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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO C/L 1997/W424

BETWEEN	WARRINGTON WILLIAMS	1 ST PLAINTIFF
AND	BUSINESS SERVICES HOLDINGS	
	LIMITED	2 ND PLAINTIFF
AND	DOUGLAS ANTHONY SINCLAIR	DEFENDANT

Mr. Allan Wood and Mrs Ridsen-Foster instructed by Livingston Alexander and Levy for the Plaintiffs.

Mr. Raymond Clough instructed by Clough Long and Co for the Defendant.

IN CHAMBERS

Summons to strike out Defence and Counter Claim

Heard : March 2, June 11, 1998

HARRISON J

Let me first of all apologise for the delay in handing down this judgment as I was engaged in the criminal jurisdiction for some weeks since judgment was reserved.

The Application

The application before me is to strike out the Defence and Counterclaim to the Plaintiffs' Statement of Claim in which they claim:

1. Rescission of an agreement in writing dated 3rd June 1997 and made between the Plaintiffs and Defendant for the sale by the Defendant of the land known as 1 Norbury Drive, Kingston comprised in Certificate of Title registered at Volume 990 Folio 124 of the Register book of Titles for the sum of \$9 million.

2. Repayment of the sum of \$1,360,062, 50 paid by the Plaintiffs to the Defendant together with interest thereon at the rate of thirty (30) per centum per annum or such other rate as may be deemed just, from the 7th October, 1997 until payment...”

The Plaintiffs are seeking the following orders:

1. An order striking out the Defence and Counterclaim as failing to disclose any arguable Defence or cause of action.
2. An order entering judgment in favour of the Plaintiffs for the sum of One Million Four Hundred and Eighty-Seven Thousand Seven Hundred and Twelve Dollars Fifty Cents (\$1,360,062.50)
3. Alternatively, that the defendant do provide security for the aforesaid sum of \$1,360,062.50 by placing such sum on deposit in the joint names of the Attorneys at Law for the Plaintiffs and the Defendant at Bank of Nova Scotia Jamaica Limited or at such other commercial bank as agreed.
.....”

Affidavit Evidence

The land in dispute is encumbered with registered mortgages in favour of

National Commercial Bank (Jamaica) Ltd who are mortgagees for the first three mortgages and Nissan Latin America, S.A Panama the fourth mortgagee.

The Plaintiff Warrington Williams who is agent for the second named plaintiff has deposed on behalf of himself and the second plaintiff in an affidavit sworn to on the 3rd February 1998. His affidavit evidence reveals that the parties had executed a sale agreement in respect of 1 Norbury Drive and a Transfer was drafted and sent to the Plaintiffs' Attorneys-at-Law for execution. At their request certain amendments were made and it was thereafter executed by the first plaintiff on behalf of the second plaintiff.

A further amended instrument of Transfer was forwarded to the Plaintiffs which according to Mr. Williams, purported to represent that the plaintiffs had made an agreement with National Commercial Bank. The Plaintiffs were requested to execute same, but by letter dated 9th September, 1997 it was returned by their Attorneys- at - Law with written amendments advising that the Plaintiffs would only be prepared to execute the transfer if National Commercial Bank provided the Plaintiffs with an indemnity against any claims made by the fourth mortgagee.

The affidavit evidence of Mr. Williams further disclosed that the defendant's Attorneys advised by letter dated September 10, 1997 that they did not see any need for an indemnity hence the first plaintiff responded that he was not prepared to advise the second plaintiff to sign the transfer without the indemnity.

On September 12, 1997 the plaintiffs' Attorneys served a notice to complete the

agreement for sale on the defendant and on the 15th September 1997 Messrs. Clough Long & Co, Attorneys-at-Law for the Defendant, advised that the notice was premature and that the Defendant had offered to complete. The first plaintiff informed Clough Long & Co that since there was no agreement between the plaintiffs and National Commercial Bank, the plaintiffs had a difficulty taking a transfer from National Commercial Bank without an indemnity. The Plaintiffs thereafter required the Defendant to obtain and supply to them discharge of the mortgages endorsed on the title and to comply with the notice to complete. They also informed the Defendant's Attorneys-at-Law that if National Commercial Bank was selling the premises pursuant to a power of sale in its mortgage, the plaintiffs would consider contracting directly with NCB. The parties could not agree so a notice terminating the agreement for sale was served on the defendant. The first plaintiff deposed as follows:

“12. The Defendant failed to complete the sale in compliance with the plaintiffs' notice to complete and by letter dated 7th October, 1997, Messrs. Livingston, Alexander and Levy issued to Messrs. Clough Long & Co a notice to terminate the agreement for sale due to the Defendant's non-compliance with the notice to complete and further demanded the refund of the sum which had been paid to the Defendant under the agreement....

13. Up to the date of the termination of the agreement for sale made between the plaintiffs and the Defendant, no agreement had been entered into between NCB and the

Plaintiffs or either of them for the sale of the land. In the circumstances, the plaintiffs maintain that they have acted reasonably in refusing to execute an instrument of transfer with NCB and the Plaintiffs are now entitled to the refund of all sums paid to the Defendant with interest thereon.

15(sic) That there is no factual dispute between the Plaintiffs and the Defendant in this action and the question which arises is whether in the circumstances, the Plaintiffs acted reasonably in refusing to execute the instrument of transfer which falsely represented that there was an agreement between the Plaintiffs and NCB as mortgagee. The Plaintiffs contend that as such a transfer would have had the effect and must have intended to have the effect of defeating the interest of the fourth mortgagee, Nissan, Latin America, S.A, the Purchasers acted reasonably and properly in refusing to execute the said transfer, particularly as the Plaintiffs' request for an indemnity from any claim by the fourth mortgagee had been rejected. In the circumstances the Plaintiffs pray for relief as sought in its summons for judgment."

The defendant's response to the above affidavit evidence is contained in an affidavit sworn to on the 26th day of February, 1998. The evidence revealed that he is the owner of registered land situate at 1 Norbury Drive, St. Andrew which is

encumbered with mortgages. He has deposed that the first mortgagee, National Commercial Bank, had advised that the Bank would exercise its powers of sale in respect of the mortgaged premises. There were negotiations with the first mortgagee and it was decided that he would sell the property. His property at Riva Ridge which was also mortgaged to The National Commercial Bank was also put up for sale.

Problems arose surrounding the discharge of the mortgages and he deposed as follows:

“7. That because of the delay in obtaining a discharge of mortgage and because it was financially in my best interest in the arrangement of my affairs, inter alia, in the payment of Transfer Tax, it was decided that the transfer should be effected by the mortgagees under its power of sale in the mortgage.”

The defendant further stated that the premises at Riva Ridge was sold and transferred to purchasers by virtue of a transfer executed by National Commercial Bank and himself. It was intended to follow the same procedure in the sale between the Plaintiffs in the instant case and himself so, they were requested to execute the Transfer. According to him, the plaintiffs agreed to this proposition and they returned the Transfer to his Attorneys at Law with certain amendments. The plaintiffs had also requested an indemnity from National Commercial Bank but his Attorneys advised that they did not see the need for it.

After further correspondence between the Attorneys at Law for the respective parties, the defendant maintained that the plaintiffs terminated the sale agreement on the basis that he had failed to complete after a notice was served on him. He further contended that the plaintiffs' only right was to ensure that it received title which a transfer from NCB would have ensured. He has also stated that the plaintiffs have acted unreasonably in breach of the Agreement for Sale in refusing to execute the transfer with National Commercial Bank and has maintained that the Plaintiffs are not entitled to the refund of all sums paid to him with interest thereon. Finally, he deposed as follows:

“22. ...There is a factual dispute between the Plaintiffs and the Defendant in this action and the question which arises is whether in the circumstances, the plaintiffs acted unreasonably in refusing to execute the instrument of transfer that would have given effect to the Agreement of Sale between the Plaintiffs and transfer title into its name. The value of land has fallen in Jamaica, the Plaintiff seeks an excuse to withdraw from the Agreement.

23. That the Plaintiffs, contention that as such a transfer would have had the effect and must have intended to have the effect of defeating the interest of the fourth mortgagee, Nissan Latin America, S.A is ridiculous as the mortgage of the first mortgagee gave it absolute unfettered right to dispose of the mortgaged premises....”

Submissions

Mr. Wood argued that when the Sale Agreement was executed, it was signed by the defendant in his personal capacity and not on behalf of the first mortgagee, National Commercial Bank,(hereinafter referred to as NCB). There was no contract or agreement between the Plaintiffs and NCB but it was obvious he said, that subsequently, a decision was taken by the defendant to have NCB effect the transfer. According to him, the introduction of NCB into the transfer on the basis that there was a contract between them and the Plaintiffs as purchasers was a false and inaccurate statement.

Mr. Wood further argued that although it was quite clear that a proper exercise of a mortgagee's power of sale under section 105 of the Registration of Titles Act would have the effect of passing title free from subsequent mortgages, it was also clear that the participation by a transferee in a transfer by a mortgagee which was not proper and bona fide could leave his title open to attack pursuant to section 71 of the Registration of Titles Act.

He submitted that it was obvious that NCB was introduced to defeat the interest of the fourth mortgagee. He said that by unilaterally introducing NCB and to represent that there was a contract between the first mortgagee and the Plaintiffs would not be reasonable for the Plaintiffs to participate in.

He further submitted that since the fourth mortgagee had not given its consent for the Defendant to sell the property there would have been a breach of covenant not to sell until his indebtedness to that mortgagee was satisfied.

Mr. Wood finally submitted that there was basis therefore for the application of summary judgment pursuant to sections 79 and 80 of the The Judicature (Civil Procedure Code) Law. He sought reliance upon the cases of *Gregg v McCulloch* 12 JLR 749 and *Tomlinson v Almac Developments Ltd.* 14 JLR 104.

Mr. Clough responded and referred to sections 105 and 106 respectively of the Registration of Titles Act. He argued that there was a factual dispute between the Plaintiffs and Defendant and the question which arose was whether in the circumstances, they acted reasonably in refusing to execute the instrument of transfer that would give effect to the Agreement of Sale between the plaintiffs and transfer title into its name. He said that the value of land had fallen in Jamaica and the Plaintiffs have sought an excuse to withdraw from the Agreement whereas the Defendant would have suffered damages, that is the difference between the contract price and the current market price.

He further argued that the Plaintiff's contention that such a transfer would have had the effect and must have been intended to have the effect of defeating the interest of the fourth mortgagee was ridiculous as the first mortgagee has an absolute and unfettered right to dispose of the mortgaged premises and that The Bank owed no obligation to subsequent mortgagees.

Mr. Clough submitted that the Plaintiffs had acted unreasonably and improperly in refusing to execute the said transfer, particularly as the request for an indemnity from any claim by the fourth mortgagee did not exist in law. He further submitted that if the Plaintiffs were in doubt as to NCB's right to "come into" the agreement, they could

have sought the Court's ruling. Furthermore, he said, "It is very clear at the time when the Transfer, the superior Transfer, was tendered, there was no breach of the Agreement of Sale.

In relation to the application for summary judgment, Mr. Clough submitted that the Plaintiffs would have to prove that the Defendant has no defence based on the merits of the case and that sections 79 and 80 of the Judicature (Civil Procedure Code) Law were not available if fraud is alleged.

Finally, he submitted that the reliefs sought in the Summons for Judgment should be refused.

Appraisal of the Law and the facts

In my view, sections 105 and 106 of the Registration of Titles Act call for consideration. Section 105 provides inter alia:

"105 - A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged; and in case default be made in payment of the principal sum, interest or annuity secured, or any part thereof respectively.....the mortgagee.....may give to the mortgagor....notice in writing to pay the money owing on such mortgage....."

Section 106 states as follows:

" 106 - If such default in payment, or in performance or observance of

covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and re-sell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale, and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.”

Section 106 of the Registration of Titles Act makes it very clear therefore, that once the power of sale has arisen and is exercised by the mortgagee, he can give a good title to a purchaser free from the equity of redemption and any person who is injured from an unauthorized, improper or irregular exercise of the power has a remedy in damages against the person exercising it. A purchaser therefore takes the estate free from all interests and rights to which the mortgage has priority. Where the purchaser takes title from a first mortgagee he is not affected by later mortgages.

There is also provision in section 106 of the Registration of Titles Act for the

mortgagee to enter into any contract for the sale of the mortgaged land and to make and sign such transfers necessary for effectuating such sales. The section reads *inter alia*:

“106 -the mortgagee....may sell the land.....and may buy in or vary or rescind any contract of sale, and re-sell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating and such sale and no purchaser shall be bound to see or inquireinto the propriety or regularity of any such sale...”(emphasis supplied)

Although there was no contract or agreement between the Plaintiffs and NCB it is my view, that section 106 (supra) empowers the first mortgagee to pass title by virtue of a Transfer. There are allegations in the Defence that NCB had agreed to transfer the premises to the Plaintiffs. The Plaintiffs joined issue with those allegations in their Reply to the Defence and Counterclaim. Here is what the Defence alleges:

“5. The Defendant denies paragraph 8 of the Statement of Claim and states that in pursuance of the agreement for sale and the condition to pass title to the plaintiffs free from encumbrances save and except the restrictive covenants and easements endorsed on the title, the first mortgage (sic) having given notice to the Defendant agreed to transfer the premises to the Plaintiffs.”

The Plaintiffs in their Reply to the Defence state *inter alia*:

“2. Further and in answer to paragraph 5 of the Defence and Counterclaim, the Plaintiffs state that under the agreement for sale, it was the obligation of the Defendant to duly obtain the discharge of the mortgages which were registered upon the title for the land, including the

fourth mortgage in favour of Nissan Latin America SA. Rather than presenting a discharge of the fourth mortgage from the fourth mortgagee.....the Defendant sought to circumvent that mortgage by having the Plaintiffs execute an instrument of transfer with National Commercial Bank (Jamaica) Limited (Hereinafter called "NCB"), the prior mortgagee, upon the basis that the Plaintiffs had contracted with NCB when, in actual fact, there was no such contract in existence. In the circumstances, the Plaintiffs maintain that they acted reasonably and properly in refusing to execute such a transfer."

It is further my view that a breach of covenant between the fourth mortgagee and the defendant not to sell the mortgaged property until the indebtedness has been made good, cannot arise where the first mortgagee has exercised its powers of sale.

There is no contest as to the first mortgagee's right in exercising the power of sale because from the nature of the amendments to the Transfer, the plaintiffs seemed to have had no problem with that mortgagee joining in the Transfer provided it gave the required indemnity.

It is also my considered view, that there is no basis in law for the contention that it was a false and inaccurate statement in the Transfer that there was a contract between The Bank and the Plaintiffs as purchasers. Indeed, the introductory paragraph of the draft Transfer refers to The Bank as the "Transferor", the Defendant as the "Owner" of the mortgaged property, and the second Plaintiff as the "Transferee." The document was amended by the Plaintiffs' Attorney-at-Law and it speaks for itself thereafter.

Again, section 106 of the Registration of Titles Act gives the mortgagee the right to make and sign such a Transfer necessary for effectuating the sale between the

Plaintiffs and the Defendant. I am at a loss therefore, when Mr. Wood submitted that NCB was introduced to defeat the interest of the fourth mortgagee and that in the absence of a genuine contract between the Plaintiffs and NCB it was reasonable and lawful for the Plaintiffs not to participate in such a transaction. When one looks at the letter of the 9th September, 1997, it will be seen that it was the Plaintiffs' Attorneys at Law who returned the draft Transfer on which they penned certain amendments for consideration. There was one caveat however, and that was they would advise the second plaintiff to proceed with the transfer provided The Bank agreed to indemnify them against all losses in the event that the fourth mortgagee should "at any time reverse the Transfer and/or make any claim against our clients."

Mr. Clough did refer to the case of *In re Thompson and Holt* (1890) 44 Ch. D 492 and I find it most useful. Let me set out the facts:

A mortgage of leaseholds to the trustees of a building society, in the ordinary form of a building society mortgage, contained a covenant by the mortgagor to pay as required by the rules of the society and that in case of default the power of sale should apply. On the same day the mortgagor executed a second mortgage of the property to his bankers. The mortgagor subsequently became bankrupt. The first mortgagees without any formal notice to the second mortgagees or the mortgagor's trustee in bankruptcy, though with their knowledge and consent, put up the property for sale by auction subject to conditions of sale. The property not being sold at the auction, the first mortgagee sold the property by private treaty. Upon the purchaser's requisition the mortgagor's trustee in bankruptcy consented to join in the conveyance; but subsequently the purchaser raised the objection that the first mortgagees could not make title at all because three months notice was required to be given under the provisions of the Conveyancing Act. The purchaser filed a summons but the vendors had, after being served with the summons, offered to procure the concurrence of the second mortgagees in the conveyance in addition

to that of the mortgagor's trustee in bankruptcy and the second mortgagees had expressed their willingness to concur. It was held inter alia, that the conveyance by the first mortgagees would not be the less a conveyance by them under their power of sale, according to the contract, because the second mortgagees, either by the same or a separate deed, concurred in or confirmed the conveyance by passing such interest as they might have.

The judgment of Kekewich J is most instructive. At page 499- 500 he states inter alia:

".....Mr. Terrell however, insists that, though with the concurrence of these parties he might possibly get a good title, it would not be the title for which he has contracted for, and no other. What he has contracted for is a title under the mortgage by a conveyance from the first mortgagees only, with no other parties to that conveyance.....But a more important question to consider is whether the purchaser will not, as regards title, really get something else than what he has contracted to take. Mr. Terrell says that, in the events which have happened, and under the circumstances, what he will really get is a conveyance by the mortgagees and the owners of the equity of redemption, and that that is not a conveyance by the mortgagees under their power of sale. To my mind that proceeds on an incorrect notion of the function of a power of sale in a mortgage deed.

These mortgagees will exercise their power of sale; they will exercise their power as mortgagees, and they will enter into such covenants as are usually entered into by mortgagees. It will not make any substantial difference that other parties who have some interest in the property are also made parties and confirm the conveyance. If they convey, their conveyance will pass such interest as they have. If they confirm by an independent document, they will confirm what has been already done. In either event the sale will be made by the first mortgagees under their power of sale. It seems to me, therefore, that the objection that a different title is made falls to the ground. It is the same title, although with some modifications in the words of the conveyance..."

Conclusion

I am of the view that there are allegations in the pleadings in the instant case which raise serious questions of fact to be resolved at the trial hence the parties should have their day in court. An important question to consider at the trial is whether the purchasers will not, as regards title, really get something else than what they had contracted to take.

I do not believe either that the defendant should be shut out of court by being put on onerous terms to pay money into court as a condition to provide security for the sum of \$1,360,062.50.

The summons is therefore dismissed with costs to the defendant to be taxed if not agreed.