



[2023] JMSC Civ. 84

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION**

CLAIM NO. SU2023CV00059

BETWEEN	EVEROL ORR	CLAIMANT
A N D	ASCENDANCY CARIBBEAN LIMITED	1st DEFENDANT
A N D	KENESHA ALLEN	2nd DEFENDANT
A N D	GEORGE ALLEN	3rd DEFENDANT

IN CHAMBERS (VIA VIDEOCONFERENCE – ZOOM PLATFORM)

Mrs. Kaysian Kennedy-Sherman Attorney-at-Law instructed by Messrs TWP Attorneys-at-Law for the Claimant

Mr. Anthony Williams, Attorney-at-Law instructed by Messrs Usim, Williams & Co for the 2nd and 3rd Defendants.

April 27, 2023 and May 3, 2023

Application for Injunction – Application for Equity of Redemption etc. – Whether or not Interim Injunction should be extended – Whether the Claim Against the 2nd and 3rd Defendants is frivolous or vexatious.

Application for Discharge of Injunction – Application for Equity of Redemption – Whether the Claim is Frivolous or Vexatious – Whether injunction should be discharged.

STAPLE J (Ag)

BACKGROUND

- [1] The Claimant is desperate. His property was purportedly sold to the 2nd and 3rd Defendants in the purported exercise of a Power of Sale under a Mortgage held by the 1st Defendant.
- [2] The Claimant is now seeking to claw it back from the hands of the 2nd and 3rd Defendants and is asking this Court to delay a case brought by the 2nd and 3rd Defendants against him in the Parish Court for him to be evicted from the property.
- [3] In answer to the Claim filed by the Claimant against them, the 2nd and 3rd and Defendants have filed and served a Defence and Counterclaim against him. The Defence essentially denies any wrongdoing on their part and they assert that they were simply bona fide purchasers for value without notice and had the property sold to them under the power of sale by the 1st Defendant. They counterclaim against the Claimant for Recovery of Possession he having been duly served with a notice to quit and having failed to remove from the property.
- [4] That is the essence of the pleadings before the Court. The Claimant has filed this Application for an Injunction for the following relief:
- a) **An Injunction restraining the 2nd and 3rd Defendants whether by themselves, their servants and/or agents or otherwise howsoever from taking any further steps to access or to take possession of the property situate at Volume 1018 Folio 486 of the Register Book of Titles prior to the determination of this claim.**
 - b) **That there be a stay of proceedings with respect to Plaintiff No. SE2022CV00730 initiated by the 2nd and 3rd Defendants until the determination of the claim herein.**
- [5] The Application has been staunchly resisted by the 2nd and 3rd Defendants. They have themselves filed their own Application for Court Orders seeking to discharge the interim injunction currently in place among other things. The latest version of this Application, filed on April 25, 2023, seeks to add a claim for Summary

Judgment. This lately added claim for summary judgment cannot be heard today as it is woefully short served¹.

[6] On their Amended Application, the now 2nd and 3rd Defendants seek the following relief:

- a) **That the Claimant's Amended Notice of Application for Court Orders filed on the 13th day of March 2023 be dismissed;**
- b) **That the interlocutory injunction granted on the 27th day of February 2023 by the Honourable Mrs. Justice Sarah Thompson-James and extended to the 27th March 2023 which was further extended by the Hon. Ms. Justice Opal Smith (Ag) on the 27th March 2023 to the 20th April 2023 shall be discharged;**
- c) **That the Claimant, Everol Orr, shall vacate and deliver up vacant possession of the subject property of this suit, namely Lot 34 Tremor Park, Santa Cruz in the parish of St. Elizabeth registered at Volume 1018 Folio 486 of the Register Book of Titles within 7 days from the date of the Order;**
- d) **That the Claimant, Everol Orr, shall pay to the Third and Fourth Defendants Kelesia Allen and George Allen mesne profits in the sixty-five thousand one hundred dollars (\$65,100.00) per month from the 23rd day of November 2022 to the date of actual possession for the Claimant's use and occupation of the said subject property.**
- e) **The Claimant's statement of case be struck out; etc**

[7] The grounds filed by the 2nd and 3rd Defendants are extensively set out in the Amended Application.

[8] It is now for the Court to determine whose application to grant and on what terms.

ISSUE

[9] The Court, having examined the pleadings, applications (as amended) and all the affidavits filed in this matter, has considered that the real issue to decide this

¹ See rule 15.4(3) of the CPR. Note well that as this is not a scheduled Case Management Conference, rule 15.4(5) cannot apply to dispense with the notice requirement of rule 15.4(3).

application is whether or not the Claimant's claim against the 2nd and 3rd Defendants is frivolous or vexatious. Does it disclose a serious issue to be tried?

[10] The law relating to injunctions is clear. If it is that the case is frivolous or vexatious, then the injunction cannot be maintained. I do not need to cite much authority in relation to this as the matter is fairly well settled by now.

[11] As this is an application for an interim injunction, the Court had regard to the well established guidelines from the celebrated cases of ***American Cyanamid Co v Ethicon Limited***² and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision of ***NCB Limited v Olint Corporation***³ (hereinafter *Olint*). These considerations are:

- (i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?
- (ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.
- (iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Claimant or the Defendant, then I will go on to examine the balance of convenience generally;
- (iv) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

[12] In the case of ***Tapper v Watkis-Porter***⁴ Phillips JA stated that, "An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction"

[13] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the *American*

² [1975] 1 All ER 504

³ Privy Council Appeal No. 61/2008, April 28, 2009.

⁴ [2016] JMCA Civ 11 at para 37

Cyanamid and the *Olint* cases. I can do no better than to quote from the eminent jurist:

In considering where the balance of convenience lies, the court must have regard to the following:

“Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.

If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party’s case.”

[14] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party⁵.

IS THE CLAIMANT’S CLAIM FRIVOLOUS OR VEXATIOUS?

[15] The starting point is **always** (emphasis mine) the pleadings. The pleadings form the foundation of any case in the Supreme Court. The Civil Procedure Rules sets out the requirement for the Claimant to set out all of the facts upon which they will rely to prove their claim.

[16] The relevant portions of rule 8.9 are set out here in full:

8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of **all the facts** on which the claimant relies.

(2) Such statement must be as short as practicable.

⁵ Id

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

- [17] It is important to recall that the Claimant has averred, in his Further Amended Particulars of Claim filed on the 27th April 2023, that the 2nd and 3rd Defendants, “wilfully, fraudulently, and or recklessly conspired with the 1st Defendant to purchase the said property at a gross undervalue, well knowing that it was purchased at a gross undervalue. Further, the said 2nd and 3rd Defendants have wilfully, fraudulently and or recklessly mislead and or deceived the Claimant by purporting to be a bona fide purchaser for value without notice.⁶”
- [18] The 2nd and 3rd Defendants have strongly resisted this in their Defence and counterclaim filed on the 20th April 2023 (even though they haven’t had time to respond to the amendment dated the 27th April 2023, the Defence would not be affected).
- [19] Mrs. Sherman, on behalf of the Claimant, relied on the case of ***Waring v London Manchester Assurance Company Ltd et al***⁷ for the principle that once a mortgagee enters into an agreement to sell the mortgaged property, the mortgagor’s equity of redemption is extinguished unless the mortgagee has acted in bad faith.
- [20] She contends that the sale could be set aside once it is that the court determines that the 1st Defendant acted in bad faith in the exercise of their power of sale. Mrs. Sherman pointed out that in the Further Amended Particulars of Claim, the acts of bad faith complained of on the part of the 1st Defendant. They include allegations that they:

⁶ See paragraph 13 of the Amended Particulars of Claim filed on March 13, 2023.

⁷ [1935] Ch 310

- a) Wilfully fraudulently recklessly obtained an inaccurate valuation of the property;
- b) Relied on the said erroneous valuation;
- c) Failed to take steps to get a valuation.
- d) Failed to inform the Claimant as to the valuation of the property.
- e) Failed to act in the best interest of the Claimant in the valuing of the property etc.

[21] However, section 106 of the **Registration of Titles Act (RTA)** makes the point beyond doubt, in my view. In the case of ***Aspinal Wayne Nunes v Jamaica Redevelopment Foundation Inc***⁸ Morrison P (as he then was) confirmed the effect of section 106 of the RTA in that once the power of sale is exercised, then section 106 will exclude the mortgagor from any other remedy other than damages.

[22] But from as far back as ***Lloyd Sheckleford v Mount Atlas Estate Limited***⁹ Forte P (as he then was) made it clear at page 8 of the decision that,

“Where the purchaser is a bona fide purchaser without any knowledge of any impropriety or irregularity in the sale, and where he has no obligation to make enquiries into such matters, the statute bestows upon him the guarantee that the registration cannot thereafter be restrained.”

[23] Counsel for the Claimant relied on the decision of ***Cowell Anthony Forbes et al v Miller’s Liquor Store (Dist) Ltd***¹⁰ as authority that the principle in *Waring* above was implicitly adopted in Jamaica. This was based on her use of the case of ***Devon Morris et al v JN Bank Ltd et al***¹¹. In that case the Claimants were owners of property. They fell into arrears and the 1st Defendant purported to exercise a power of sale to have the property sold to the 3rd Defendant. Importantly in that case, there was no completion of the sale. Laing J (As he then was) granted an injunction barring the completion of the sale as he found that there were major grounds for

⁸⁸ [2019] JMCA Civ 20

⁹ Unreported SCCA 148/2000 delivered December 20, 2001.

¹⁰ [2016] JMCA Civ 1

¹¹ [2019] JMCC COMM 25

finding that there was bad faith on the part of the mortgagee in the exercise of the power of sale.

- [24] In the case of ***Cowell Anthony Forbes Brooks*** JA (as he then was) had to consider the impact of s. 106 of the RTA on the decision in *Waring*. Remember that *Waring* is an English decision which does not have the Torrens system. While Brooks JA, found that while the principle was still relevant to the Torrens system of land registration that obtains in Jamaica, it is still the RTA that is applicable.
- [25] At paragraph 46 of the *Cowell Anthony Forbes* decision, Brooks JA (as he then was) cited with approval the decision of *Sheckleford* as being the position concerning the law in Jamaica when a mortgagee exercises the power of sale and the protection afforded to a *bona fide* purchaser for value without notice under s. 106 of the RTA.
- [26] I must confess that I find some difficulty with *Waring's* applicability in Jamaica in the face of the clear wording of s. 106. Section 106 provides full protection to a *bona fide* purchaser even if the mortgagee's exercise of the power of sale is done in circumstances of impropriety on his part. To my mind, **impropriety** (emphasis mine) incorporates exercise of the power of sale in bad faith. *Sheckleford* makes it clear that s. 106 provides this full protection. But I am bound by this decision in *Cowell* and so will apply it in this case.

The Claim of Bad Faith – Is There Sufficient Facts to Vitiating the Sale?

- [27] The *Cowell Anthony Forbes* decision really highlights the difficulty that the Claimant will encounter with his assertion of bad faith.
- [28] On examination of the Claimant's case, the case of bad faith against the 1st Defendant is not supported by much factual pleading. In *Cowell Anthony Forbes* the Appellant contended that the low sale price relative to what it was valued was manifest evidence of bad faith. The Court of Appeal roundly rejected that idea.

[29] *Waring* itself makes the same point. Crossman J in *Waring* relied on the principle set out in *Warner v Jacob*¹² that,

“...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.”

[30] In the *Cowell Anthony Forbes* case, the property was eventually sold for \$8,000,000.00 after the Forbes' had been trying to sell, but getting no better offer than \$8,000,000.00. The evidence revealed that the property was subsequently valued at \$12,000,000.00. The Court of Appeal upheld the finding of the trial judge that there was no bad faith as a consequence of this sale price.

[31] The evidence revealed in this application shows to me that the 1st Defendant put out a high sale price of \$28m initially. Then, much later on, the price advertised dropped to what it was eventually sold for. Without more, the Court is not in a position to say that this was a bad faith sale just on the price alone. Even if it is that there was a valuation for a higher price as the Claimant/Applicant submits.

[32] The allegations of bad faith etc. as against the 1st Defendant are largely built around the valuation and the sale price to the 2nd and 3rd Defendants. In my view, the factual averments presented in the pleadings and the evidence contained in the affidavits does not present a prima facie case that the 1st Defendant acted in bad faith at all. There are no facts to support that the valuation used by the 1st Defendant was “wrong”. There is no averment to support that the 1st Defendant acted in bad faith in advertising the property for sale at the 2 sets of prices stated. Or that the 1st Defendant acted in bad faith in selling the property for the price at which it was eventually sold.

¹² 20 Ch D p 220 at 224

[33] Again, the authorities make it clear that a mortgagee is not exercising a trust for sale when exercising a power of sale. He is under no obligation to the mortgagor beyond doing its best to get a fair price for the property. Indeed, the fact of 2 advertisements for the sale of the property actually works against the view that they were in any undue haste to sell or were acting in bad faith. They tried at one price, couldn't get a sale and so had to lower it. Remember as well that this sale was being conducted during the very lean and uncertain times of the Covid 19 pandemic.

[34] In those premises, I do not believe that there was a strong prima facie case made out of bad faith to trigger the *Waring* exception to s. 106 of the RTA.

The Allegations Against the 2nd and 3rd Defendants

[35] What is more, concerning the 2nd and 3rd Defendants, there is pleaded not one fact to support the allegations set out against them. The Court is therefore unaware what is the evidential basis for the averments made. There isn't even any such factual averments in the Claimant's affidavits in support of this application.

[36] What is the factual averment to support that allegation that the 2nd and 3rd Defendants knew of the "true value" of the property yet deliberately purchased it for less than the true value fraudulently? What is the factual averment to support the allegation that there was any such conspiracy between the 1st Defendant and the 2nd and 3rd Defendants? No agreement between them was pleaded. No factual allegation of any conversation or correspondence exchanged between the 1st Defendant and the 2nd and 3rd Defendant was averred to suggest any nefarious dealings between them.

[37] There is no factual assertion that the Claimant and the 2nd and 3rd Defendants had any conversation, discussion or communication between themselves to give a basis for saying that the Claimant was deceived or misled by the 2nd and 3rd Defendants as to their status as *bona fide* purchasers for value without notice.

[38] There is no factual assertion made to assist the Claimant to raise the real likelihood of his claim for the equity of redemption being successful. I found the case submitted by the 2nd and 3rd Defendants of **Donovan Foote v Capital and Credit Merchant Bank Ltd et al**¹³ to be helpful in this regard. But I place reliance on the decision of the Court of Appeal on appeal from that case in **Foote v Capital and Credit Merchant Bank Ltd et al**¹⁴.

[39] Morrison JA (as he then was), in delivering the judgment of the Court said as follows at paragraph 48,

“From the foregoing, I would therefore conclude that the legal position is as follows: (i) Once a notice of default has been served on a mortgagor in arrears, pursuant to section 105 of the RTA, section 106 gives the mortgagee a power of sale of the mortgaged property if the default continues for a period of one month after service of the notice; (ii) a bona fide purchaser for value from the mortgagee acting under the statutory power is under no obligation to see or inquire (a) whether there has actually been a default on the part of the mortgagor, (b) whether notice of default has been served, or (c) otherwise into the propriety or the regularity of the sale; (iii) the remedy of any person suffering loss from an unauthorised, improper or irregular exercise of the power of sale lies in damages only against the person exercising the power; (iv) so long as the mortgage debt, or any part of it, remains unpaid, the mortgagee’s power of sale remains unaffected by any previous attempt to collect the mortgage debt by other means, such as an action.”

[40] Morrison JA went on to affirm the ruling of Anderson J in the Court below in paragraph 29 of Anderson J’s judgment (as quoted by the 2nd and 3rd Defendants in their submissions at paragraph 6 (iii)) that in order for the purchaser to be deprived of the protection of s. 106 of the Registration of Titles Act, it is necessary for the purchaser under the power of sale to have **actual knowledge of the**

¹³ Unreported 2008 HCV 03328 per Anderson J decided October 27, 2010.

¹⁴ [2012] JMCA App 14.

irregularity or impropriety in the exercise of the power of sale by the mortgagee.

- [41] In the case at bar, there is no pleading on the part of the Claimant that the 2nd and/or 3rd Defendants had actual knowledge of any alleged irregularity or impropriety in the exercise of the power of sale.
- [42] Likewise, I am minded to agree that there is no proper pleading of fraud on the part of the 2nd and 3rd Defendants. All that is set out, even in the latest version of the Amended Particulars of Claim, are generic terms of fraud that have no factual foundation to support them in the pleadings.
- [43] The case of *Wallingford v Directors of the Mutual Society etc and Official Liquidator*¹⁵ cited by the 2nd and 3rd Defendants makes the point that, a general allegation of fraud, however strong the words used, **where there is no statement of the circumstances relied on as constituting the alleged fraud**, is insufficient even to amount to an averment of fraud of which any Court ought to take notice.
- [44] In this case, we have no such statement of the circumstances of the fraud that can even be remotely considered sufficient for the Court to take cognizance of the averment of fraud.
- [45] In the premises the Court is left to conclude that there are no serious issues to be tried against the 2nd and 3rd Defendants. The Claimant has thrown nothing but bare allegations at them without any factual substratum pleaded as is required.
- [46] At this stage the Court does not feel at all satisfied that there is any serious issue to be tried as between the Claimant and the 2nd and 3rd Defendants. What makes this position even more concretised is that at the start of these submissions, Mrs. Kennedy-Sherman stated that she intended to withdraw the allegations of fraud as

¹⁵ [1880] 5 AC 685 at 697 per Lord Selbourne

against the 2nd and 3rd Defendants and had filed amended pleadings on the day of the hearing to effect such a position.

[47] When the Court examined the amended documents, the effect was not properly carried out much to the dismay of Mrs. Kennedy-Sherman.

The Effect of Laches on the Claimant's Application.

[48] It is often said that delay defeats equity. It is quite true here. Here we have the Claimant who, on the clear and unequivocal evidence, was faced with the now 1st Defendant who was determined that the only way to preserve the home for the Claimant was for him to hand over the entire sum owed plus interest. This position was known and repeatedly communicated to the Claimant by the 1st Defendant.

[49] So he could never legitimately claim to be taken aback when he discovered that the property was to be sold.

[50] Yet, he failed to take any steps to attempt to restrain the 1st Defendant from carrying out the power of sale before the sale and transfer was completed.

[51] It was at the point when he was getting a notice to quit and a suit filed in Court by the 2nd and 3rd Defendants that he decided to bring this claim and applied for an injunction.

[52] In my view, by that time the horse had bolted and there was no stopping the inevitable.

[53] As such the interim injunctions will no longer be extended and the injunctions are discharged.

APPLICATION TO STRIKE OUT

- [54]** Counsel for the Claimant has in one sense, conceded that she has no case in fraud against the 2nd and 3rd Defendants and that they are in this matter now, effectively, as interested parties.
- [55]** However, the latest amendment to the Particulars of Claim has failed to achieve that aim.
- [56]** But, in either event, the case against the now 2nd and 3rd Defendants is not made out on the pleadings as there are no factual allegations made against them to support the claims of fraud.
- [57]** In that regard, the Claims against the 2nd and 3rd Defendants are struck out as disclosing no reasonable grounds for being brought.

ORDERS:

- 1 The Claimant/Applicant's Amended Notice of Application for Court Orders filed on the 13th March 2023 is dismissed.
- 2 Costs to the 2nd and 3rd Defendants on that application to be taxed if not agreed.
- 3 The interlocutory injunction granted by Thompson-James J on the 27th February 2023 which was further extended by the several Orders of the Court is now discharged.
- 4 The Claimant's claim against the 2nd and 3rd Defendant is struck out and judgment entered against the Claimant in favour of the 2nd and 3rd Defendants on the Claimant's claim.
- 5 Orders 3, 4, 6 and 7 of the 2nd and 3rd Defendants Further Amended Application filed on the 25th April 2023 are otherwise refused.
- 6 Costs to the 2nd and 3rd Defendants on the 2nd and 3rd Defendant's Further Amended Application filed on April 25, 2023 to be taxed if not agreed.

- 7 The 2nd and 3rd Defendants shall discontinue any and all other claims in any other proceedings that cover the same ground as the Counterclaim in this suit before the Case Management Conference date for the counterclaim.
- 8 The Counterclaim is set down for Case Management Conference for the 29th June 2023 at 9:00 am before Staple J (Ag) for 1 hour.
- 9 The 2nd and 3rd Defendants' Attorneys-at-Law are to prepare file and serve this Order on or before May 12, 2023 by 3:00 pm.

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Dale Staple
Puisne Judge (Ag)