 Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.A130/1989

BETWEEN	JOAN ADAMS	PLAINTIFF
A N D	WORKERS TRUST & MERCHANT BANK LIMITED	DEFENDANT

Mr. Michael Hylton and Miss lynette Palmer instructed by Myers, Fletcher and Gordon for the Plaintiff.

Messrs. Dennis Morrison and Carl Dowding instructed by Knight, Pickersgill, Dowding and Samuels for the Defendant.

HEARD: MAY 21, 1992

JUDGMENT DELIVERED: 20.11.92

Wesley James, J.(Acting)

Premises know as 5 Richings Terrace, Kingston 6, are located in a residential area of Saint Andrew generally described as being in the middle to upper income group.

The Plaintiff Mrs. Adams, was in 1986 the registered proprietor of the fee single estate. In that year she borrowed $220,000.00; being $160,000.00 from the Defendants, Workers Trust and Merchant Bank and $60,000.00 from the Workers Savings and Loan Bank and secured them by way of two mortgages which were duly registered on the Certificate of Title for the above premises on the 20.1.86. The purpose for obtaining these loans was, according to the plaintiff's evidence, to effect renovation and expansion of the property.

By 1987 the plaintiff, not surprisingly, fell into arrears and in 1988 the defendant exercised its power of sale under the mortgage. Before this, however, the plaintiff's attempts to have the loans refinanced were unsuccessful as she and the defendant could not agree on how the outstanding installments on the loan were to be repaid.

The defendant in exercise of its powers of sale first attempted to sell the premises by public auction in August 1988. No sale was carried out at the auction. The subsequent events are set out in more details. I now turn to events commencing with an undated letter in which Anthony and Pamela Gutzmore offered to to purchase the premises from the de.fendant for $400 ,000.00.

This offer was accepted by the defendant by letter dated 2.12.88.

A receipt was issued by Workers Savings and Loan Bank and dated 2.12.88. for $15,000.00 "as payment for deposit re purchase of 5 Richings Terrace, Kingston 6 ".

The next event is documented by letter dated 12.12.80 and referred to as exhibit 2C. (I must add that the year '80' has been regarded by the parties as a typographical error and it is accepted as '88'.) This is another offer by the Gutzmores for $395,000.00 for the same premises and in it they stated that "this offer supercedes my offer of $400,000.00 already made. We have been advised by the manager that our offer is accepted. Kindly therefore confirm".

Two further deposits of $50,000.00 and $10,000.00 were made in December 1988.

The plaintiff advertised the sale of the property and on 6.1.89 New World Realtors advised Mrs. Taylor, who was then the attorney for the plaintiff that they had a purchaser for the above premises and that the agreed sale price was $480,000.00. This information was conveyed to the defendant by letter dated 9.1.88. (This should read 9.1.89).

The defendant's response was that they regretted to advise that they could not consider the offer of $480,000.00 as they had already accepted a prior offer in writing on 2.12.88. Further that they had collected deposit of $75,000.00 towards the purchase and in their opinion it would not be prudent to renege on this agreement.

On 19.1.89 the plaintiff through her lawyers, the present ones, wrote the defendant and made it clear to them that if they went through with the sale for $395,000.00 they would institute proceedings against them.

The sale was duly finalised as evidenced by agreement for sale dated 20.6.89.

The plaintiff also gave evidence that she, through New Word Realtors had "secured" one W. Moore of a London address to purchase the said premises for $500,000.00. This was communicated to Mrs. Taylor by letter dated 8.5.89.

In May 1988 the plaintiff had engaged the services of Chang Rattray & Co. Chartered Surveyors to prepare a valuation for the purposes of securing loan financing. Upgrading work was in progress and it was estimated that on completion a fair market value would be $445,000.00.

The defendant in December 1988 requested Allison Pitter & Company, Chartered Surveyors to assess the market value of the premises. The open market value was placed at between $420,000.00 - $430,000.00 and in a forced sale situation at a reserve price of $370,000.00.

In this action the plaintiff seeks to recover:

(1) The sum representing the difference between the market value and the sale price, the sum claimed being $155,000.00.

(2) Exemplary and/or aggravated damages.

(3) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

The defendant counter claimed for $42,148.59, the amount outstanding after applying the net proceeds of sale. The plaintiff from the outset accepted that the defendant's power of sale had arisen and that they had a right to exercise it.

The plaintiff, however contends that:-

(a) there was no binding contract to sell premises for $395,000.00 when the defendant refused to accept an offer for $480,000,00 nor indeed any of the other offers made those being one for $500,000.00 and another for $550,000.00.

(b) that the defendant owed her a duty of care to take reasonable steps to obtain the market value of the premises and that the defendant was in breach of that duty.

Perhaps a convenient starting point is the agreement to sell the premises for $400,000.00 on 2.12.88. This was followed by a deposit of $15,000.00 for which a receipt was duly issued and dated 5.12.88.

On the 12.12.88 the Gutzmores who had already contracted with the defendant to purchase the premises for $400,000.00 made another offer of $395,000.00 for the same premises stating inter alia "this supercedes my offer of $400,000.00, already made. We have already been advised by the manager that our offer is accepted. Kindly therefore confirm".

This was a unilateral repudiation of the contract. The defendant was and remained silent.

Before me, no evidence was given by the defendant as to how this turn of event would be treated. When Miss Olive Lyn gave evidence for the defendant, she stated that the agreement for sale was prepared on her instructions in December 1988, and we now know that the sale price quoted therein is $395,000.00.

What is the effect? By the conduct of the defendant - ie in preparing an agreement for sale in which the price stated is $395,000.00 an not $400,000.00 is some evidence that they were no longer relying on the previous agreement for $400,000.00. However, the preparation of an agreement for sale is not an acceptance of an offer and in any event the agreement for sale was not made until 20.6.89. It follows therefore that when the defendant on 10.1.89 advised the plaintiff's attorney that they could not consider the offer of $480,000.00 as they had already accepted a prior offer and then went on to state that that offer was accepted in writing on 2.12.88, the defendant made a statement which from the evidence did not represent the course of events nor indeed the legal position.

If the defendant is correct, then the agreement for sale would have stated the sale price as $400,000.00 and not $395,000.00. It should be borne in mind that the Gutzmores, the purchasers, lived in the U.S.A. Miss Lyn's evidence is that the normal conveyancing practice was followed in this case, that being that the purchasers signed the agreement first. It appears that the agreement for sale was signed by the purchaser on or about the 27.1.89. (although the year is stated as 1988). One cannot but observe the number of occasions on which the year has been incorrectly stated on documents tendered in evidence). What, however, is absolutely clear is that the agreement was made on the 20.6.89.

Mr. Hylton submitted that both in law on the evidence there was no enforceable agreement in December 1988.

The defendant had therefore erroneously concluded that they were in a binding agreement and could not accept the offer of $480,000.00.

But the mere fact that the defendant had misled itself as to the legal status of the agreement does not necessarily in my judgment render it liable in damages.

The real question is whether the defendant in selling the mortgaged property by private treaty had demonstrated that duty of care owed to the plaintiff.

In Cuckmere Brich Company V. Mutual Finance [1971] 2 2All R 633 it was held that a mortgagee was not a trustee of the power of sale for the mortgagor, and where there is a conflict of interest, he was entitled to give preference to his own over those of the mortgagor, in particular in deciding on the timing of the sale in exercising his power of sale, however, the mortgagee was not merely under a duty

to act in good faith, ie honestly and without reckless disregard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell.

Was the defendant in breach of the duty of care owed to the plaintiff? In this regard and in attempting to answer the question posed, I do not find comfort in the words of Carberry, J.A. in the unreported case of Moses Dreckett v. Rapid Vulcanizing Company Limited SC.CA NO. 35/83 delivered on 25.3.88 when he said "the state of the law in this area, that is the mode of sale to be adopted by the mortgagee in selling the mortgaged property and his possible liability arising there-from is not free from difficulty". An echo from previously decided cases.

Mr. Morrison submitted that the defendant did take reasonable steps to obtain the market value of the property in December 1988 in particular, he referred to the valuation done by Allison Pitter & Company in which the open market value was put at between $420,000.00 - $430,000.00 and in a forced sale situation at $370,000.00. He contrasted this valuation against one done by Chang,Rattray & Company in July at the request of the plaintiff in which a valuation of $445,000.00 was placed on the property at the completion of works undertaken. It should be noted that whereas the Allison Pitter & Company valuation was for the assessment of the open market value, the Chang, Rattray & Company's valuation was done with a view for securing loan financing.

It cannot be overlooked that a major problem faced by mortgagee is the rapid fluctuations which are affecting the market value especially in real property.

Apart from the abortive auction in August 1988, the defendant had in December, 1988 engaged the services of Allison Pitter & Company to assess the market value of the mortgaged premises.

The plaintiff contended that that effort of relying solely on that valuation without taking other steps namely to advertise and to ask real estate agents to do so fell far short of the duty of care.

I find to be helpful Carberry's J.A. comprehensive review of the cases in Moses Dreckett v. Rapid Vulcanizing Company Limited. (Supra) Apart from reaffirming the duty of care owed by a mortgagee to the mortgagor, in the case of Pendlebury v. Colonial Mutual Life Assurance Society Limited; (1912) 13 CLR 676 the mortgagee was held liable for loss accasioned by the sale. The factors which influenced the decision were:-

(a) omission to take obvious precautions to ensure a fair price.

(b) getting proper valuation.

(c) failing to adequately advertise the sale.

These were held to amount to showing that the mortgagee was absolutely careless whether a fair price was obtained or not.

In the instant case the defendant did not advertise the property before sale but chose to sell by private treaty. Such failure to advertise, compled with the fact that he misdirected himself as to whether there was a binding agreement, leaves me to conclude that the defendant fell short of the standard of the duty of care owed to the plaintiff.

I therefore hold that the defendant is liable for the loss suffered as a result of the sale for $395,000.00. By advertising, the property could have been exposed to prospective purchasers in the open market.

The next question to which I must address my mind is what is the measure of damages for which the defendant is liable? The plaintiff claims $155,000.00, the difference between $550,000.00 and $395,000.00 the sale price of the premises.

This figure of $550,000.00 is what on the plaintiff's evidence she could have realised on a sale to one Michael Riley. Although this evidence was not challenged, it nevertheless raises several questions, the answers to them cannot now be answered. Suffice it to say that there is no proof of when the negotiations took place. There is no evidence that this was communicated to the defendant.

It will be convenient to deal with the letter dated 8.5.89 in which New World Realtors wrote Mrs. Patricia Taylor informing her that they had secured a purchaser, one Woodrow Moore of a London address to purchase the property for $500,000.00. This too, may well have been so there being no challenge by the defendant.

After carefully considering this piece of evidence it is my view that these prospective purchasers found by New World Realtors demonstrate no more than the high degree of fluctuations that there are in the market place.

Presumably, having regard to such state of fluctuations the longer one waits there exists the possibility that prices or value will go up.

But is that what is required of a mortgagee once his power of sale has arisen? Is he not endowed with all rights to chose the time to sell? Once he has so done his obligation is to obtain the true market value.

Again I must refer to the letter of the 9.1.88 should have read 9.1.89, advising the defendant of prospective purchaser for $480,000.00. The plaintiff was satisfied and willing to sell at that price. Indeed her attorney, Mrs. Taylor asked to be allowed to proceed with this sale as the amount would enable the plaintiff to liquidate her debts to the defendant and to [illegible] Workers Bank.

This is some cogent evidence which I accept and hold that $480,000.00 was the best or to put it another way the true market value obtained by the defendant; having exercised its right as to the timing of the sale.

If I am correct in so finding then the other figures quoted above namely; $500,000.00 and $550,000.00 do not arise for consideration.

I turn to the claim for exemplary and/or aggravated damages.

It would appear that a correct approach to this head of damage is to be found in Rookes v.Bernard 1964 A.C. 1129. H.L. where in that case their Lordships held that exemplary damages could be awarded in cases:

(1) of oppressive, arbitrary or unconstitutional acts by government servants.

(2) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

Suffice it to say that there is no evidence before me on which a finding and award for exemplary damages could be made.

In so far as aggravated damages are concerned I reviewed the authorities Rookes v. Bernard, (Supra) and Granville Scott v. Selvin Wilkie (1970) 12 JLR 200. In the latter case, the court while holding that exemplary damages were not appropriate, upheld an award for aggravated damages. In that case an award for aggravated damages was upheld on the particular facts on the specific finding of the learned Resident Magistrate.

Mr. Hylton also relied on the case of Archer v. Brown [1984] 2All E.R 267 to justify an award of aggravated damages for "injured feelings".

The plaintiff was in that case the victim of a fraud perpetrated on him by the defendant, who sold him the share capital of a company for thirty thousand pounds when he had already sold the same shares several times over to other unsuspecting victims. It was held that there was no reason in logic or justice why aggravated damages could not be awarded in deceit to compensate the plaintiff for his injured feelings.

In this case plaintiff admitted that the major cause of trauma was from the fact that her expectations in realising a sum on the sale which would enable her to clear off her indebtedness to the defendant did not materialise. This is quite understandable. Not withstanding the finding of negligence I do not find from the evidence that the defendant's conduct was such to cause the plaintiff to suffer such injury to her feelings to result in an award.

Naturally, a person, the plaintiff being one such person who finds herself in the predicament of losing her property in the manner in which the plaintiff did is expected to experience some degree of grief.

I therefore refrain from making any award under the heading of claim for aggravated damages. For the foregoing reasons the defendant counterclaim has also failed.

The claim for interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

Section 3 of the Act to which reference is made above provides that

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment".

There is no evidence before me either from an expert or other authorative source on the rate of interest. True, Miss Lyn in cross-examination gave what may at best be described as speculative evidence.

I am mindful to award interest to the plaintiff but as there is no cogent evidence as to what the rate was or is, I have to do my best in the circumstances.

The result is that the plaintiff will have judgment for $85,000.00 that is the difference between $395,000.00 and $480,000.00. I also award interest pursuant to the Law Reform (Miscellaneous Provisions) Act as the rate of 20% from the 10.10.89 (the date of the registration of the transfer to the Gutzmores) to 20.11.92.

The plaintiff will also be entitled to have costs to be agreed or taxed.