

Tudgment Book

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JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E. 472 OF 1995
IN CHAMBERS

BETWEEN BURCHELL WHITTAKER PLAINTIFF
A N D MICHAEL CHUCK DEFENDANT

DAVID WONG KEN AND MISS CHARMAINE RDHODEN INSTRUCTED BY
WONG KEN & CO. FOR DEFENDANT.
MISS MARINA SAKHNO INSTRUCTED BY HUGH ABEL LEVY & CO. FOR
PLAINTIFF.

14TH DECEMBER, 1995

HARRISON J.

This is an application by the plaintiff for an interlocutory
injunction against the defendant to restrain

"the defendant, by himself, his servants or agents from
selling the plaintiff's property known as 11A King Street,
Linstead registered at Volume 1022 Folio 157 by public
auction or otherwise under the mortgage dated June 6,
1994 registered on title as number 818323."

By an originating summons filed on the 20th day of November,
1995, the plaintiff sought inter alia, an injunction, in the terms described
above, as also,

- "2. An order mortgage loan be set aside on the basis
that it is harsh and unconscionable and contrary
to theMoney-lending Act or in the
alternative, on order that the interest in
the said Demand Loan be reduced to 50% per annum;
- 3. An order that the defendant render a full
an accurate account of the monies outstanding under
the said Demand Loan
- 4. An order that the plaintiff be at liberty to exercise
his rights of redemption of the said mortgage within
thirty (30) days from the receipt of such account;..."

An interim injunction was granted on the 21st day of November, 1995 by Mrs. Justice Harris for fourteen (14) days, and further extended on the 5th day of December, 1995 by Harrison, J to the 14th day of December, 1995.

Having been forewarned by counsel for the defendant, Miss Sakhno for the plaintiff argued that the originating summons was filed under the provisions of section 535 of the Judicature Civil Procedure Code, "the Code", which permitted, any mortgagee or mortgagor or person having the right to redeem the mortgage to take out such an originating summons; that an injunction may be applied for on such summons, that the plaintiff had an interest in the said property; that the plaintiff had signed the mortgage instrument as a guarantor along with his mother, one Thelma Whittaker, the legal owner, and therefore he was a person liable to pay the mortgage debt, consequently was entitled to redeem the mortgage and therefore could issue the said originating summons and apply for the injunction to restrain the defendant/mortgagee. She relied on Halsbury's Laws of England, 3rd Edition, Vol. 27, paragraph 412.

Mr. Wong Ken argued that at the time of the granting of the injunction the plaintiff was not entitled to any relief; that he was a mere borrower, was not paying the "mortgage debt", was not a mortgagor, who had an interest in land, neither was he an equitable mortgagor; that an injunction may not be granted on an originating summons, because under section 531 of the said Code, which empowered the Court to construe documents and declare the rights of the parties, there was no power to grant relief - he relied on, **S.C.C.A. No, E 179/79 Neville Williams vs Jamaica Pump & Valve Ltd.** et al delivered on the 17th day of January 1983; and that the injunction should not have been and should not now be granted to the plaintiff.

The facts relevant, inter alia, are, that the plaintiff, the son of one Thelma Whitaker, as a guarantor, along with the said Thelma Whitaker, to secure a loan, the said premises being the said security. Thelma Whitaker is the sole registered owner of the said premises. The plaintiff has no interest in the premises. He merely guaranteed that he would repay

the loan, being \$750,000 received from the defendant/mortgagee Michael Chuck, with interest at 50% per annum "over a period of eighteen (18) months."

In his affidavit dated the 20th day of November, 1995, the plaintiff admitted that he received the mortgage loan, the purpose of which was, "..... to finance the importation into Jamaica of large quantities of produce for resale for profit.....", and that he had the intention" of discharging my indebtedness to the defendant.....(but).....suffered a major set back in cash flow and failed to make several payments to the defendant."

The said premises was advertised in the newspaper for sale by public auction on the 23rd day of November, 1995, in the exercise of the powers of sale of the mortgagee under the mortgage. The said interim injunction was accordingly applied for and granted on the 21st day of November 1995.

Section 535 of the Code reads,

"535. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say, -

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.

A person "..... having the right to redeem any mortgage", was defined, in Halsbury's Laws of England, 3rd Edition, Volume 27,

Section 2 Persons entitled to redeem

412. Persons who can redeem. The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem.

The mortgagor, until he has absolutely assigned his equity of redemption, can redeem the mortgaged property, and a mortgagor who has entirely parted with the equity of redemption nevertheless, upon being sued for payment of the mortgage debt by the mortgagee, acquires a new right to redeem

413. Persons claiming under the mortgagor. The following persons claiming under the mortgagor can redeem:- an assignee of the equity of redemption, including a volunteer a tenant for years under a lease made subsequent to the mortgage which the mortgagee refuses to confirm; a surety on payment by himself or refusal by the principal debtor to discharge the mortgage debt, or if the surety has mortgaged his own estate as security for the debt. (emphasis added.)"

Generally, the right to the equity of redemption, is the prime basis on which the holder maintains the entitlement to redeem the mortgaged property. The mere obligation to pay the mortgage debt as a guarantor in the event of default by the mortgagor does not confer on the guarantor a right to redeem. Such a guarantor has no interest in the mortgaged property.

In **Pearce v. Morris (1869) 5 Chan. 227**, it was held that the mortgagee was not bound to convey the legal estate in the mortgaged property and deliver the title deeds to the person from whom he has accepted the principal and interest, if such person only contracted to purchase a part of the mortgaged estate and had not received title.

In **Green v Wynn (1869) 4 Chan 204**, the mortgage deed provided that the debtor was required to repay the principal and interest, and the surety covenanted to pay in default. The debtor conveyed the mortgaged property to trustees and the creditor released the debtor. The Court held that the surety was not released. He could pay off the principal and recover the amount from the debtor.

In *Tarn vs Turner* (1887) 39 Chan. 456, without the consent of the mortgagee leased lands to T, who entered into possession, and on notice from the mortgagee paid rent to the mortgagee. It was held that T was entitled to redeem the mortgage; he had an interest in the property. Kekewich, J. at first instance, said of the tenant in possession, at page 462,

".....the real point is that however small the interest he is entitled to redeem Whatever other value it may have, that is an assignment to him of a partial interest in the property carved by the mortgagor out of his equity of redemption. That entitles that assignee to redeem."

On appeal,

Cotton, L.J., said, of the tenant in possession, at page 465,

"The interest which he got from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time In *Pearce vs Morris* Lord Hatherley points out that anyone entitled to an interest in the equity of redemption is entitled to redeem."

On the authorities therefore, even a lessee, with his limited interest in property may acquire the equity of redemption, in certain circumstances. In the instant case, the plaintiff has no known interest in the mortgaged property; there is therefore no equity of redemption in him, it remains in the mortgagor. He has not paid nor tendered the principal and interest. The right of the surety/guarantor, simpliciter, has never been and cannot be elevated to that of possessing the equity of redemption. He has no right to redeem. If he has paid any mortgage installments he has a mere action in debt against the mortgagor for the repayment of such monies paid on his behalf under the guarantee. He is a stranger to these proceedings, and cannot maintain an action against the mortgagee.

The provisions of section 531, are distinctly different from those of section 535 of the Code. Section 531, limits the Court to the construction of documents or the declaration of the rights of the parties, vide

Neville Williams vs Jamaica Pump & Valve Ltd. et al (supra). Under section 535, a person who has paid the mortgage debt and has the right to redeem, presumably, may issue an originating summons and obtain relief thereunder - probably including an injunction.

Accordingly, the plaintiff has no status to issue this summons. The summons for injunction is dismissed with costs to the defendant to be agreed or taxed.