



[2018] JMCC Comm 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL

CLAIM NO. 2016CD00253

| | | |
|----------------|--|-------------------------|
| BETWEEN | ST CATHERINE CO-OPERATIVE CREDIT UNION LIMITED | CLAIMANT |
| AND | HERMAN RHULE | DEFENDANT |
| AND | The Occupiers of ALL THAT parcel of land comprised in the Certificate of Title formerly registered at Volume 1393 Folio 224, but now registered at Volume 1500 Folio 726 of the | SECOND DEFENDANT |

IN CHAMBERS

Mr Dennis Richards and Mrs Shereen Richards instructed by Richards & Richards, Attorneys-at-Law for the Claimant

Mr Courtney Williams and Mr Jonathan Morgan instructed by DunnCox, Attorneys-at-Law and for the Defendant

9th and 19th March 2018

**Civil Procedure- Application for stay of proceedings- Principles to be applied
Mortgage – Whether foreclosure proceedings can be reopened – Whether
difference between value of foreclosed property and mortgage debt and/or
special value of land to mortgagor sufficient factors**

LAING J

- [1] The Defendant granted the Claimant a mortgage over property being a parcel of land part of Garden Hill in the parish of St Catherine, currently registered at Volume 1500 Folio 726 (“the Property”) to secure a loan in the sum of \$4,000,000.00. There was a default on the loan and on 6th May 2015 the Claimant applied for an order for foreclosure which was granted by the Registrar of Titles on 3rd September 2015 (the “Foreclosure Order”). On the 11th July 2016 the Claimant was entered on the title of the Property as the registered proprietor. The Defendant has refused to comply with a notice to quit issued on behalf of the Claimant dated 14th July 2016 and on 22nd August 2016 the Claimant filed the fixed date claim form herein against the Defendant seeking and order of possession in respect of the Property.
- [2] The parties were encouraged to settle the matter and were given a number of opportunities to do so, including a referral to mediation, with no positive result. Consequently, the trial of the fixed date claim form was fixed for hearing on 9th March 2018 at 10 am. On the morning of the 9th March 2018 at 9.16 am, the Defendant filed a notice of application seeking to have proceedings in the claim herein stayed until the determination of Claim No. 2018 CD 0141 – **Herman Rhule v Saint Catherine Co-operative Credit Union Limited** (the “Separate Claim”). In the Separate Claim, the Defendant in the instant claim, Mr Rhule, is seeking orders that the Foreclosure Order be reopened and that the Property be sold in lieu of foreclosure.
- [3] It was accepted by Counsel on both sides that the Court has an inherent jurisdiction to stay proceedings generally and as far as may be necessary for the purposes of justice pursuant to section 48(e) of the **Judicature (Supreme Court) Act** and under the Court’s general powers of management pursuant to Rule 26.1(2)(e) of the Civil Procedure Rules, 2002.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

The legal basis of the separate claim

- [4] It was submitted by Counsel for Mr Rhule that a judge has judicial discretion to reopen a foreclosure order when the sums outstanding to the mortgagee is significantly less than the property value and where the property had a special value to the Mortgagor. Counsel relied on the following extract from **Cheshire's Modern Law of Real Property**, eleventh edition by E.H. Burn at page 659:

Revival of Equity of Redemption. But it must not be thought that a foreclosure absolute irrevocably passes the mortgagor's interest to the mortgagee, although it appears on the surface to do so, for there are certain circumstances in which the foreclosure may be re-opened and the equity of redemption revived. This re-opening takes place if the mortgagee, after obtaining an order absolute, proceeds to sue on the personal covenant; but in addition to this case the court has a discretion to re-open a foreclosure if such relief appears in the special circumstances of the case to be due to the mortgagor. Moreover, the foreclosure may be re-opened against one who has purchased the estate from the mortgagee. It is impossible to lay down a general rule as to when the relief will be granted, for everything turns upon the particular circumstances of each case.

In Campbell v. Holyland, JESSEL, M.R., enumerated those factors which might influence the court in reopening the foreclosure: the promptness of the mortgagor's application, his failure to redeem being due to an accident which prevented him from raising the money, the difference between the value of the property and the loan, and any special value which it had to the parties. (cited without footnotes)

- [5] Counsel also relied on an extract from **Commonwealth Caribbean Property Law** by Gilbert Kodilinye, at page 239 as follows:

Re-opening of a foreclosure

An order of foreclosure absolute may be 'reopened' in certain circumstances: for instance where the mortgagee, after obtaining an order absolute, proceeds to bring an action on the personal covenant; where a mishap at the last moment prevents the mortgagor from repaying the debt; where there is a marked difference between the value of the property and the amount of the debt; and where the property is of special value to the mortgagor (for example, where it is an old family estate). (cited without footnotes)

Sale in lieu of foreclosure

The court has a statutory power to order a sale instead of foreclosure at the request of any person interested (for example, a later mortgagee or the mortgagor). The power is most likely to be used where the value of

the property far exceeds the amount of the mortgage debt. In such a case, the court may order a judicial sale, the effect of which is that each mortgagee is paid what is due to him in order of priority and the balance is given to the mortgagor. (cited without footnotes)

[6] Counsel submitted that in the circumstances of the claim herein, a just result would be obtained by the Court ordering a sale in lieu of foreclosure.

[7] Counsel relied the judgment of **Campbell v Holyland** 1887 Chancery (which was referred to in the previously mentioned extract from **Megarry and Wade**) and in particular on the following observations of Jessel MR at page 173:

Then an element for consideration has always been the nature of the property as regards value. For instance, if an estate were worth £50,000, and had been foreclosed for a mortgage debt of £5000, the man who came to redeem that estate would have a longer time than where the estate was worth £5100, and he was foreclosed for £5000. But not only is there money value, but there may be other considerations. It may be an old family estate or a chattel, or picture, which possesses a special value for the mortgagor, but which possesses not the same value for other people; or it may be, as has happened in this instance, that the property, though a reversionary interest in the funds, is of special value to both the litigants: it may possess not merely a positive money value, but a peculiar value having regard to the nature of the title and other incidents, so that you cannot set an actual money value upon it. In fact, that is the real history of this contest, for the property does not appear to be of much more money value-though it is of some more-than the original amount of the mortgage. All this must be taken into consideration.

[8] An earlier valuation of the Property conducted by W&L Associates Limited dated 19th October 2010 had opined that an appraised value was \$26,000,000.00. However it is common ground that the land was recently valued at approximately \$33,915,000.00 and that was the figure used in the 6th May 2015 application for foreclosure. In the same application the principal balance as at 22nd October 2014 was listed at \$3,986,043.32 with an interest balance as at the same date of \$1,305,701.42. When these are added to the legal and administrative fees of \$217,834.89, the total is \$5,537,579.63. It is therefore beyond debate that there is a marked difference between the value of the Property and the mortgage debt.

It is in an attempt to secure a portion of this difference which has motivated the filing of the Separate Claim and the application for a stay herein.

- [9] The affidavit of the Defendant refers to his attachment to the Property and the special value it has for him. This evidence was only served on the other party on the morning of the hearing and was unchallenged but in any event it appeared that Mr Richards had formed the view that having regard to his submissions the application would not have turned on this fact.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [10] The submissions of Mr Richards were very clear and concise. He submitted that the authorities provided by Counsel for the Defendant were of no assistance because they were not made against the background of the Registration of Titles Act ("RTA") or any similar legislation. He noted that the authorities even referred to the concept of a foreclosure absolute which is not in keeping with how foreclosure orders are granted in this jurisdiction. Most importantly, he submitted, was the fact that those authorities were not decided in the context of the Torrens system of land registration provided for by the RTA, in particular, as it relates to concept of the indefeasibility of title as contained in section 105 of RTA. He further submitted that, notably, the extract from Dr Kodilinye's work did not provide any evidence using cases from any Caribbean jurisdiction, which referred to any legislation similar to the RTA that could support a conclusion by this Court that the principles he stated are applicable.

THE ANALYSIS

- [11] Foreclosure is one of the remedies available to a mortgagee. As a general rule mortgagees in Jamaica prefer to exercise the power of sale which as a remedy is quicker and more efficient. In any event, under the Torrens system of land registration adopted by Jamaica under the RTA, a mortgagee is statutorily required to first attempt to exercise the power of sale and must be unsuccessful in that attempt before seeking an order for foreclosure. Before making the order

for foreclosure the Registrar must also offer the land for sale. The process for obtaining an order for foreclosure is outlined in section 120 of the RTA as follows:

“120. Upon such application the Registrar may cause notice to be published once in each of three successive weeks, in at least one newspaper published in the city of Kingston, offering such land for private sale, and shall appoint a time (not less than one month from the date of the first of such advertisements) upon or after which the Registrar shall issue to such applicant an order for foreclosure, unless in the interval a sufficient amount has been obtained by the sale of such land to satisfy the principal and interest moneys secured, and all expenses occasioned by such sale and proceedings, and every such order for foreclosure under the hand of the Registrar when entered in the Register Book, shall have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage; and such mortgagee or his transferee shall, upon such entry being made, be deemed a transferee of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same, in his own name, and the Registrar shall cancel the previous certificate of title and duplicate thereof and register a new certificate”.

- [12] The practical operation of the procedure for obtaining an order of foreclosure offers multiple opportunities for a mortgaged property to be sold. This explains (in part) the rarity of the foreclosure remedy since the property will typically be sold at some point along the way during that process. In those instances in which the mortgagee manages to obtain an order for foreclosure and there is positive equity with the value of the property exceeding the amount of the debt, the mortgagee may have the opportunity to make a substantial windfall. This is because if there is a subsequent sale and the proceeds of sale exceed what had been the mortgage debt, the mortgagee is under no obligation to pay any of the surplus proceeds to the mortgagor as would be the case on an order for sale. The debt is simply extinguished on the granting of order for foreclosure, and so is the equity of redemption.
- [13] In the case before the Court the Claimant is now the sole legal owner of the Property, having applied for and obtained title in its own name in respect of the Property, pursuant to the RTA. One of the key features of Torrens system of land

registration as applies in Jamaica, is that of the indefeasibility of a registered title save for instances of fraud. In **Harley Corporation Guarantee Investments Co. Ltd v The Estate Rudolph Daley [2013] JMSC Civ.114**, the Court of Appeal considered the requirement of fraud in the context of RTA. Harris JA at paragraph 51 provides the following analysis:

51. *As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In Fels v Knowles (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620:*

“The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.” (“By statute” would be more correct.) “Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.”

[14] It seems clear therefore that the Court does have the power to re-open a foreclosure where there has been fraud or non-compliance with the statutory procedural requirements for obtaining an order for foreclosure. By way of example in the case of **Millard Dunbar v St Catherine Co-operative Credit Union [2018] JMCC Comm 7** (judgment delivered 18th January 2018), the Claimant sought to challenge the validity of the foreclosure order on the basis that the notice of foreclosure was invalid because it was served by registered post and was not actually received whereas the RTA required actual receipt of the notice by the mortgagee. The Court accepted the possibility of re-opening the foreclosure but did not interfere with the foreclosure order since the case turned on its finding that the service by registered mail required by the RTA did not contemplate the Mortgagee proving actual receipt.

Sale in lieu of foreclosure

[15] The relevant footnote in Gilbert Kodilinye's work referred to above which addresses the possibility of a sale in lieu of foreclosure references section 28(2) of the Conveyancing Act of Jamaica. In the England there is specific statutory procedure in the form of Section 91 of the Law of Property Act which provides as follows:-

“91 Sale of mortgaged property in action for redemption or foreclosure.

(1)Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

(2)In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that—

(a)any other person dissents; or

(b)the mortgagee or any person so interested does not appear in the action;

and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.

(3)But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them”.

It is of significance that there is no equivalent provision to either section 28(2) of the Jamaica Conveyancing Act or the English section 91 of the law of Property Act in the RTA.

Conclusion

- [16] The legislature has passed comprehensive legislation in the form of the RTA. It is my opinion that had it been intended that the value of the property *vis a vis* the amount of the mortgage debt was to be a relevant consideration, for the Registrar or the Court, then there would have been appropriate provisions addressing this factor in the RTA. Similarly, if it were intended that there should have been a right of the mortgagor or anyone else to apply for a sale in lieu of mortgage, then an appropriate provision would have been included. As it relates to the right to apply for a sale in lieu of mortgage, it appears to me that in any event such a provision would be wholly unnecessary having regard to all the opportunities for sale which would have arisen, including the Registrar's offer prior to the granting of the order for foreclosure.
- [17] It is noteworthy that the **Campbell** case (*supra*) referred to by counsel for the Defendant is of some vintage and it predated the RTA. Having reviewed the RTA and the scheme it has created specifically as it relates to the procedure for an application for foreclosure and the indefeasibility of a registered title obtained hereby, this Court finds that the scheme does not contemplate or permit the re-opening of a foreclosure and the unwinding of a registered title obtained thereby in the circumstances as advanced by Counsel for the Defendant.
- [18] The Court concludes that where the formalities of the RTA have been complied with and there is no fraud, the Court has no power to re-open the foreclosure. The amendment of the Register of Lands to delete the Mortgagee after it has been entered as the legal owner in the absence of fraud or other procedural irregularity is wholly inconsistent with the RTA and the Court has no jurisdiction to make such an order. The Separate Claim filed by the Defendant which is premised on the existence of such a power, as a matter of law, is bound to fail. In such circumstances, the filing of the Separate Claim cannot provide a proper reason or basis for this Court to stay the claim herein, nor is there any other reason which could provide a proper basis for a stay.
- [19] For the reasons stated herein the Court makes the following orders:

1. The Notice of Application filed 9th March 2018 seeking a stay of this claim until the determination of Claim No. 2018 CD 0141 – **Herman Rhule v Saint Catherine Co-operative Credit Union Limited** is refused.

2. Costs of the application are awarded to the Claimant to be taxed if not agreed.