

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2008/0004

BETWEEN:

DELANO IRVINGTON GIBBS
CHRISTINE INGRID GIBBS

Claimants

and

THE BANK OF NOVA SCOTIA

Defendant

Appearances:

Mrs. Celia Edwards, Q.C. and Ms. A. Ventour for the Claimants
Mrs. D. Haynes for the Defendant

2009: May 22

DECISION

- [1] **HENRY, J.:** In February 1989 claimants became the owners of a parcel of land situated at Mount Gay in the parish of Saint George. By a legal mortgage dated the 17th November 1997, the claimants gave the defendant a mortgage over the said parcel of land for the sum of \$350,000.00 together with interest thereon at the rate of 10.25% per annum. There is no dispute that by April 2006 the claimants fell into arrears and subsequently the defendant notified claimants that it had decided to exercise its power of sale. On 10th August, 2007, the property was sold by the defendant at public auction. This action was commenced by the claimants on 4th January, 2008 seeking an order for damages for breach by the defendant of its duty to act in good faith upon exercising its power of sale and for wrongfully clogging the claimants' right to redeem the mortgage.

[2] The defendant now applies for an order that the Statement of Claim filed herein be struck out on the grounds that the Statement of Claim does not disclose any reasonable ground for bringing a claim. Alternatively, the defendant seeks an order for Summary Judgment on the ground that the claimants have no real prospect of succeeding on the claim.

The Application to strike out the Statement of Claim

[3] CPR 26.3 (1) provides that the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(a) ...

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

[4] There is no dispute that a mortgagor has a right to redeem. There is also no dispute that sections 9(1) and 11 of the Conveyancing and Law of Property Act Cap 64 gives a mortgagee power to sell the mortgaged property by private contract or by auction, and subsequently to complete by conveyance. Of course, redemption by payment of the principal sum due together with interest and charges extinguishes the mortgagee's power to sell.

[5] In their Statement of Claim the claimants allege that after the mortgage fell into arrears, they made persistent efforts to sell the property in order to pay off the defendant; that they continued to try to find a buyer even after the defendant advertised the property for sale by auction. The defendant had by letter dated September 1, 2006 instructed its Attorneys to commence power of sale action against the claimants. The Statement of Claim further alleges that at the beginning of August 2007, the second-named claimant spoke to a Mr. Sterling Lyons of defendant's office, who, knowing of her efforts to procure a buyer, informed her that she had no authority to negotiate any price for the sale of the said property; that he would be the one to set the price for the sale thereof.

[6] Paragraph 9 of the Statement of Claim sets out that on 6th August 2007, one Margaret Superville expressed to the second-named claimant an interest in purchasing the property in advance of the advertised auction date of 10th August 2007. That based on

the representation made by Mr. Lyons, the second-named claimant asked Mrs. Superville to speak with Mr. Lyons to make arrangements for the purchase.

- [7] Paragraph 10 sets out the details of the meeting which took place the following day between Mr. Lyons and Mrs. Superville's representative. It states that Mr. Lyons advised that it was too late to cancel the auction as he would like to have other interested parties have a chance to bid. Mrs. Superville, it is stated, undertook to have her agent attend the auction.
- [8] The auction took place, it is alleged, on 10th August 2007 and the property was sold for \$721,476.00 to the Supervilles through their representative.
- [9] It is alleged that apart from Mrs. Superville, the claimant had received three offers before the sale by auction: (a) for the sum of \$800,000.00 from one David Mc Kee (b) for the sum of \$750,000.00 from Messrs. Grant, Joseph & Co. on behalf of their client; and (c) for the sum of \$900,000.00 from one Franklyn Joseph. The details of these three offers, it is alleged, were communicated to defendant's Manager of the Office of the President in Canada after the auction.
- [10] It is further alleged that by letter dated 1st October 2007, claimants wrote to defendant through their Attorney indicating that an offeror for the sum of \$825,000.00 was ready to complete, but that no response was received to the letter. However, it is alleged that under cover of the 10th October 2007, the defendant forwarded to the claimant a memorandum of the Auction which indicated not only that a deposit had been made on behalf of Mrs. Superville and that the intention was to purchase the property at the price of \$721,476.00 but also that the completion date for the agreement was set for the 12th November 2007.
- [11] Claimants concluding paragraphs in the Statement of Claim state that by denying them the opportunity to sell the said property at a price negotiated by them, and at a higher price secured by them, the defendant interfered with the claimants' right to redeem the said mortgage; further, that by insisting on selling the property in its own name instead of allowing the claimants to sell it, caused them further losses, in that the claimants were charged property transfer tax at the rate for aliens instead of the rate for nationals. Further, that defendant in exercising its power of sale as mortgagee failed to act in good faith in breach of its duty to the claimants by failing to obtain the best

possible price. The claimants conclude with a prayer for damages, both general and special.

- [12] In **Duke and Others v Robson and Others** [1973] 1 W.L.R. 267, the English court of Appeal held that the mortgagor's contract for sale of the equity of redemption could have no possible effect on the rights and powers of a mortgagee to sell. Even where the mortgagor's solicitors had indicated to the mortgagees' solicitors that the claimants were prepared to put the total due into the joint names of solicitors, the Court held that this could not be described as equivalent to a tender or payment of what was due, which is what would be necessary for someone to say that the mortgagee no longer had their power to sell available to them. The Court reiterated that a contract for sale by the mortgagor to a bona fide purchaser at the market value cannot be described as the equivalent of tender, or payment into court or redemption.

As noted, the Conveyancing and Law of Property Act gives the mortgagee the power to sell either by auction or by private contract. The right of the mortgagor is to redeem by paying the outstanding amounts due. Finding a buyer is not an act of redemption on the part of the mortgagor. The mortgagee was not obliged under the circumstances set out, to allow the mortgagor to sell. So the failure to do so cannot form the basis of a claim for interference or wrongfully clogging the claimants' right to redeem. No payment having been tendered by the mortgagor, the mortgagee was entitled to proceed to exercise its power of sale.

- [13] The Statement of Claim also refers to an offer communicated to the defendant by letter dated 1st October 2007 from claimants' Solicitors. The letter indicated that an offeror for the sum of \$825,000.00 was ready to complete. It is alleged that the defendant failed to respond to the letter and later completed the conveyance to Mrs. Superville for a much lower price. The Court notes however, that the defendant accepted the bid by Mr. Strachan on behalf of Mr. Superville at the auction on 10th August 2007. Closing was then set for November 2007.

- [14] In **Property & Bloodstock Ltd. v Everton** [1967] 3 W.L.R. 973, the Court held that the entry by a mortgagee into an unconditional contract for the sale of the mortgaged property, pursuant to section 101(1) of the Law of Property Act 1925, barred the mortgagor's right of redemption so long as the contract subsisted. Section 9(1) of

Grenada's Conveyancing and Law of Property Act is identical with the English Law of Property provision. When the defendant accepted the bid and made a deposit at the auction, it entered into an unconditional contract for sale of the mortgaged property and at that point the mortgagor's right to redeem was barred. It follows that as a matter of law there could be no action for interference of a barred right based on facts occurring after the auction.

- [15] The claimants also allege in their Statement of Claim that the defendant in exercising its power of sale, failed to act in good faith by failing to obtain the best possible price. The law in this regard is to be found in the judgment of Salmon, LJ in **Cuckmere Brick Co. v Mutual Finance** [1971] 2 All E.R 633. He stated:

"I accordingly conclude, both on principle and authority, that 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."

- [16] The defendant asserts that the claimants are alleging in their pleadings that the defendant failed to act in good faith, yet they do not allege any details of bad faith.

- [17] After setting out the various offers that had been received by the claimants, paragraph 25 states:

"In all the circumstances detailed herein, the defendant, in exercising its power of sale as mortgagee, failed to act in good faith in breach of its duty to the claimants by failing to obtain the best possible price."

- [18] The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it, **British Airways Pension Trustees Ltd. v Sir Robert Mc Alpine & Sons Ltd.** [1994] 72 BLR 26. Lord Woolf MR in **Mc Philemy v Times Newspapers Ltd.** [1993] 3 All ER 775 noted that pleadings are required to mark out the parameters of the case that is being advanced by each party and that in particular they are critical to identify the issues and the extent of the dispute between parties. What is important, he emphasized, is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.

The Statement of Claim sets out several offers received by the claimants before the auction, all well above the price for which the property was sold at auction. Paragraph

25 then sets out the parameter of the bad faith alleged. It cannot be said that the Statement of Claim is defective and any further particulars required can be obtained by pre-trial disclosure.

The Application for Summary Judgment

[19] Rule 15.2 of the Civil Procedure Rules 2000 governs the granting of summary judgment by the Court. It provides:

“The court may give summary judgment on the claim or on a particular issue if it considers that the –

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or issue.

[20] In *Swain v Hillman* [2001] 1 All E.R. 91 the English Court of Appeal upheld a decision of a Judge who had rejected an application for summary judgment. The Court found on the pleadings that there were issues of fact requiring investigation at a trial. In interpreting Part 24 of the English Civil Procedure Rules, which is comparable to our Part 15 the Court stated:

“Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial..., the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.”

[21] Defendant denies that it has acted in bad faith. In the affidavit in support of the application the bank sets out the various opportunities it gave to the claimants to sell the property themselves. The bank asserts that this is evidence that it acted in good faith. The bank also refers to the fact that the property was advertised for 5 weeks.

[22] According to the pleadings the property was sold for substantially less than several offers the claimants had received prior to auction. There is a triable issue as to whether that was due to any fault in the sale arrangements. In the Court’s view, the proper disposal of this claim requires a trial.

Conclusion

- [23] The application to strike out the Statement of Claim is granted only to the extent of striking out the claim for wrongfully clogging the claimants' right to redeem. Accordingly, paragraphs 20, 21, 22 and 26(b) are hereby struck out.
- [24] The application for summary judgment is denied.
- [25] The defendant shall file and serve its defence in respect of the remaining claim herein within 14 days of the date herein. No order for cost.

Clare Henry
High Court Judge