IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1990/S109

BETWEEN	ZACHARIAH SHARIEF	PLAINTIFF
A N D	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Janet Stanbury & (Ms) D. Edwards for Plaintiff.

Michael Hylton & Patrick McDonald for Defendant.

April 18 & 19 & June 13, 1994

PATTERSON, J.

In this action, the plaintiff contends that the defendant wrongfully and negligently exercised a power of sale of his property by virtue of a mortgage registered at Volume 1051 Folio 379 of the Register Book of Titles to secure the money mentioned in the mortgage. The plaintiff's claim is for:-

"(a) An injunction restraining the Defendant either by itself or by its servants or agents or otherwise from completing the sale and registration of the transfer by way of auction.

(b) An Order setting aside the aforesaid sale.

(c) Further and/or alternatively damages for the wrongful and negligent exercise by the Defendant mortgagee of its powers of sale."

The plaintiff is a Jamaican who resides in the United States of America. In 1983, he purchased a parcel of land part of Stony Hill in the parish of St. Andrew, numbered Lot 30, registered at Volume 1051 Folio 379 of the Register Book of Titles. He commenced building a dwelling house on the said land, and in 1986 and again 1987, he obtained loans from the defendant to assist him in his venture. The moneys borrowed were secured by mortgages of the parcel of land, and the mortgages were registered on the title on the 20th February, 1987 stamped to cover $120,000.00 with interest, and on the 30th April, 1987 stamped to cover $25,000.00.

The plaintiff agreed to repay the first loan by monthly installments of $4,111.11, and after receiving the additional loan, the repayment agreed on was $4733.00 per month over 4 years commencing in February, 1987. The plaintiff would lodge money to a savings account which he operated with the defendant's bank at Knutsford Boulevard, New Kingston, and the defendant would debit that account to meet the monthly payments. This arrangement did not work well. By September, 1987 the plaintiff had fallen into arrears in his payments, and on the 10th September, 1987, letters of demand were sent to him and also to his guarantor Mr. Winston Wilson. Thereafter, the plaintiff paid various amounts, but not enough to clear off the arrears in his payments. From time to time variations in the monthly payments were agreed on by the parties, but nevertheless, the arrears piled up.

On June 8, 1989 the plaintiff's loan account stood at $241,912.33, and the arrears in payments amounted then to $20,910.33. The defendant sent the plaintiff a letter informing him accordingly, and it stated, inter alia, that "unless some positive steps are taken to repay the loan, we regret that we shall be obliged to take the necessary action to recover our debt." Letters of demand in accordance with the provisions of the Registration of Titles Act were later sent out.

It is important to note that this letter of June 8, 1989, as well as all previous and subsequent correspondence were all addressed to the plaintiff at "1185 Nostrand Avenue, Brooklyn, New York 11225 U.S.A." The plaintiff contends that there is no such address and that he has never received any correspondence from the defendant addressed to him there. He admits that he is a restauranteur doing business for many years at 1184 Nostrand Avenue, Brooklyn, New York 11225 U.S.A., and that is his mailing address - He can recall that at the time he applied for the loan, he spoke with one Mr. Stewart and he gave Mr. Stewart certain personal information. He says he told Mr. Stewart that he lived in New York, he gave his telephone number and his true address then as 1040 Carrol Street, Apt. 4E, Brooklyn 11225, but he says he cannot recall if

he gave Mr. Stewart a Nostrand Avenue address

It was Mr. Kenneth Mitchell the assistant manager at the defendant's bank, who wrote the letter to the plaintiff on June 8, 1989, and his evidence is that he got the plaintiff's address from the record of the plaintiff's account which is kept by the bank on cards known as "G 18". The customer's name, address, occupation together with lendings, terms of repayments, interest rate, principal lent, securities taken, purpose of loan or advance as also notes of talks with customer, telephone calls, correspondence to and from the customer and the state of the account are all recorded on the "G 18" cards. A bundle of cards relating to the plaintiff's account was tendered and admitted in evidence as Ex.9, with the consent of the parties. These cards originated with Paul Stewart, who was the assistant manager at the defendant's bank when the loan was negotiated. The exhibit is not in the best of condition at this time, but what is relevant can be plainly seen. On the first page, Mr. Stewart recorded the plaintiff's address as "2 Trevennion Road, Kingston 5" and the plaintiff says that is the address that he gave then as his mailing address. Also written on that page in red is this address:-

"Foreign Address
1185 Nostrand Avenue
Brooklyn N.Y. 11225"

and this telephone number:- "Tel. - 718-9531571". The "5" from "1185" is struck in black ink, and above is written "1184". The evidence does not disclose who it was that made the notation in red or who did the correction from "1185" to "1184". Mr. Stewart says it was not there when he made up the first card, but Mr. Mitchell says he saw the foreign address in red when he came to deal with the account. It is plain that the notation must have been made by someone in the bank in the ordinary course of business, and that the information must have been obtained either from the plaintiff himself on an occasion when he telephoned the bank, or it could have been obtained from one of the notifications accompanying the payments

sent by the plaintiff through Remittance Express Co. Inc. One such notification, tendered in evidence (as Exhibit 5) bears date July 14, 1988 and it states the plaintiff's address as "1185 Nostrand Avenue."

I am satisfied that the plaintiff's correct foreign mailing address in the U.S.A. is 1184 Nostrand Avenue, Brooklyn, N.Y. 11225, and that the address noted on the first card in red is not only incorrect but non-existent. As to how it came about that the incorrect address was noted on that card may not be a crucial consideration. What is of utmost importance in my view is whether or not the plaintiff received the correspondence and in particular the notice in writing as is required by S.105 of the Registration of Titles Act, for only if he was notified in accordance with the Act and there is default in payment would the power of sale be exercisable. So I return now to the letter of June 8, 1989 which I referred to as being important. There is an entry on the cards (Ex.9) which refers to this letter and the next entry on the cards is dated 14th August, 1989, and Mr. Mitchell says he saw and initialled it to confirm that he had read it. It reads as follows:-

> "Mr. Sharief called from New York today in response to our letter. He advised that he had given an alleged friend the funds to up-date the loan 2 months ago and he is amazed to know that this was not done. (The word "lie" is written after this by Mr. Mitchell). He promised to forward funds via T/T by the end of week to clear the arrears. He will visit Jamaica in October at which time we will discuss the future operation of the account."

This is an entry made in a banker's book, in the usual and ordinary course of business, and such entry is prima facie evidence of the matters transactions and accounts therein recorded. In my view, a reasonable inference to be drawn from it is that the plaintiff must have received the letter of June 8, although it was addressed to him at 1185 Nostrand Avenue, and that he was prompted by it to make the telephone call. I accept the evidence for the defendant that none of the letters or any other correspondence forwarded to the plaintiff was ever returned as undelivered. It is not surprising to me. The plaintiff is a businessman and it is more probable

than not that the postman would know him, or at least his business, and since there is no such address as 1185 Nostrand Avenue, the postman would deliver the letter to the plaintiff at his known address. From the evidence, at least eight different letters were posted to the plaintiff between August 1988 and January, 1990, some by ordinary mail, others by registered mail, and none was returned to the defendant. I reject the evidence of the plaintiff that he did not receive any of those letters, and I find as a fact that he did receive all the letters sent to him. In particular, I find that on a balance of probabilities, the plaintiff received the registered letter with notice of demand written by the Assistant Manager of the defendant's bank and addressed to him at 1185 Nostrand Avenue on November 20, 1989 and also that posted to him at the same address by Deryck A. N. Russell, Attorney-at-Law on January 12, 1990. That letter reads as follows:-

"DANR/ms

January 12, 1990

Mr. Zachariah Sharief
1185 Nostrand Avenue
Brooklyn
N.Y. 11225
U.S.A.

Dear Sir

I act for National Commercial Bank Jamaica Limited and am instructed that as at the 8th of December, 1989, you were indebted to the Bank's New Kingston Branch by way of loan in the amount of Two Hundred and Thirty-Three Thousand Five Hundred and Twelve Dollars and Thirty Five Cents (J$233,512.35) with interest accruing at the rate of 31% per annum.

I hereby make formal demand upon you for the liquidation within thirty (30) days as of the date hereof of all sums owing by you to the Bank.

In the event of your default, I shall immediately take steps to realize the securities held by the Bank.

Your cooperation is however anticipated.

Yours faithfully

_____

DERYCK A. N. RUSSELL

c.c. New Kingston Branch".

I do not think that there is any doubt that the plaintiff was in default in his monthly payments on January 12, 1990 when formal demand was made for payment of the full amount of the plaintiff's indebtedness to the defendant. I have already mentioned that I find as a fact that this formal demand came to the hands of the plaintiff. Again I will refer to a note made on the "G 18" cards - it is dated 14th February, 1990 and it reads as follows:-

> "14/2/90 'C' called from New York and advised that the address on our files was incorrect and as a result he was not aware of the adverse position on the loan. He was however told that it is incumbent on him to ensure that the loan was being serviced, especially in light of the source of repayment i.e. Mr. Wilson is responsible for payments while he takes care of Mr. Wilson's bills in New York. He has deposited US$1000 and promised to call back on Wednesday with plans for repayment. He was told that the payment made was not enough and a substantial reduction would have to be made to stop us from disposing of the property. (Although by accepting payment we will have to hold off until three months have elapsed). We await call on Wednesday D/V 22/2/90. On checking C's track record the impression one gets is that C does not speak the truth. This therefore appears to be another story in the long line of excuses."

Again, this entry in the banker's book is prima facie evidence which supports a finding of fact that the plaintiff received the notice sent on January 12, 1990. How else would he have known that the address in the defendant's record was incorrect and of the adverse position of the loan? It seems logical that it was at this time that the mistake in the foreign address was corrected to to read "1184" instead of "1185". I do not accept his evidence that he did not receive the notice, nor do I believe that his reason for calling the bank in February 1990 was because he had not sent money since November, 1989. As I have said before, I am satisfied that all the letters were delivered at 1184 Nostrand Avenue, although addressed to 1185 Nostrand Avenue. But the further question to be decided is this - Did the defendant comply with the provisions

of the law which give rise to the power of sale and the right to exercise that power of sale?

The relevant statutory provisions are to be found in Ss 105 & 106 of the Registration of Titles Act - ("The Act"): For the power of sale to arise, the mortgagor must have made default for one month or more in payment of the principal sum or the interest or any part thereof. In the instant case, this is not an issue; the plaintiff was in arrears with his payments for several months. The next step that must be taken before the power of sale can be exercised is clearly set out in the Act:-

> "The mortgagee .... may give to the mortgagor notice in writing to pay the money owing on such mortgage ..... by giving such notice to him or them, or by leaving the same on some conspicuous place on the mortgaged or charged land, or by sending the same through the post office by a registered letter directed to the proprietor of the land at his address appearing in the Register Book." (Sec.105).

These provisions of the Act, in my view, are not mandatory, but are only directory. The general object and paramount importance of the provisions of Ss.105 & 106 of the Act must be, in my mind, to ensure that the mortgagor is notified of the mortgagee's intention to exercise his power of sale, and to allow the mortgagor time to fore-stall the sale. The mortgagor must be presumed to know he is in arrears, and the notice in writing, it seems to me, is intended to remind him of his obligation and to call upon him to repay the money in accordance with the demand within the time mentioned therein. The manner of service of the notice is not of general importance, and it may be by any of the means set out in the Act or in the deed itself, and to my mind, it may be by some other means, provided that in such a case, it is clearly shown that the notice did come to the knowledge of the mortgagor. The date of the service of the notice of demand is important because it is from that date that time begins to run against the mortgagor for the exercise of the mortgagee's power of sale, for although the power of sale arises when the mortgagor defaults, that power is not exercisable before the time for payment specified in the notice has elapsed.

Sec. 106 of the Act provides as follows:-

> "106. If such default in payment, shall continue for one month after the service of such notice, or for such other period as may by such mortgage or charge be for that purpose fixed, the mortgagee ..... may sell the land mortgaged .... by public auction or by private contract ....."

Looking at the mortgage deed, the parties thereto, by clause 2(j) "agreed and declared" as follows:-

> "Any demand or notice hereunder may be properly and effectually made given and served on and to the Mortgagor if signed by any Director Manager Acting Manager or Assistant Manager of the Bank or any Attorney-at-law on behalf of the Bank and sent by registered post addressed to the Mortgagor at the address stated as "Mortgagor's Address" in the said Schedule and every such demand or notice sent by post as aforesaid shall be deemed to have been received on the second day following the posting thereof."

I have expressed the view that the provisions in the Act to like effect are only directory, and this clause in the mortgage deed, in my judgment, is not mandatory. Although it requires the notice of demand to be addressed to the mortgagor at the address stated as "Mortgagor's Address" in the schedule to the deed, which is "2 Trevennion Road, Kingston 5", the fact that it was sent to the mortgagor at another address, does not vitiate the notice. I have stated earlier on in my judgment that I am satisfied that the demand notices did come to the hands of the plaintiff, and I hold that the notices were properly served. In the circumstances, I reject the plaintiff's contention that the defendant failed to notify him in the manner prescribed by the Registration of Titles Act because he was not notified "at the address set out in the Register Book of Titles."

The next issue that falls to be decided is whether or not the defendant wrongfully and negligently exercised the power of sale. The plaintiff pleaded as follows:-

> "(d) The Defendant failed to obtain a fair or reasonable market valuation for the plaintiff's property, alternatively,

> the defendant failed to take reasonable steps to obtain whatever was the true market value of the mortgaged property.
>
> (e) The Defendant purported to sell the Plaintiff's property for a price which in the circumstances it knew or ought to have known was a grossly undervalued price.
>
> (f) Further or alternatively the Defendant acted in bad faith in that it was reckless in its purported exercise of its power of sale."

The defendant denies the allegation in the pleadings of the plaintiff, and in particular, that the property was sold for less than the market value, and that it acted in bad faith or recklessly in its exercise of the power of sale.

It is settled law that a mortgagee must exercise the power of sale in a prudent way, with a due regard to the interest of the mortgagor in the surplus sale moneys. In Cuckmere Brick Company Limited & Another v. Mutual Finance Ltd. [1971] 2 ALLER 633 at 646, Salmon L.J. said:-

> "Both on principle and authority a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

A mortgagee is not a trustee of the power of sale, but in exercising the power of sale, he must bear in mind the interest of the mortgagor and that he is a trustee of the proceeds of sale and so is ordinarily bound to account to the mortgagor for any surplus remaining after his mortgage has been discharged.

So, let me now examine the evidence in the case to see if the defendant is in breach of the duty owed to the plaintiff in this regard. The first letter of demand was sent on or about November 20, 1989. A second letter of demand was sent on or about January 12, 1990, giving the plaintiff 30 days to discharge the mortgage. It appears to me that in the ordinary course of events, that letter would have been delivered long before the end of January, 1990. However, the plaintiff's telephone call to the defendant on the 14th February, 1990 confirms, in my view, that he did receive

that letter of demand on or before the 14th February, 1990. Mr. Winston Wilson was written to at the same time as the plaintiff. Mr. Wilson it was who guaranteed the loan. Nothing was done to comply with the letters of demand.

During the month of January, 1990, the defendant retained the services of D.C. Tavares & Finson Company Limited, Valuators, Appraisers, Auctioneers, Real Estate Agents, Consultants, to carry out a valuation of the mortgaged property and to furnish a report. The report is dated the 1st February, 1990, and in summary, the market value of the property was placed at $550,000.00 and the forced sale value at $440,000.00. It has not been contended that the valuators were incompetent or negligent in carrying out the valuation. It seems to me that the mortgagee acted with prudence in obtaining the valuation.

On the 1st March, 1990, the defendant gave instructions to D.C. Tavares & Finson Company Limited to arrange for a sale of the property by public auction. The sale was advertised by notices in the issues of "The Daily Gleaner" newspaper on the 20th & 28th March, 4th & 5th April, 1990 for 11:00 a.m. on the 5th April, 1990. The notices were prominently displayed and stated, inter alia, the area of the land and a description of the building. There was no complaint about the notices. The sale was conducted by public auction at the auction room of the auctioneers. The bidding as reflected on the bidding sheet, seems to have been quite lively. The property was sold to E. Martin for $511,000.00, a price in excess of the estimated forced sale valuation price, but below the estimated market value price.

The property sold consisted of a two storey detached residence with basement, in the course of construction, on land of approximately 37,000 sq. ft. The plaintiff's evidence is that at the time of the sale, the following work remained to be done to complete the building:-

> 60% - 70% tiling to be done downstairs.
> Windows and doors to be installed.
> The building to be painted (one coat had been done on the inside.)
> Bathrooms and kitchen fixtures to be installed, light fixtures to be installed

(the house had been wired for electricity)
The upper floor to be carpeted.

The plaintiff says he learnt of the sale of his property through a telephone call from a friend of his. As a result, he arrived in the island on or about the 11th April, 1990 and sought legal advice. He had a valuation done on the property by one Cleve L. Smith, a Real Estate Dealer and Appraiser. The valuation report is dated April 25, 1990. The plaintiff testifies that at the time he instructed Mr. Smith to carry out the valuation, he told him the things that he intended to do towards completing the building, but that the valuation should be done "as it was then". It does not appear that Mr. Smith carried out those instructions, because his valuation is based on the completed building. His market value is this:-

> "Based on current market evidence of comparable facilities and on satisfactory completion of the building, I am of the opinion that a fair market value of the freehold interest is $1,400,000.00, land with improvements being $200,000.00 of the value and advise accordingly."

His forced sale value reads as follows:-

> "On completion, if the subject property is placed on the open market to recover investment funds, it is likely to be sold for a price in the region of $1,250,000 - $1,300,000."

He estimated that the building was about 80 - 85% completed, and he listed the remaining work to be done in much the same way as the plaintiff did, giving the estimated costs to complete as $250,000.00. So it seems that Mr. Smith's estimate of the value of the property in its incomplete state would be at least $1,000.000.00. That is almost twice as much as the property was sold for.

A further valuation of the property was done by Mr. Smith in August, 1992. The building was still incomplete and his valuation, based on the then present condition was: Market value:- $1,850,000 - $2,000,000; forced sale value:- $1,700,000.00 - $1,800,000.00 and Replacement value:- $3,000,000.00.

It is difficult to reconcile the differences in value arrived at by the valuators. The valuation report prepared at the request of the mortgagee is dated 1st February, 1990, and the report prepared at the request of the mortgagor is dated April 25, 1990. It cannot be that both can be relied on. Both reports were admitted in evidence with the consent of the parties, and so the Court did not have the opportunity of seeing and hearing the witnesses to assess their competence and veracity. However, having regard to the bidding, I am prepared to hold that the market value of the property stated in the report prepared at the request of the mortgagee was done in good faith and is more reliable than the amount stated in the other report which is stated to be prepared "for mortgage purposes."

In my judgment, the plaintiff has not established that the defendant failed in his duty to take reasonable precautions in the exercise of his power of sale. I am satisfied that on a balance of probabilities, the property was sold for a price quite close to the estimated market value, a price which was not unreasonable or under-valued in the circumstances. I am also satisfied that the defendant did not act in bad faith nor was it negligent or reckless in the exercise of its power of sale. The power of sale was exercised with due consideration for the interest of the mortgagor.

The plaintiff's claims fail and accordingly, there will be judgment for the defendant with costs to be taxed or agreed.