

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
BETWEEN

2019/CLE/gen/01332

ROBERT IAN MITCHELL

Plaintiff

AND

GATEWAY ASCENDANCY LTD.

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Carlton Martin for the Plaintiff

Attorneys Candice Hepburn and Lashona Knowles for the Defendant

Date of Hearing: 13th July 2022

DECISION

FACTUAL SUMMARY

1. The Plaintiff commenced this action by way of a Specially Endorsed Writ of Summons filed on 17 September 2019. In the Writ, the Plaintiff alleges that he is the legal and beneficial owner in fee simple of a property which is the subject matter of “an Indenture” dated 8 August 2000. The Plaintiff further alleges that the said Indenture of Mortgage was made between himself and Scotiabank (Bahamas) Limited and is recorded in the Registry of Records in Volume 9185 at pages 421 to 432. However, the property to which the Plaintiff refers is ALL THAT piece parcel or lot of land situate in the Eastern District of the Island of New Providence being the Eastern and Western moiety of Lot Number Five (5) in Block Number One (1) in the Subdivision known as “*Winton Estates*”. According to the mortgage deed dated 8 August 2000, the parties to the mortgage were Celeste Mitchell, the former spouse of the Plaintiff, and Scotiabank (Bahamas) Limited.
2. On 25 July 2001, Celeste Mitchell obtained a Further Charge on the mortgage, which is believed to have been accidentally destroyed by fire in the Firm of Messrs. K. M Gibson & Company. An affidavit was sworn by Joann Moss to this effect. The Further Charge was then recorded on 15 May 2002 in the Registry of Records. On 21 March 2005, Celeste Mitchell and the Plaintiff executed a Deed of a Second Further Charge under the mortgage. On 22 October 2007, Celeste Mitchell and the Plaintiff executed a Deed of a Third Further Charge under the mortgage. Celeste

Mitchell and the Plaintiff defaulted on the mortgage, the Further Charge, Second Further Charge and Third Further Charge which resulted in Supreme Court Action 2013/CLE/gen/00401 being initiated against them by Scotiabank (Bahamas) Limited. On 10 July 2014, the Honourable Justice Milton Evans ordered vacant possession of the property. Further to the order for vacant possession, a Writ of Possession was filed by Scotiabank (Bahamas) Limited and executed by Deputy Provost Marshall, Tommy Sands on 1 June 2015.

3. A Deed of Transfer between Scotiabank (Bahamas) Limited and Gateway Financial Limited dated 4 May 2016 was executed to transfer and assign the full benefit of the mortgage, further charge, second further charge and third further charge together with all sums of money due and payable under the mortgage to Gateway Financial. On 19 February 2018, a Second Deed of Transfer was executed between Gateway Financial Limited to the Defendant and recorded in the Registry of Records. Justice Ian Winder in the Mortgage Action ordered ex-parte that Gateway Ascendancy Ltd. be substituted as the Plaintiff in the action and that Gateway was entitled to enforce the order made 10 June 2014. This order was made in the presence of Counsel for the Plaintiff.
4. The Plaintiff claims that about a year prior to filing the Writ in this action, the Defendant wrote to him informing him that they are the owners of the property. The Plaintiff claims that the Defendant is not known to him. The Plaintiff alleged that on or about 13 September 2019, the Defendant by way of their agents or servants wrongfully entered upon the property and entered the house situated thereon. The Plaintiff claims that he asked the Defendant to vacate the land immediately and to not return. The Plaintiff's position is that unless the Court restrains the Defendants via an injunction from wrongfully interfering with his property, they will continue to do so. The Plaintiff claims to have suffered loss and damage due to the Defendant's trespass. The Plaintiff sought an injunction to restrain the Defendants and or its agents/servants from entering upon or interfering with the property in any manner; the sum of \$10,000.00 as estimated damages for the trespass; further relief and costs.
5. The Defendant on 23 July 2020 filed a Defence to the Writ. In the Defence, the Defendant relies on the order for vacant possession granted to Scotiabank (Bahamas) Limited by Justice Evans on 10 June 2014 to claim beneficial ownership of the property through Deed of Transfer. As such, the Defendant asserts that it is not wrongfully interfering with the premises and did not cause any loss or damage to the Plaintiff. The Defendant further asserts that the Plaintiff contravened the Writ of Possession by returning to the premises and residing therein.

On 15 December 2015 by Summons supported by Affidavit of Jenna Knowles, the Defendant applied to the Court to strike out the Plaintiff's Writ of Summons. The Defendant contends that the Writ discloses no reasonable cause of action; it is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay a fair trial and that it is otherwise an abuse of process. In addition, the Defendant filed a Summons supported by Affidavit of Rico Ginton on 11 January 2022 seeking an injunction to prevent the Plaintiff and his servants/agents from trespassing on the property.

PLAINTIFF'S CASE

6. The Plaintiff relied on the affidavit of Robert Ian Mitchell filed on 12 July 2022, and written submissions. The Plaintiff submits that he commenced this action in 2019 seeking relief against the Defendant for its repeated wrongful interference with his property. He claims to be the legal and beneficial owner in fee simple possession of the property in dispute. The Plaintiff submits that he and his former wife Celeste Mitchell entered into a mortgage and subsequent further charges with Scotiabank (Bahamas) Limited. The Plaintiff acknowledges that he and his former wife defaulted on the payments under the mortgage which resulted in Supreme Court Action 00401 of 2013. The Plaintiff further cited from the Defendant's Affidavit of Jenna Knowles that the mortgage was transferred via Deed of Transfer to Gateway Ascendancy Limited.
7. The Plaintiff contends that the issue to be determined in this action is whether the mortgage and further charges exist to be transferred after the entry of final judgment in the mortgage action. The Plaintiff submits in this regard that 'on the basis of the principle of merger, the mortgage merged into the judgment and did not exist to be transferred.' For clarification, I understand the Plaintiff's submission to be that the judgment of the Court provided for the outstanding mortgage to be paid to Scotiabank (Bahamas) Limited. Thus, there was no mortgage in existence to be transferred to Gateway Financial Limited and Gateway Ascendancy Limited after the final judgment was made. The Plaintiff relies on the case of *Attorney General v Birmingham Corporation (1880) 15 Ch D 423* and Order 15 Rule 9 of the Rules of the Supreme Court to advance his position that a party who has been substituted after final judgment cannot execute a judgment. The Plaintiff contends that the Court in the mortgage action had no jurisdiction to grant leave to the Defendant (Gateway Financial Limited) to amend or substitute to Gateway Ascendancy Limited following the Deed of Transfer. The Plaintiff submits that Gateway Financial Limited was supposed to do this by way of a fresh action being initiated.

DEFENDANT'S CASE

8. The Defendant relies on the Affidavits of Jenna Knowles and Rico Ginton, and written submissions to support their Summonses. The Defendant contends that the Plaintiff's Writ should be struck out on all of the grounds contained in Order 18 Rule 19 of the RSC. The Defendant's position is that the Plaintiff claims to be the legal and beneficial owner of the property when in fact Celeste Mitchell was conveyed the property by Alyson Investments Company Limited on 22 August 2000. The Defendant asserts that the Plaintiff only became intermingled in the mortgage on 21 March 2005 when he and Celeste Mitchell received additional advances from Scotiabank (Bahamas) Limited via a Second Further Charge. As a condition of this further charge, the Plaintiff became a party to the mortgage dated 8 August 2000 and was bound to repay. The Plaintiff and Celeste Mitchell subsequently received a Third Further Charge on 22 October 2007.
9. It is the Defendant's position that the Plaintiff knew that vacant possession of the property was granted to the Defendant and/or its agents. Therefore, the claim of trespass cannot succeed. Additionally, it is the Defendant's position that the Plaintiff is using the instant action as an attempt

to delay the Defendant's right to its Power of Sale and a swift conclusion of the matter. The Defendant relies on *Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch 274* to ground their position that "the object of the power to strike out is to stop cases which ought not to be launched, which are obviously frivolous or vexatious or obviously unsustainable."

10. Moreover, the Defendant seeks an injunction to restrain the Plaintiff from trespassing on the said property. In the Affidavit of Rico Ginton, it is alleged that the Plaintiff interfered with Mr. Ginton, who is the Manager of the property. Mr. Ginton avers that a number of incidents transpired with the Plaintiff. It is stated that the Plaintiff continuously changed the locks to the property even after the execution of the Writ and that the Plaintiff verbally and physically accosted Mr. Ginton in the presence of potential buyers. As a result, Mr. Ginton reported the incidents to the Royal Bahamas Police Force. The Defendant's position is that if this Court does not grant an injunction restraining the Plaintiff from trespassing on the property, he will continue to do so and unlawfully interfere with the property and the sale of it.

LAW & ANALYSIS

11. Striking out is a discretionary power that is reserved for the plainest and most obvious cases where an action or pleading is irrefutably bad. This is a jurisdiction that ought to be used sparingly as it has the effect of denying a party the right to trial (see. *Hamby v Hermitage Ltd. (SCCIV App. No. 21 of 2008)*). Order 18 Rule 19 of the Rules provides:

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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,
- and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

12. The Court must make a judgment without conducting a mini-trial of the matter but focusing on the justice of the case. Charles J. in *B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J No. 28* explains:

"7. As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.

8. In *Walsh v Misseldine* [2000] CPR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make ‘a broad judgment after considering the available possibilities.’ The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.”

No reasonable cause of action

13. Lord Pearson in *Drummond Jackson v British Medical Association* [1970] 1 All ER 1094 defined no reasonable cause of action as an action that is sure to fail. His Lordship stated that a reasonable cause of action is “...a cause of action with some chance of success, when... only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out”.
14. The Plaintiff alleges trespass against the Defendant to property owned by himself. Without a protracted examination of the merits of the Plaintiff’s case, there was no specification to the property which the Plaintiff referred to, as it was not mentioned in the Writ. The Court, therefore, had to have recourse to the Defence filed by the Defendant to garner an exact description of the property to which the Plaintiff made reference. The Plaintiff failed to plead with specificity his ownership of the property. He vaguely stated that he was the legal and beneficial owner of the same. However, it remains a question of the Court how the Plaintiff became seised of said property.
15. In considering the submissions of the Defence, I take judicial notice of the fact that a mortgage action between Scotiabank (Bahamas) Limited, the Plaintiff and Celeste Mitchell was initiated and concluded. The Plaintiff was an active Defendant in the matter and as such had to have had knowledge of the Court’s decision and subsequent orders. Judgment in the matter was granted in favour of Scotiabank (Bahamas) Limited. The Plaintiff was ordered by Justice Evans to deliver up vacant possession to Scotiabank (Bahamas) Limited and to vacate the property by 8 September 2014. It is incredulous for the Plaintiff in 2019 to assert to this Court that he is the legal and beneficial owner of the property. As such, there can be no merit in the Plaintiff’s claim for trespass and it must fail on this ground.

Prejudice, Embarrass or Delay the Fair trial of the matter

16. A party who has framed their case or pleading in such a way that it is unnecessary to do so, is prejudicial in nature, or delays the fair trial of the action, may be subjected to their action or pleading being struck out on the aforementioned grounds. Bowen LJ in *Knowles v Roberts* (1888) 38 Ch D 263 at pages 270-271 explained:

“It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that

rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right.”

17. The point on the ownership of the property essentially bars the Plaintiff from making the claim of trespass as he cannot be deemed the owner of the property. In this vein, the Plaintiff’s framing of his case is prejudicial to the Defendant who has received final judgment for vacant possession in the matter and has executed a Writ of Possession. The unnecessary filing of this claim for trespass inhibits the Defendant from possessing the property. The Defendant is restrained from exercising their right to the power of sale as the Plaintiff continues to attempt to assert ownership of the property. In essence, this claim for trespass delays the Defendant in managing and possessing the fruits of their judgment, all contrary to the Court’s order of 2014 and subsequent Writs of Possession. This action in my estimation is beyond the Plaintiff’s right and must also fail on this ground.

Scandalous, frivolous and vexatious and an abuse of the process

18. I now turn to the last two grounds which I will address together due to their bearing on each other. Lush J in *Norman v Mathews (1916) 85 LJ KB 857* at 859 stated:

“There is an inherent power in every Court to stay and dismiss actions or applications which are frivolous and vexatious and abusive of the process of the Court... In order to bring a case within the description it is not sufficient merely to say that the Plaintiff has no cause of action. **It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court.**”

19. As it relates to what may constitute an abuse of process, Lord Diplock in *Hunter v. Chief Constable of West Midlands (1982) A.C. 529 at page 536* was instructive when he stated:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

20. I find the Plaintiff’s Writ of Summons to be vexatious and an abuse of the Court’s process. I find that the Plaintiff had full knowledge that he had lost vacant possession of the subject property.

Further, the Plaintiff's assertion that the Defendant is unknown to him is fallacious as the Order made by Justice Winder, although made ex parte, reflected that Counsel for the Plaintiff was present when the Order was made to substitute the Defendant. This is a matter which ought not to have been brought before the Court given the adjudication of the mortgage action in 2014. In light of the reasons which I have provided, I find this action to ultimately be frivolous and an abuse of the Court's process.

Failure to serve Defence and Substitution of the Defendant after judgment

21. The Plaintiff has made submissions concerning the failure of the Defendant to serve him with the Defence and raising the issue of the substitution of a party after final judgment had been granted. With respect to the first point, it is clear that a Defendant in making the application to strike out is entitled to make the application before filing its defence in the matter. (see. ***Duchy Lancaster v London and North Western Railway Company (ibid)***). This is especially so in instances where the party is applying on the ground that the action or pleading discloses no reasonable cause of action. In any event, this point is otiose given my decision to strike out.
22. As it relates to the question of whether a substituted party can enforce a judgment obtained prior to the substitution, I note that the Court has the authority pursuant to Order 15 Rule 8 of the Rules to substitute a party at any stage of the proceedings where the interest or liability is assigned or transmitted to another. In ***Attorney General v Birmingham Corporation*** the Court determined that a party may be substituted with the leave of the Court at any stage of the proceedings but not after final judgment had been made. This conclusion was interpreted against the provisions of the equivalent Order 15 Rule 8 in ***Millen v Brown and others [1984] Lexis Citation 2365***. In that case the Court stated in the headnote that "(iii) A person may be added as a party under Order 15, rule 6(2)(b)(ii) at any stage of the proceedings and the proceedings were still in being until any necessary steps had been taken to enforce judgment against the insurers under article 98 of the 1981 Order." The reference is to any person, and is therefore not limited to a Plaintiff or Defendant.
23. Most importantly, later in the decision the Court referred to another decision and said as follows:
One may also derive some assistance from the decision of Jessel M.R. in *Campbell v. Holyland* (1877) 7 Ch.D. 166, in which he allowed the joinder of the successors in title of a defendant mortgagor in a foreclosure action, some months after the decree was made absolute, in order that they should take steps to redeem the mortgage. In ruling upon the application Jessel M.R. said at page 169:
"An order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute, nor can it be so now. In cases of great hardship a mortgagor might have obtained further time for payment, and the suit was allowed to go on after decree. The decree, though final in terms, was not final in fact, and the suit could not be considered as terminated."
The criterion upon which Jessel M.R. fixed his attention was the continuation in existence of the suit, not the more technical point of making of a judgment, and this appears equally to be the true foundation of his later rulings in the cases referred to above."

24. The Plaintiff suggests that a Defendant can be joined, but not a Plaintiff. This ignores the provisions of Order 15 Rule 8(2) which provides as follows:
“(2) Where at any stage of the proceedings in any cause or matter the interest or liability of **any party** is assigned or transmitted to or devolves upon **some other person**, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order **that other person** to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party. An application for an order under this paragraph may be made ex parte.”
25. It is clear that the provision refers not to a defendant or plaintiff, but to a party, and permits substitution to ensure that the matter is completely adjudicated upon, which certainly encompasses enforcement proceedings or even, as in **Millen**, an appeal. On the basis of that provision, as well as the authorities cited above, I do not agree with the Plaintiff’s contention that the mortgage did not exist to be transferred, and that the Defendant would be required to institute a new action to obtain vacant possession and judgment.
26. The instant hearing before me was solely to determine the Plaintiff’s entitlement to the claim of trespass and any relief available to him thereunder. I am satisfied for the purposes of this action that via Deeds of Transfer dated 4 May 2016 and 19 February 2018, that Scotiabank (Bahamas) Limited transferred and assigned all benefits of the mortgage, further charges, and all sums of money due and payable to the Defendant. The assignment of the benefit of a mortgage to my mind includes the fruits of a judgment obtained with respect to that mortgage. Thus, I find that the Defendant, pursuant to the Order, is entitled to enforce the judgment for the mortgage as upon substitution and the Deed of Transfer, it essentially stepped into the shoes of the preceding party (Gateway Financial Ltd.). The argument of the Plaintiff that there was no mortgage left to be transferred is rejected.

Injunction

27. In *Patel v W H Smith (Eziot) Ltd. [1987] 2 All ER 569* the Court of Appeal held that ‘*where the [landowner’s] title to the land is not in dispute, he is entitled to an injunction restraining trespass, whether or not any harm was caused or the trespass had continued for a long time.*’ that principle is applicable in the instant case. The Defendant having secured and executed the Writ of Possession is the beneficial owner of the property and there can be no dispute as to their ownership in this instant matter. Therefore, I hereby grant the injunction restraining the Plaintiff and his servants or agents from trespassing on the property.

CONCLUSION

28. Considering the matter as whole, I find that this is a proper case for the exercise of the jurisdiction to strike out. I am not satisfied that this is a case that can be cured through an amendment and therefore order that the matter be struck out in its entirety. Additionally, I grant the injunction

restraining the Plaintiff and his servants or agents from trespassing on the said property. The costs of this application are awarded to the Defendant to be taxed if not agreed.

Dated this 2nd day of May, A.D. 2023

A handwritten signature in black ink, appearing to read "Neil Brathwaite". The signature is fluid and cursive, with a long horizontal stroke at the end.

Neil Brathwaite

Justice