[2018] JMCC COMM 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00058

BETWEEN	**MILLARD DUNBAR**	**CLAIMANT**
AND	**SAINT CATHERINE CO-OPERATIVE CREDIT UNION LIMITED**	**DEFENDANT**

Mr. Carlton Williams of Williams Mckoy & Palmer for Claimant

Mr. Denis Richards, Mrs Shereen Richards of Richards & Richards for the Defendant

HEARD : 23rd and 31st July 2018

IN OPEN COURT

Application for payment of money held as security - Injunction discharged - Whether undertaking as to damages implied – Whether damage or loss is to be set off against money held as security – Foreclosure – whether mortgagor entitled to refund of money held as security.

COR : BATTS, J

[1] In this matter, having heard the evidence and considered the written and oral submissions, I reflected on the words of Shylock as he addressed the court in Shakespeare's famous work "The Merchant of Venice":

> *"The pound of flesh which I demand of him is clearly bought, 'tis mine and I will have it. If you deny me, fie upon your law! There is no force in the decrees of Venice. I stand for judgment: answer, shall I have it ?"*

[2] In this case it is, not a pound of flesh but, $4,735,173.03 with interest which the Defendant demands. The circumstances are that the Claimant paid that amount into a joint interest bearing account (in the names of the attorneys representing the parties). The payment in was a condition of an order, for an interlocutory injunction, restraining the Defendant (mortgagee) until trial from selling the mortgaged property. At issue in the litigation was the question whether foreclosure, undertaken by the mortgagee, was lawful. The trial judge decided that it was. In consequence, judgment was entered for the Defendant (mortgagee) against the Claimant (mortgagor), see judgment of Laing J in this suit delivered on the 18th January 2018 **[2018] JMCC Comm 7**.

[3] The Defendant is now the registered proprietor of the property in question. It has commissioned valuations which indicate a market value of approximately $15,000,000, for the property, as at the date of foreclosure. The debt, for which foreclosure was effected, is $4,735,173.03. The Defendant, having foreclosed, is at liberty to sell the property and retain the entire net proceeds of sale. The Defendant is entitled to the benefit of any appreciation in value as well as any rental or profits earned since the date of foreclosure. This includes, of course, the period covered by the injunctive order.

[4] The Defendant nevertheless , by Notice of Application filed on the 22nd March 2018, urges this court to Order.

> *" 1. That the Applicant is entitled to the sum of $4,736,173.03 and interest thereon which is held in the Fixed Deposit Account # 100-219-6387 at the King Street Branch of CIBC First Caribbean International Bank held in the name Williams McKoy and Palmer/Richards & Richards.*
>
> *2. That the Applicant is entitled to recover such sums for damages suffered as a consequence of the interim Order granted to the Respondent/Claimant by this Honourable Court on March 14 2016*
>
> *3. Costs of the application be costs to the Applicant."*

[5] Mr. Williams, for the Claimant, at the commencement argued a preliminary point. He submitted that there was no basis for the application and that it should be

struck out. This is because, when the injunction was granted, no undertaking as to damages had been ordered or requested by the court. The sum paid in, he submitted, was security for the debt owed. The intention being that, had the foreclosure been set aside, the Defendant would receive payment of the debt owed. If foreclosure was not set aside the money would be returned to the Claimant.

[6] In response to the preliminary point Mr. Richards stated that an undertaking as to damages was contained in the Notice of Application for an injunction filed by the Claimant. It was in any event to be implied in the injunctive order. Furthermore, he submitted, the sum paid was held "until *further order of the Court*." Therefore, he submitted, it was contemplated that payment out would take into account any loss or damage suffered by the Defendant in consequence of the injunction.

[7] I dismissed the point in limine although I agreed with Mr Williams that there was no relevant or applicable undertaking as to damages. As it so happened I was the judge who made the injunctive order on the 14th March 2016. There was no undertaking as to damages requested or given. There was however an order made that the amount owed should, as a condition of the grant of the injunction, be paid into a jointly held interest bearing account. In order to prevent the property being sold before the trial the Claimant met the condition imposed .The entire debt was therefore paid into an account jointly held by the respective attorneys "*to abide the outcome of this matter or further order*". It seems to me, and I so ruled, that before the sum can be ordered paid out it is a material consideration whether the Defendant has sustained loss or damage. I indicated to Mr. Richards that this application ought properly to have been made to the trial judge. Counsel indicated that the matter was mooted, when judgment was delivered, however Laing J suggested that a formal application be filed. This was done and the matter is now before me. My brother is, I understand, unavailable to hear it as he is on vacation. Having given my ruling on the preliminary point I commenced the hearing, to determine what was to become of the sums held in the joint account.

[8] Mr. Richards indicated that he had an objection to the expert report filed by the Claimant. He submitted that the opinion of Mr. Alton Morgan, attorney at law, was irrelevant and could not assist the court on the issue to be determined. Mr. Williams, in reply, urged that the report was relevant. It was not only about the law but the practice as it relates to foreclosure and what obtains in relation to that. I decided to allow the evidence to be given insofar as it provides relevant material about the practice in the industry.

[9] The Defendant's first witness was Ms. Patricia Williams-Burke. Her witness statement dated the 20th May 2018 stood as her evidence in chief. She was allowed to amplify her evidence as contained in paragraphs 9 and 10. She deponed that for 2017 the average rate of interest was 14%. She describes the Defendant's rate of interest as the market rate. She asserted that competition among financial institutions determined the interest rate charged. Her witness statement said that she is credit manager of the Defendant Company. She gave a brief history of this litigation. It was her evidence that as a consequence of the interim injunction the Defendant was:

> *(5)..... "obliged to cancel an ongoing 90 day transaction for sale of the relevant property for $15 million. The said 90 day transaction started on February 15, 2016 and was scheduled to end on May 15, 2016."*

The witness further stated that, after subtracting taxes, sales commission and legal fees, the Defendant would have enjoyed net proceeds of sale of $13,050,000.00. Those proceeds would have been applied to the business of lending in which the Defendant is engaged. They would be loaned out at a rate of 20%. It means the Defendant would have earned $2,620,000 per annum or $7,150.69 per day. Up to the date of Justice Laing's judgment, she states, the Defendant would have lost $4,383,369.86 in consequence of the interim injunction.

[10] When cross-examined the witness acknowledged that average interest rate meant that sometimes there were higher and lower rates of interest. However in

the course of a year she says it did not change much .The Defendant's "bottom" rate was 9.5% but that was where the loan was secured by the borrower's own savings. The greater the risk the higher the rate of interest. The witness indicated that the Defendant had a valuation of the subject property for $15 million. She was also aware that a valuation done by Venetia Realty put it at $42 million. There was no re-examination of this witness. That was the case for the Defendant.

[11] The Claimant then gave evidence .His witness statement dated the 19th day of June 2018 stood as his evidence in chief. He stated that in 2009 he borrowed $3 million from the Defendant. The loan was secured by a mortgage of his property. In 2010 he experienced financial difficulties as a result of which the property was, he says, wrongfully foreclosed. The amount outstanding at the time was $4,735,173.03. He too gave a brief history of the litigation .He says, at paragraph 8 :

> *"The defendant by virtue of foreclosure has benefitted and has been enriched to the extent that the value of the premises far exceeds the outstanding mortgage. Valuation (sic) relied on by the defendant put the value of the premises at $15,000,000.00 approximately 4 times the outstanding sum. Further valuation of Venecia Realty Company Limited a well known and reputable valuation done in August 2013 placed a value of $42,000,000.00 on the premises."*

[12] When cross examined the Claimant admitted that he had received a notice to quit. He had at the time been advised that the Defendant had become the registered proprietor but had been shown no documents to that effect. The cross-examiner attempted to get the witness to admit that an owner is entitled to benefit from his property but was unsuccessful.

[13] The Claimant's next witness was Mr. Alton Morgan attorney at law. His report was admitted into evidence as Exhibit 1. That document states the question to the expert as:

> *"where the Mortgagor has defaulted and the security is taken by the mortgagee upon foreclosure and the sale is injuncted what is the post foreclosure entitlement of the Mortgagee which is a credit union."*

His conclusion is succinctly stated.

> *"The suggestion that the Defendant incurred a loss by not being able to loan out money realised as profit on the sale of the foreclosed land is not supported by the regulatory restraints that would have been imposed upon its use of that money for lending."*

[14] Having read the report I confess my earlier ruling was erroneous. The expert set out to answer a legal question on Jamaican law. It ought not to have been admitted and I shall for purposes of this judgment disregard its contents. Furthermore the cross examiner successfully demonstrated that the premise of the opinion was incorrect. That is, and as Mr Morgan admitted, the Defendant is not regulated by the Bank Services (Deposit Taking Institutions) (Capital Adequacy) Regulations 2013. The Defendant is not a licencee under the Financial Institutions Act. The Defendant is a Cooperative Society. The expert did however give the following evidence, when cross examined,

> *"Q: What is effect of foreclosure*
>
> *A: The fee simple absolute right to absolute title is subsumed to mortgagee. In a mortgage owner assigns right to lender under certain conditions. One condition is that mortgage debt is repaid. If not repaid mortgagee can take property in satisfaction of debt. That is foreclosure.*
>
> *Q: When it takes property what happens to mortgage*
>
> *A: It is extinguished*
>
> *Q: Being extinguished is it that sum no longer owed*
>
> *A: Correct, owner of property and owner of debt became one and the same."*

His evidence was otherwise unremarkable.

[15] The Claimant closed his case and the attorneys made oral submissions. The Defendant also filed written submissions dated 19th July 2018. I shall not repeat the submissions but the parties are to rest assured that I considered them all.

[16] It seems to me that the sum paid into court along with the interest earned thereon is to be returned to the Claimant. I am told there is an appeal pending against the judgment of Laing J .However there is no injunction in place pending that appeal. There is no warrant therefore for continuing the condition attached to an injunction which has been discharged. This court has discretion in relation to any damage, loss or costs incurred by the Defendant in relation to this matter. That is to say the court can set off or apply the whole, or part, of the amount paid in towards such damage or loss. Having considered the evidence I am satisfied no damage or loss, consequent on the injunction or at all, has been established.

[17] To the contrary the evidence is indicative of a substantial profit or gain by the Defendant. In this regard see the observations of Laing J (at paragraph 72 of his judgment). The debt outstanding was $4,735,173.03. The evidence, corroborated by the offer to buy obtained in 2016 by the Defendant, is that the property was worth at least $15 million in 2016. More than three times the debt. The property has been foreclosed and the Claimant's interest in it extinguished, see section 120 of the Registration of Titles Act .The Defendant will be entitled to retain the entire net proceeds of sale.

[18] The Defendant contends that, when the prospective sale for $15 million had to be aborted in consequence of the injunction, the opportunity to lend the net proceeds of sale was lost. That may be so. However there is no evidence that prospective borrowers were turned away because the Defendant did not have $15 million (or less) to lend. Furthermore, the sale having been aborted, they retained the property and any rent or outgoings earned, as well as any capital appreciation. In this regard judicial note can be taken that property values in Jamaica usually move upward. The Defendant has not demonstrated that there has been a change in market conditions resulting in a fall in value of the

premises or that for some other reason the property cannot be sold. The evidence of the lost sale in 2016 suggests otherwise. On the evidence the Defendant lost nothing. The Defendant now owns the property may now proceed to sell it.

[19] In this area of mortgages courts of equity have always been mindful to protect the innocent. That is why, for example, the equity of redemption exists. It is a right to pay up and end the mortgage at any time, whether the mortgagor wishes to or not. In the case at bar there has been foreclosure, this brings an end to the possibility of redemption, see section 120 of the Registration of Titles Act. The mortgagee has acquired property worth more than three times the amount of the loan secured. To this, as a matter of law, they are entitled. It is a relevant fact, when considering the ultimate disposition of the sum paid as a condition of the grant of an injunction, that the mortgagee is unlikely to be out of pocket and will in all probability gain. The remedy of the injunction also has its origin in the court of equity. The condition imposed served to balance the competing interests. It gave the Defendant the security of knowing that the challenge in court was not merely a ruse to delay or escape payment of a lawful debt. The Claimant demonstrated his ability to honour his obligation by providing security in the amount of the total amount due and owing. He has now lost his cause. The Defendant is now at liberty to sell the property and retain the entire proceeds of sale. In all the circumstances of this case a court of equity is entitled, and indeed duty bound, to release the security to the Claimant.

[20] For the reasons stated the Defendant's application is dismissed. I direct that the amount held as security pursuant to the Order of Batts J dated the 14th March 2016, and all interest earned thereon, be released forthwith and paid out, no later than the 3rd August 2018 , to the Claimant or his attorneys at law. The costs of the application will go to the Claimant to be taxed if not agreed.,

[21] I commenced this judgment with a quotation from one of the Bard's most famous works and, perhaps, it is right that I similarly end it. This time with the words of Portia, as she addressed the pursuer in court,:

> *"The quality of mercy is not strained. It droppeth as the gentle rain from heaven, upon the place beneath: it is twice blest, it blesseth him that gives and him that takes."*

I am comforted by the thought that justice has been done in accordance with the law, as it was also in the "Merchant of Venice", although the pursuer showed no mercy.

David Batts
Puisne Judge