

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Side

2015/CLE/gen/01070

BETWEEN

TIMOTHY DAMES

AND

ETHEL DAMES

Plaintiffs

AND

DESMOND FRAZER

First Defendant

AND

ERNEST LEVI GARNER JR

Second Defendant

Before Hon Mr Justice Ian R Winder

Appearances: Carlton Martin for the Plaintiffs

Edward Turner for the Second Defendant

11 November 2020

DECISION

WINDER, J

This is the Second Defendant's application for the sale of certain freehold property belonging to the Plaintiffs in satisfaction of a judgment debt.

1. The application is made by Summons dated 28 May 2020, which is settled in the following terms:

LET ALL PARTIES CONCERNED attend before the Honourable Justice Ian Winder, Justice of the Supreme Court in the Supreme Court Building, Bank Lane in the City of Nassau, Bahamas on .....on the hearing of an application by the Second Defendant for an Order for the Sale of the freehold property being All that piece parcel or tract of land situate on the South Side of West Bay Street and measuring approximately Six Thousand Six Hundred and Sixty-eight ft East of Lyford Cay Circle in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas containing Five (5) acres by Public Auction and that the proceeds of sale, less the expenses of the said auction, be paid to the Second Defendant in this action in payment of the Judgment herein dated the 4 September 2018 and filed on the 22 November 2018 with the consequential directions as may be necessary and that provision be made for the cost of this application.

2. The Second Defendant obtained a judgment in the amount of \$171,000 by consent in his claim against the Plaintiff. The order provided for costs which were subsequently taxed in the amount of \$43,800. The Certificate of Taxation issued by the Registrar is dated 19 November 2019 and filed on 12 February 2020.
3. The Plaintiffs oppose the application and complains that when the consent order was made it was agreed on the understanding that they would have possession of the disputed property together with quiet enjoyment of the property. They say that they are unable to pay the debt to the Second Defendant and requested that the Court grant a stay of execution of the Order until the completion of this action.

4. By this application the Second Defendant seeks, he says, to impose a charge on the beneficial interest of the judgment debt in the property of the debtor Plaintiffs situated at West Bay Street.

5. The Plaintiffs say that:

*“there is no basis or jurisdiction on the part of the Court to grant to the Second Defendant the relief he seeks”.*

*“Under section 63 of the Supreme Court Act, 1996, a judgment of the Supreme Court is an equitable charge over the legal and equitable interest of the judgment debtor in his land. Section 63(2) says the charge may be enforced in the same manner as an equitable charge made under the hand of the judgment debtor. Outside of Sections 63 and 64 of the Act, there is no jurisdiction on the part of the Supreme Court to grant relief with respect to the sale of the judgment debtor’s land. Such relief under these Sections are equitable and can only be applied or resorted to after the common law means of enforcement are exhausted, as is popularly known. Equity follows the law and eases its rigors.”*

*“It is the desire of the Plaintiffs that the Court should stay the execution of the Consent Order pursuant to Order 47 r 1 of the Rules of the Supreme Court”*

6. The Plaintiffs filed a Summons on 3 November 2020 seeking a stay of execution of the Consent Order until the completion of the action.

7. Section 63(1) of the Supreme Court Act Ch. 53:

*“63. (1) A judgment entered up in the Supreme Court (‘whether before or after the commencement of this Act) against any person (in this section called a ‘judgment debtor shall operate as an equitable charge upon every estate or interest (whether legal or equitable) in all land to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes*

—  
*(a) beneficially entitled,’ or*

(b) entitled to exercise a power of disposition for his own benefit without the assent of any other person:

and the judgment shall bind:

- i. the judgment debtor,
- ii. all persons deriving title under him subsequent to the entry of the judgment, and
- iii. all persons capable of being bound by a disposition by the judgment debtor made after the entry of the judgment, including the issue of his body and all other persons (if any) whom he might, without the assent of another person, have barred from any remainder, reversion or other interest, in the land.

(2) A charge imposed under subsection (1) shall have the like effect and shall be enforceable in the same manner as an equitable charge created by the debtor by writing under his hand.

(3) The preceding provisions of this section shall apply in relation to a judgment, order decree or award (however called) of any court or arbitrator (including any foreign court or arbitrator) which is or has become enforceable, as if it were a judgment or order of the Supreme Court as they apply in relation to a judgment or order of the Supreme Court.

(4) A charge imposed by this section shall take priority over all other mortgages or charges affecting the land other —

(a) any mortgage or charge registered prior to the date of the entering up of the judgment; or

(b) any further advance made under the security of a mortgage or charge registered prior to such date which provided for the mortgagee or charge to make further advances.

(5) For the purposes of subsection (4), “registered” means lodged and accepted for record in the Registry in accordance with the Registration of Records Act “.

8. In *Imperial Life Assurance Co. of Canada v Wells, Lyons J.* stated:

**25** In *Tennant v Trenchard* (1869) 4 Ch App 537 at page 542, Lord Hatherly L.C. opined:-

"It has been argued with considerable force, having regard to the authorities that if a person has a charge, the right to foreclose accrues. But although some of the authorities appear to conflict with

each other, it seems, on the whole, to be settled that if there is a charge simpliciter, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not foreclosure."

**26** More recently in *Carreras Rothman Ltd. v Freeman Mathews* (1985) 2 Ch 207, the court considered the incidents of an equitable charge at page 227 of the judgment of Peter Gibson J. There the learned judge making reference to Megarry and Wade's, *The Law of Real Property*, 4th ed. (1975) pp. 902, 925, opined:-

"The type of charge which it is said was created is an equitable charge. Such a charge is created by an appropriation of specific property to the discharge of some debt or other obligation without there being any charge in ownership either at law or in equity and it confers on the chargee rights to apply to the court for an order for sale or for the appointment of a receiver, but no right to foreclosure (so as to make the property his own) or to take possession."

**27** I respectfully adopt this reasoning. In my opinion the charge created by s 63(1) is a charge simpliciter, irrespective of the subject matter on which the creditor seeks to enforce. The judgment creditor may thus enforce by exercising a power of sale (O 31 applies) in the normal manner of enforcing on an equitable charge.

9. I am satisfied that Section 63(2) created an equitable charge on the real property of the Plaintiffs including the West Bay Street property. In *Imperial Life v Wells*, the property being sold pursuant to Section 63(2) and Order 31 was property of the Defendant in Exuma, not his property in New Providence, which was the subject of the action. A similar circumstance exists here. I am prepared therefore to grant the order for sale, as there is no dispute that the moneys are due and owing to the Second Defendant.

10. Insofar as the Plaintiffs seek a stay I am not prepared to grant a stay as the circumstances relayed, of not having possession of the property and being unable to pay would not warrant staying the action until the conclusion of the trial of the main action. Further, the stay sought is until the completion of the action, an action which the Second Defendant is not a participant to. The completion of the action will therefore have no impact on the status of the judgment debt, so as to permit set off or otherwise.

11. I grant the Order for sale by public auction. I will suspend the said Order for sale for a period of 6 months to permit the Plaintiffs to settle the debt or obtain a private sale of the property on its own terms to settle the Second Defendant's debt.

Dated the 7<sup>th</sup> day of December 2020

A handwritten signature in black ink, appearing to read 'I. R. Winder', with a stylized flourish at the end.

Ian R. Winder

Justice