

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2009/CLE/gen/01819

IN THE MATTER of An indenture of mortgage dated the 21st day of January, A.D., 2007, between **TUESDAY ST. AGNES WHITE** of the one part and **SCOTIABANK (BAHAMAS) LIMITED** of the other part.

GATEWAY ASCENDANCY LTD.

Plaintiff

AND

TUESDAY ST. AGNES WHITE

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Cyd Ferguson for the Plaintiff

Myra Russell for Alpin Russell III, an interested party

2 and 11 March 2022

RULING

WINDER, J

This is my brief decision on the application of Alpin Russell III (Russell) for an Order that:

- (1) he be added as a Defendant or Interested Party; and
- (2) the Writ of Possession issued by the Deputy Registrar be stayed pending an appeal to the Court of Appeal.

Background

- [1.] This is a mortgage action brought to recover on a mortgage dated 21 January 2007 made between the Plaintiff and the Defendant. The Defendant is the only party to that mortgage. On 27 January 2014 this Court ordered that the Defendant deliver up to the Plaintiff vacant possession of the property.
- [2.] Russell says that he is the husband (estranged) of the Defendant and that he is in possession of the premises which he rents to others. He claims that he purchased the equity of redemption in the property from the Defendant. The document, which Russell says purports to convey this interest to him, is inadmissible as it is unstamped. Further issues affecting Russell's claim to this interest by way of an equity of redemption are that:
 - (a) the mortgage specifically restricted the Defendant from alienating her interest in the property; and
 - (b) there is some evidence, by way of email communication from the Defendant to the mortgagee (the Plaintiff), where she claims that the alleged transfer from her to Russell is a forgery. She denies transferring any interest to Russell.
- [3.] Further, it appears that the Defendant, by letter dated 28 April 2008, conceded the Plaintiff's decision to enforce its power of sale over the property. By the letter she

stated "I give full consent to the Bank to go ahead with the sale to cover the outstanding debt."

- [4.] Russell complains that the Order made on 27 January 2014 was made in breach of an earlier ex parte Order by Lockhart J (acting) on 23 July, 2008 in action 1229 of 2008. That Order was made ex parte, in a collateral action (2008/CLE/gen/1229) brought by Russell against the Plaintiff and its agents to stave off an earlier effort to evict him. The Order provided:

THIS COURT DOTH ORDER that all of the Defendants and each of them be restrained until after the 29th day of July AD 2008 or until further in the meantime from doing whether by themselves or by their servants or agents or any of them or otherwise howsoever the following acts or any of them that is to say evicting the Plaintiff from and/or exercising the power of sale or taking possession of the premises situated at Lot Number 15 Block Number Ten (10) in the subdivision called and known as Westward Villas First and Second Addition situate in the Western District of the Island of New Providence in The Commonwealth of The Bahamas without giving the Plaintiff a proper accounting of all amounts which may be in arrears or are due and payable under the Indenture of Mortgage relative to the above mentioned property made by one Tuesday S. White the estranged wife of the Plaintiff to Scotiabank Limited sometime in the month of March AD 2007 and thereafter allowing the Plaintiff a reasonable time and opportunity to pay the same.

Application to be joined as a Defendant

- [5.] I am not satisfied that the Defendant ought to be joined as a Defendant but he will be permitted to make representations as an interested party. Russell is not a party to this mortgage and even if he could substantiate his claim to an interest in the equity of redemption, such an interest was not obtained in accordance with the mortgage. Further, the Defendant as mortgagor, appears to have conceded the claim to the Plaintiff.

Application for Stay

- [6.] According to Russell in paragraphs 4.1, 4.5 and 4.6 of his submissions:

4.1 The court has a general case management power under Order 31A, rule 18 (2) (d) and power pursuant to Order 45, rule 11 and Order 59, rule 1 and Order 59, rule 13, to stay the whole or any part of any proceedings or Judgment either generally or until a specified date or event. The power pursuant to Order 31A, rule 18 (2) (d) and Order 45, rule 11 are wide, but it must be exercised within the context of the facts before the court. I have laid the facts out at paragraph 1.2 of this Skeleton Argument. In applying the facts before me to the present case, one must examine the case of **Esley Hanna v. Bradly Hanna 5SCCivApp No. 182 of 2017** [Delivered the 7th August, 2018]. In that Judgment delivered by Madam Justice Crane-Scott at paragraph 11 on page 5, the Court of Appeal opined:

“ Section 12 of the Court of Appeal Act mirrors the provisions of O 59. r. 13 of the former English Rules of the Supreme Court 1965. It is therefore useful to advert to the following portions of Practice Note 59/13/1 found at pages 1076 - 1077 of Volume 1 of the 1999 Edition of The English Supreme Court Practice:Nowadays the court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where that test is not satisfied, if enforcement of the money judgment under appeal would result in the appellant’s house being sold or his business being closed down”.

Therefore, it is submitted that the Interested Party’s application falls squarely within the **Esley Hanna** case, as the application for the stay is to prevent an order for vacant possession (the house being sold or his business closed down) and payment of a judgment debt which would render the Interested Party homeless, as the subject-property is his sole dwelling house and that it would leave the Interested Party without income from rent received from his tenants.

...

4.5 It is submitted that the intended appeal does have some prospect of success (**Linotype-Hell Finance**). It should be noted that the court should determine this question by examining what “*real prospect*” means. It is submitted that “*real prospect*” means realistic as opposed to a “*fanciful*” prospect of success.

4.6 In applying that facts of this case realistically, one may assert that the fact that there is another action, that being 01229 of 2008, whereby an injunction was granted to prohibit the Plaintiff in this instant case, from selling the subject property and mandating that they give a true and proper accounting of the monies due and owing to them, which gives the Intended Party a real prospect of success, as that injunction has not been set aside or the action restored to the cause list nor has a true and proper accounting of the monies due and owing been given to the Intended Party. It is submitted that Randol Dorsett and Kenneth Lightbourne agreed to supply the Intended Party with the payout figures in order to facilitate gross fund recovery by Scotiabank. However, once this was explained to Scotiabank by their attorneys, Scotiabank, the client, told three attorneys that they had no intention of complying with the court’s order. The attorneys for the bank were then tasked with finding a work around. That’s when the forum shopping commenced.

[7.] The application for a stay must also fail. Up to the time of this application there is no appeal pending before the Court of Appeal. There is no draft appeal or draft grounds of appeal, such that I may consider, to determine whether there is any reasonable prospects of success in the appeal. Further, not being a party to the proceedings upon which the order was made, it is difficult to appreciate, without these draft grounds, how an appeal is possible by Russell.

[8.] Notwithstanding the absence of any appeal or draft appeal, Russell says that the Writ of Possession was somehow prohibited by an order made in 2008. Respectfully, on any fair reading of the order made by Lockhart J(Ag) on 22 July 2008, it expired after the 29 July 2008. The Order made in this action was therefore not made contrary to the earlier order of Lockhart J(Ag).

[9.] If and when an appeal is lodged with the Court of Appeal it is open to Russell to make application directly to the Court of Appeal for a stay.

[10.] The application by Russell is therefore dismissed.

Dated this 25th day of April 2022

A handwritten signature in black ink, appearing to read 'I R Winder', written in a cursive style.

Ian R. Winder

Justice