs. SGITTIA [1998] C.L.C 625). Our new order 31A places greater emphasis on the judge “managing” the case and making decisions to get the case moving effectively. This must imply a power, on application to aggressively deal with pleadings, which offer little prospect of success and, if pursued would amount to a waste of time and an abuse of process.”**

[17] The Defendant in the instant matter has only provided a bare defense in virtually every paragraph.

[18] The Defendant having admitted in court that she ceased making payments sometime in 2011 can hardly be heard to say that she has a defense to the action itself.

[19] The Plaintiff is a mortgagee seeking to exercise its power of sale under a mortgage deed and the principles relating thereto are clearly set out by Frazer J. in **EVANS Vs. COMMONWEALTH BANK Ltd. and ANOTHER [2016] 2 BHS J. No. 95** where she relied on the dicta of DUNKLEY J. and set out the relevant factors to be considered at paragraph 29 as being;

**“29. In First Caribbean International Bank (Bahamas) and Dr. Hiram Mitchell and Carla Lockhart (2015) BHS Acting Justice Dunkley as he then was relied on the following principles contained in the case of Cuckmere Brick Co. v Mutual Finance (1971) Ch 949;**

- (1) The mortgagee must make an informed judgment and because judgment is required, there are no steps which the mortgagee must definitely take;**
- (2) Generally, it is for the mortgagee to decide on the manner of sale, if appropriate after having sought expert advice. The property should be properly advertised; that is, advertised sufficiently frequently and sufficiently widespread to reach the appropriate pool of prospective purchasers;**
- (3) The mortgagee is entitled to decide the length of time the property should remain available for sale, subject to this, the property must fairly and properly be exposed to prospective purchasers;**

- (4) The mortgagee is not under a duty to improve the property for sale. The mortgagee is not under a duty to pursue or obtain a planning permission and, it seems to me, by parity of reasoning, the mortgagee is under a duty, in a case such as this one, to remove encumbrances like the Grant from the property. But a mortgagee is under a duty to bring to the attention of prospective purchasers potential advantages that might be achievable; so that, for example, prospective purchasers ought to be informed of the property's development potential;**
- (5) Where the sale price is just above the sum required to discharge the mortgagor's outstanding debt, the court will scrutinize the sale with particular care;**
- (6) There is recognition that the fact of repossession can taint the property so resulting in it only being capable of sale at a reduced price;**
- (7) The mortgagee will not have breached his duty unless he is "plainly on the wrong side of the line";**
- (8) The mere fact that a higher price might have been obtained does not inevitably mean that the duty has been breached;**
- (9) The burden of proving a breach of duty by the mortgagee rests on the mortgagor" (Emphasis added).**



[20] Based on the facts of the instant case and the principles set out above, I see no basis on which the exercise of the Plaintiff's power of sale can be either questioned or fettered. Save and except only in the event there existed some doubt as to the propriety of the mortgage transaction itself. I have found no such question or issue.

[21] In the case of **CITIBANK V MAJOR [1996] BHS J. No. 66 GANPATSINGH J.A.** in delivering, the judgement of the Court of Appeal held at paragraph 17;

**“The cases cited on the impeachment of mortgage securities all show that unless there is a mortgage action in which is raised a serious question to be tried involving the validity of the mortgage transaction itself or fraud or irregularity in the exercise of the power of sale, the courts will not intervene to prevent a mortgagee from exercising his lawful right under the mortgage deed.”**

[22] In light therefore of the authorities and in all the circumstances and pursuant to the Plaintiff's summons filed on the 16<sup>th</sup> July A.D., 2019 I hereby order the following.

1. An Order that the Defendant's Defence and counterclaim filed herein on 23<sup>rd</sup> October, 2015 be and is hereby struck out pursuant to Order 18 Rule 19 of the Rules of the Supreme Court (RSC) and/or under the inherent jurisdiction of the Court on the grounds that;
  - i. it discloses no reasonable defence
  - ii. it's frivolous and vexatious and
  - iii. it's an abuse of the process of the Court.
  
2. An Order that the Plaintiff be, pursuant to Order 14, Rule 1 of the Rules of the Supreme Court (RSC) and is at liberty to enter judgement against the Defendant for;

- i. The sum of \$13,472.47
- ii. Interest on the said sum of \$13,472.47 pursuant to the Civil Procedure (Award of Interest) Act 1992
- iii. Damages (if any)
- iv. Costs of the action to be that of the Plaintiff to be taxed if not agreed.

I so order.

Dated the 30<sup>th</sup> of June A.D., 2020.



Keith Thompson  
Justice