

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2011/CLE/GEN/FP/00357

BETWEEN

COLINA INSURANCE LIMITED
Plaintiff

AND

MARINA MILLER
Defendant

BEFORE The Hon. Mrs. Justice Estelle Gray-Evans

APPEARANCES: Ms Wynsome Carey for the plaintiff
Mr Wendell Smith for the defendant

HEARING DATES: 2013: 26 February, 5 September
2014: 27 January

JUDGMENT

Gray Evans, J

1. This action commenced by an originating summons on 9 December 2011 in which the plaintiff pursuant to Order 77 rule 1 of the Rules of the Supreme Court ("RSC") claimed against the defendant the following relief:

- 1) Delivery by the defendant to the plaintiff of possession of Apartment 605 Lucayan Towers North Condominium situate at Greening Glade Subdivision, Freeport, Grand Bahama.
- 2) Payment of all sums due and owing by the defendant to the plaintiff together with interest.
- 3) Further or other relief and costs.

2. The originating summons is supported by the affidavits of Beverly Ferguson filed on 9 December 2011 and 24 January 2014 respectively in which Ms Ferguson deposes, inter alia, that as of 21 January 2014, the defendant was indebted to the plaintiff for the sum of \$91,391.20 inclusive of the principal sum due under a mortgage between the parties, together with interest and a payoff fee, with interest accruing daily at the rate of \$20.17.

3. At the hearing of the originating summons, counsel for the defendant raised several preliminary objections to the plaintiff's application.

4. Firstly, the defendant says the plaintiff failed to comply with RSC Order 73 rule 4 which provides that where a money lender's action is begun by originating summons the summons must contain a statement of the matters specified in rule 2.

5. RSC Order 73 rule 2 provides that every statement of claim in a money-lender's action must state:

- (a) the date on which the loan was made;
- (b) the amount actually lent to the borrower;
- (c) the rate per cent, per annum of interest charged;
- (d) the date when the contract for repayment was made;
- (e) the fact that a note or memorandum of the contract was made and was signed by the borrower;
- (f) the date when a copy of the note or memorandum was delivered or sent to the borrower;
- (g) the amount repaid;
- (h) the amount due but unpaid;
- (i) the date upon which such unpaid sum or sums became due; and
- (j) the amount of interest accrued due and unpaid on every such sum.

6. Counsel for the defendant submits that as the originating summons does not contain the statement of matters as required by RSC Order 73 rule 2 aforesaid, it is irregular and should be dismissed.

7. Counsel for the plaintiff disagrees and, relying on the cases of *Imperial Life Assurance Co v Efficient Distributors Ltd* [1989] J. No. 85 and *Citibank N.A. v Hutchinson* [1996] BHS J. No. 127, submits that RSC Order 73 does not apply to this action.

8. In the case of *Imperial Life Assurance Co.*, Georges C.J. accepted the submission of counsel for the plaintiff that RSC Order 73 did not apply. Similarly, Allen J (as she then was) in the case of *Citibank N.A. v Hutchinson* [1996] BHS J. No. 127, having considered the same issue, concluded that RSC Order 73 applied to all money lending actions other than those to which RSC Order 77 applies.

9. In both of those cases, the mortgage deed was drawn similarly to the mortgage in this case.

10. Counsel for the defendant was of the view that those cases were wrongly decided.

11. However, as Georges C.J. pointed out at paragraph 21 of his decision in *Imperial Life Assurance Co.*, the transaction in the *Imperial Life* case was not a money-lending transaction in relation to which the mortgage was given as collateral security, but rather it was a mortgage, plain and simple with no obligation to pay arising independently of the covenant in the mortgage. Georges, C.J. opined that the situation would have been different had there been a lending of money with a mortgage taken as collateral security, as in the case of a bank overdraft.

12. Similarly, the transaction in this case is that of a mortgage, plain and simple. Indeed, the mortgage in this case is drawn similarly to the mortgage in the *Imperial Life* case and I respectfully agree with the opinion expressed by Georges, C.J. in that case.

13. In the circumstances, I accept the submissions of counsel for the plaintiff that this is not a money-lending action and, therefore, RSC Order 73 does not apply.

14. The plaintiff brings this action pursuant to RSC Order 77, rule 1 of which provides that the Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for, inter alia, any of the following reliefs:

- (a) payment of moneys secured by mortgage;
- (b) sale of the mortgaged property;
- (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property;

15. Counsel for the defendant submits that the originating summons is nevertheless irregular because the plaintiff failed to comply with RSC Order 77 rules 3(3), 4(3) and 4(6).

16. RSC Order 77 rule 3(3) provides:

“Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the mortgaged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.”

17. RSC Order 77 rule 4(3) provides:

“Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of:

- (a) The amount of the advance
- (b) The amount of the repayments
- (c) The amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
- (d) The amount remaining due under the mortgage.”

18. RSC Order 77 rule 4(6) provides that:

“Where the plaintiff claims payment of moneys secured by the mortgage the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph [4](3).”

19. Counsel for the defendant pointed out that the bulk of the moneys claimed by the plaintiff as being in arrears, related to condominium maintenance fees. In that regard, counsel argues that the defendant was not provided with any information regarding the demands for maintenance fees purportedly made by the Lucayan Towers North Condominium Association on behalf of the defendant; nor was there any indication, he says, that the plaintiff informed the defendant as to how much the maintenance fees were at the beginning of the mortgage; nor was there any indication, counsel says, of whether any special assessments were made by the Condominium Association in relation to the defendant’s home.

20. Counsel for the defendant, therefore, argues that in light of RSC Order 77 rules 4(3) and (6), the plaintiff is required to: (i) prove that the money it claims is, in fact, due and payable by the defendant;(ii) provide the particulars required in rule 4(3); (iii) prove that the defendant’s maintenance was in arrears; (iv) prove that there was an obligation on the defendant’s part to pay the same. Counsel submits, in the alternative, that the plaintiff has failed to provide particulars to suggest that the defendant’s maintenance was in arrears, which, he says, the defendant denies, in that:

- (1) There is no power under the declaration of condominium to impose maintenance fees and special assessments and the like on the defendant.
- (2) There is no record of any demand from the Condominium Association to the defendant for payment of maintenance and/or special assessments or any other payment.
- (3) There is no record of any cheques to the Condominium Association paid by the plaintiff as alleged or at all.
- (4) There is no record of any cheques from the plaintiff cashed by the Condominium Association on behalf of the defendant or at all.

21. Therefore, counsel for the defendant submits, the originating summons should be set aside or, alternatively, the application for judgment should fail.

22. Counsel for the plaintiff concedes that the back of the affidavit of Beverly Ferguson was not indorsed in accordance with RSC Order 77 rule 3(3), but submits that it was an irregularity which the defendant, having entered an unconditional appearance, has waived.

23. I agree.

24. As for the defendant's complaint regarding the plaintiff's alleged failure to comply with RSC Order 7 rule 4(6), counsel for the plaintiff argues that the plaintiff has complied and, in that regard, she referred the Court to the affidavits of Beverly Ferguson and the exhibits thereto filed on 9 December 2011 and 27 January 2014 in support of the plaintiff's application.

25. In her 9 December 2011 affidavit. Ms Ferguson deposes, inter alia, as follows:

- 1) That as manager of Credit and Collections at the plaintiff, I am duly authorized to make this Affidavit on the plaintiff's behalf.
- 2) The matters deposed to herein are from my own knowledge and I verily believe the same to be true.
- 3) This Affidavit is filed in support of an originating summons filed contemporaneously with this Affidavit.
- 4) That the plaintiff is a company incorporated and existing under the laws of the said Commonwealth and is carrying on business within the said Commonwealth and carries on such business at #12 Village Road in the said Island of New Providence.
- 5) The plaintiff by way of a loan advanced to the defendant a sum in the amount of B\$61,750.00 that was secured by an Indenture of Mortgage (hereinafter referred to as "the Mortgage") dated the 10th April A.D., 1990 made between the defendant of the one part and the Imperial Assurance Company of Canada of the other part and recorded at the Registry of Records of the said Commonwealth in volume 6355 at pages 357 to 381, whereby the defendant granted and conveyed ALL THAT Apartment Number Six Hundred and Five (605) in the City of Freeport on the Island of Grand Bahama one of the Islands of the said Commonwealth.
- 6) ...
- 7) ...
- 8) ...
- 9)
- 10)
- 11) That the principal amount became due and owing on the 8th October 2008.
- 12) That clause 3(2) of the Mortgage stated that at all times during the continuance of the security duly and regularly to pay all taxes, rates, assessments, maintenance fees, service charges and outgoing with respect to the mortgaged property.
- 13) That Clause 4(2) of the Mortgage stated that it shall be lawful for but not obligatory on the Lender to advance and pay all sums of money necessary for the purpose of keeping up an insurance on the buildings which are now or may hereafter be erected on the said hereditaments or for remedying any breach or breaches of covenant or obligation statutory or otherwise imposed on the

borrower or implied by law or under the provisions of the Mortgage and all monies so paid and also all costs and expenses incurred by the Lender in relation to any inspection and notice or the repairs or amendments hereinbefore mentioned shall be repayable on demand and in the meantime shall be added to the Mortgage debt and bear interests at the same rate or rates at which interest shall be payable of the time being hereunder on the principal computed from the time or respective times of paying or advancing the same.

- 14) The defendant was in default in paying her maintenance fees for the period from November 1993 to July 2011.
- 15) The plaintiff paid \$49,115.90 to Lucayan Towers on behalf of the defendant for maintenance. Exhibited hereto and marked "BF-6" are the following letters to Lucayan Towers and/or the plaintiff evidencing that funds were disbursed on the plaintiff's behalf:

DATE OF LETTER	AMOUNT
(a) 23 rd November 1993	\$2,449.76
(b) 20 th June 1995	\$1,729.12
(c) 30 th April 1999	\$2,888.42
(d) 18 th February 2000	\$2,640.00
(e) 9 th February 2001	\$3,167.38
(f) 11 th June 2004	\$ 819.00
(g) 29 th June 2005	\$6,165.76
(h) 4 th September 2006	\$3,792.75
(i) 5 th September 2007	\$2,143.97
(j) 29 th August 2008	\$10,664.65
(k) 20 th October 2009	\$3,541.96
(l) 7 th April 2010	\$1,795.08
(m) 25 th August 2010	\$1,798.08
(n) 8 th November 2010	\$ 895.99
(o) 1 st February 2011	\$ 897.99
(p) 7 th July 2011	\$1,795.98.

- 16) The plaintiff notified the defendant by its letters dated 17th May 2004, 7th June 2005, 20th September 2006, 8th August 2007 and the 3rd March 2008 that if the defendant did not settle the outstanding fees in fourteen (14) days they would pay the maintenance fees for the subject property and that any funds disbursed would be added to the Mortgage from the dates of the letters.
- 17) The plaintiff notified the defendant by its letters dated 13th November 2001, 4th May 1999, 22nd February 2000, 25th August 2010, 1st February 2011 and the 7th July 2011 that they had paid the maintenance fees for the subject property and that any funds disbursed were added to the Mortgage.
- 18) That it was a Clause of the defendant's mortgage to:

"3(12) On demand to repay to the Lender all costs charges and expenses including any Attorney's fees incurred hereunder for collecting the Principal sum and interest or other payment due to the Lenders and until

so repaid such costs charges and expenses shall be charged upon the said hereditaments and shall be added to the mortgage debt and bear interest at the same rate which interest shall be payable for the time being hereunder on the Principal Sum computed from the time or respective times of paying or advancing the same.”

- 19) Colina has incurred the following charges in an attempt to collect the principal sum and interest due and owing to it by the defendant:
 - (a) Appraisal Fees in the amount of \$550.00 to obtain a fair market value of the property in preparation for sale of the said property and its hereditaments.
 - (b) Admin Service Charges consists of the \$20.00 fee that is charged by the plaintiff every time the plaintiff had to debit the defendant's account to pay Condominium Maintenance Fees. The Condominium Maintenance Fees were paid 16 times. The plaintiff however only charged the defendant for eight (8) times that they had to disburse funds.
 - (c) Returned cheque fees in the amount of \$160.00.
- 20) That as at 6th October 2011, the defendant had made payments in the amount of \$59,261.77 towards the principal sum and the principal sum of \$55,928.02 is owing; together with interest to that date in the amount of \$3,782.02. Exhibited hereto marked “BF-10” is a copy of the plaintiff's loan ledger and Statement of Account in respect of the defendant's account.
- 21) That from the 12th May 2011, interest accrues daily at the rate of \$15.31.
- 22) That the plaintiff and their attorneys have by several letters made demands to the defendant for repayment of the sums due and owing together with interest but the defendant has not paid the sums owing or any part thereof. Copies of the letters sent to the defendant are exhibited hereto and marked “BF-11”.
- 23) That to the best of my knowledge and information there are no persons other than the defendant in possession of the subject property.
- 24) That I verily believe that the contents of this Affidavit are correct and true to the best of my knowledge, information and belief.

26. In her supplemental affidavit filed on 27 January 2014, Ms Ferguson deposes, inter alia as follows:

- 1) That under the Indenture of Mortgage exhibited to my previous Affidavit at “BF-1”, the defendant agreed to borrow Sixty One Thousand Seven Hundred and Fifty Dollars (\$61,750.00) at a rate of Twelve Percent (12%) per annum for a period of twenty years. Payments were to be made in the amount of \$667.50 on the first day of each month commencing on the 1st day of June 1990. It was also a Clause of the Mortgage Agreement that Interim interest would be calculated on the Principal from the date of disbursement to the 1st June 1990.

- 2) That as of the 21st January 2014, the principal amount outstanding on the defendant's account with the plaintiff is \$73,624.47 together with interest to that date in the amount of \$17,624.73 and a payoff fee in the amount of \$150.00 for a total of \$91,391.20.
- 3) That from the 21st January 2014, interest accrues daily at a rate of \$20.17.

27. The contents of the loan ledger and statement of account referred to as exhibit BF-10 at paragraph 20 of Ms Ferguson's December 2011 affidavit are set out hereunder:

STATEMENT OF ACCOUNT
6 October 2011
MARINA MILLER
ACCOUNT #813714

Payments	
Principal paid to date	\$ 59,261.77
Interest paid	<u>\$134,211.76</u>
Total	<u>\$192,401.25</u>
Disbursements	
Condo fees	49,115.90
Appraisal fees	550.00
Admin. Service Charges	60.00
Return cheque fees	160.00
Advertisement fees	<u>1,163.72</u>
Total Disbursements	<u>\$51,049.62</u>
Reconciliation	
Opening Principal Balance	\$61,750.00
Add Interest Capitalization	2,390.17
Add Disbursements	51,049.62
Less principal payments	59,261.77
Outstanding principal balance	55,928.02
Add Interest Accrued	3,782.13
Payoff fee	<u>100.00</u>
Total Balance	<u>\$59,810.15</u>

28. In my judgment, the combined effect of the aforesaid affidavits and exhibits satisfy the requirements as to the particulars required by RSC Order 77 rule 4 to be set out in the affidavit.

29. The mortgage, in the usual form, was made between the defendant and the plaintiff, then called The Imperial Life Assurance Company of Canada. The sum advanced was \$61,750.00 repayable with interest at 12% per annum over a 20 year period by monthly payments of \$667.50 commencing 1 June 1990, in consideration for which the defendant, as beneficial owner, granted and conveyed to the plaintiff and its assigns the property known as Apartment 605 Lucayan Towers North Condominium, Freeport, subject to the proviso for redemption on payment of the funds advanced.

30. By clause 3(2) of the mortgage the defendant covenanted with the plaintiff:

"At all times during the continuance of this security duly and regularly to pay all taxes, rates, assessments and outgoings now or hereafter to become due and payable in

respect of the said hereditaments and to produce on demand all receipts and vouchers in proof of such payments.”

31. By clause 4(2) of the mortgage it is provided as follows:

“It shall be lawful for but not obligatory on the Lender to advance and pay all sums of money necessary for the purpose of ... remedying any breach or breaches of covenant or obligation statutory or otherwise imposed on the borrower or implied by law or under the provisions of this Mortgage and all monies so paid and also all costs and expenses incurred by the Lender in relation to any inspection and notice or the repairs or amendments hereinbefore mentioned shall be repayable on demand and in the meantime shall be added to the Mortgage Debt and bear interest at the same rate or rates at which interest shall be payable for the time being hereunder on the Principal computed from the time or respective times of paying or advancing the same.”

32. It is accepted that the mortgagee's right to possession of the mortgaged premises accrues at the date of the mortgage.

33. In the case of *Fourmaids, Ltd v. Dudley Marshall* 1957 1 AER 35 Harman, J. at page 36 said:

“... the right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right.”

34. And in *Major v Citibank, N.A.* [1996] BHS J. No. 66 Longley, J. opined at paragraphs 9 through 11 that:

“Subject to the caveat that the mortgagee's right to possession is also subject to statute, I would agree with the opinion expressed by Harman, J. as representing the law with respect to the right of a mortgagee to possession.

And the reason he has that right is that on execution of the mortgage, which is achieved by conveyance of the legal estate, he becomes the owner of the legal estate in the property which vests in him on execution. Accordingly, as an incident of that legal title, he is entitled to possession. This is borne out by the case of *Ashley Guarantee PLC vs. Zacaria* (1993) AER v 254. There, in an action for possession, inter alia, the defendant sought to deny the plaintiff's right to possession on the grounds that there were cross claims that exceeded the amount which the plaintiff contended was outstanding on the mortgage.

The Court held that a mortgagee's right to possession could not be defeated in these circumstances because the mortgagee had as an incident of his estate in the land a right to possession of the mortgaged property, and cross claims could not be unilaterally appropriated in discharge of the mortgage debt.”

35. Then Ganpatsingh, J.A. in the Court of Appeal case of *Citibank, N.A. v. Major* [2001] BHS J. No. 6 stated at paragraphs 10 and 11 that:

“The position at law is that where under a legal mortgage, being an instalment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order...; but this does not exclude a power to direct an

adjournment for a short time to enable the mortgagor to pay off the mortgage in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so."

It is pellucidly clear, therefore, that there could be no power in the Court to vary contractual rights or to deny one party the benefit of the remedies which flow from the default of the mortgagor. The mortgagee in such an event is entitled not only to possession, but as well the mortgage moneys which become presently payable as a lump sum and no longer by instalments. The mortgagor in order to get relief must necessarily raise an action on the mortgage transaction itself."

36. He continued at paragraph 17:

"The cases cited on the impeachment of mortgage securities, all show that unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud or on irregularity in the exercise of the power of sale, the Courts will not intervene to prevent a mortgagee from exercising his lawful rights under the mortgage deed."

37. Then, at paragraph 25:

"Now there is a general, though not an inflexible rule of practice, that the Court will not interfere to deprive a mortgagee of the benefit of his security, in the absence of fraud or irregularity, and a departure from the practice would normally attract the equitable principle, that the mortgagor pay into Court the amount outstanding or claimed or otherwise secure the mortgagee."

38. Although the mortgagee's right to possession accrues at the date of the mortgage, the mortgagee's right to bring an action to recover such possession may, by the mortgage deed, be postponed to some future event. One such future event is: if two or more of the monthly instalments shall be in arrear and unpaid (whether lawfully demanded or not). [clause 4(7)(a)]. Another is the failure by the mortgagor, within the time specified there for, to remedy any breach of the provisions of the mortgage in respect of which written notice thereof has been given to him.

39. In that regard, the plaintiff's evidence is that between 1993 and 2011 it paid \$49,515.90 to Lucayan Towers North Condominium Association in respect to maintenance fees owed by the defendant to that association. As evidence of such payments the plaintiff exhibits copies of correspondence between the plaintiff and the Association in which cheques of varying amounts were forwarded to the Association on behalf of the defendant. There is an acknowledgement on most of the copies on behalf of Lucayan Towers North Condominium Association as having received the payments/cheques. Also included amongst the documentary evidence were copies of letters from the plaintiff to the defendant, identical except for the date and amount of arrears, advising the defendant of the outstanding maintenance fees and her obligations under the mortgage to pay the same. The plaintiff wrote:

"We have been advised by Lucayan Towers North Condominium Association that you are presently in arrears on payment of \$...in maintenance fees on the subject property.

We advise that non-payment of the above-mentioned maintenance also represent an event of default under the terms and conditions of your mortgage with us.

We, therefore, request that full payments of the amounts due be settled within fourteen (14) days of the date of this letter, failing which we will move to protect our position as first mortgagee.

If the maintenance fees are paid by Imperial Life, a service charge of \$20.00 will be added to your mortgage account. Additionally, the prevailing interest rate will be charged on the fees paid."

40. Additionally, the plaintiff by a notice of disbursement and letters with loan debit notices, informed the defendant of its payment of the condominium fees and that the same had been added to the mortgage. On the notice of disbursement is the following note: "Upon receipt of this notice, kindly make arrangements to have amount paid, repaid to us as soon as possible."

41. Ms Ferguson's evidence is that the plaintiff and its attorneys have made several written demands of the defendant for repayment of the sums due and owing together with interest. In that regard, exhibited to Ms Ferguson's affidavit are several letters from the plaintiff to the defendant during the period 5 October 1990 to December 2010 notifying the defendant of her default under the mortgage and requiring her to remedy the same.

42. Finally, by letter dated 22 February 2011, counsel for the plaintiff wrote to the defendant as follows:

"22nd February 2011
BY HAND
Mrs. Marina A Miller
Etc.

Dear Mrs Miller

Re: Colina Mortgage Corporation Loan #813714
Apartment #605 Lucayan Towers North Condominium
Greening Glade Subdivision, Freeport, Grand Bahama,
Bahamas - Mortgage dated 10th April 1990

We act on behalf of Colina Mortgage Company Limited ("Colina") in connection with the recovery of the monies due under a loan which you took out with Colina on the 10th April 1990.

We are instructed that as at 14th February 2011, there was a total of \$60,691.49 owing by you to Colina in respect of the loan. This indebtedness comprises \$56,593.89 principal due and unpaid on the loan and \$3,997.60 accrued and unpaid interest on the loan to the 14th February 2011 and fees and disbursements. From the date, interest is continuing to accrue at the daily rate of \$15.49.

We hereby demand payment of the total amount outstanding to Colina in the sum of \$60,691.49 plus interest at the daily rate of \$15.49 commencing 14th February 2011.

Upon your failure to make payment within fourteen (14) days of this letter, we are instructed to commence a Supreme Court action against you for recovery of the debt.

Colina holds security on the debt by way of an Indenture of Mortgage dated the 10th April 1990 between yourself and The Imperial Life Assurance Company of Canada over Apartment Number Six Hundred and Five (605) Lucayan Towers North Condominium situate at Greening Glade Subdivision, Freeport, Grand Bahama, the Bahamas which said Mortgage is recorded on Volume 6355 at pages 357 to 381.

Upon your failure to make payment within fourteen days (14) we demand that you deliver up vacant possession of the property to Colina.

Upon your failure to comply with this demand, we are instructed to bring Supreme Court proceedings against you for possession of the said property.

Further be advised that any legal proceedings against you will include a claim for costs.

Yours sincerely
ALEXIOU, KNOWLES & CO
Wynsome D Carey
c.c Colina Mortgage Corporation Ltd"

43. There is no evidence that the defendant did not receive the aforesaid letters; nor is there any evidence that she responded in writing to any of them or complained to the plaintiff that she had not been billed by the Lucayan Towers North Condominium Association for maintenance fees claimed; nor is there any evidence that she indicated to the plaintiff at the time of the said letters or at any time during the period 1993 to 2010 that she did not owe the Condominium Association the amounts claimed.

44. I, therefore, accept counsel for the plaintiff's submission that the defendant having disregarded the aforesaid notices and pay the amounts claimed, the plaintiff was entitled to exercise its powers under the mortgage and pay the same to protect its interest in the property.

45. This is a difficult case.

46. The plaintiff admits having received from the defendant the sum of \$192,401.25, being principal (\$59,261.77) and interest (\$134,211.76) on an original loan of \$61,750.00 and, as observed by counsel for the defendant, the bulk of the moneys now claimed by the plaintiff relates to the payment by the plaintiff of maintenance fees on behalf of the defendant.

47. While it is unfortunate that the defendant having paid all that money the defendant still stands to lose her home, the law is clear. As opined by Ganpatsingh, J.A. in the Citibank, N.A. v. Major:

"... where [as in this case] under a legal mortgage, being an instalment mortgage, the whole money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the court has no jurisdiction to refuse to make an order";

48. The plaintiff's evidence is that the principal amount became due and owing on 8 October 2008.

49. By several letters since the parties entered into the mortgage agreement and finally by its letter dated 22 February 2011, the plaintiff notified the defendant of the amount of her indebtedness to the plaintiff and demanded payment of the sum, at the time, of \$60,691.49 plus interest.

50. I note that when this action commenced in December 2011, the amount being claimed by the plaintiff was \$59,810.15. However, at the date of Ms Ferguson's supplemental affidavit, a little over two years later, that amount had increased to \$91,391.20 being principal (\$73,616.47), interest (\$17,624.73) and other fees (\$150.00).

51. By clause 4(6) of the mortgage it was provided as follows:

"..... if any installment of principal and interest payable hereunder shall not be paid within fourteen days of the due date (whether formally demanded or not) then without prejudice to such other rights and remedies accruing to the Lender hereunder consequent on such default such installment so in arrears shall itself thenceforth bear interest at the prevailing rate computed from the date upon which the same shall have become payable to the date upon which such monies are in fact paidfurther all overdue interest whether capitalized or not together with all overdue principal moneys and the interest thenceforth accruing there from shall be secured in the same manner as the principal sum.

52. Paragraph 4(7)(a) of the mortgage provides that the full amount of principal and all interest become due and payable and all the mortgagee's powers under the mortgage shall forthwith be and become available to the Lender to recover the same and all expenses incurred or to be incurred by the Lender in enforcing its security under the mortgage:

"If two or more of the monthly installments herein provided for shall be in arrear and unpaid (whether lawfully demanded or not)."

53. So, while I sympathize with the defendant's plight, it seems to me that to accede to her preliminary objections and set aside or dismiss the plaintiff's application would only delay the inevitable, while the debt owed to the plaintiff continues to increase.

54. The authorities regarding a mortgagee's right to possession are, in my judgment, clear and as observed by Harman, J. in the Four Maids case, an observation which I respectfully adopt:

"If this were a case where there is a discretion in the matter, I should feel that it was a hard case; but the mortgagor has entered into a contract with the mortgagee, and the mortgagee wants his rights under the contract, and this court, in my judgment, has no power to refuse him those rights."

55. So, having considered the preliminary objections raised by counsel for the defendant, having reviewed and considered the evidence and heard counsel for each of the parties, I have come to the conclusion that the plaintiff is entitled to the relief it seeks.

56. In the result, it is the order of this Court that unless the defendant within ninety (90) days of the date hereof, that is, on or before 6 June 2014, pay to the plaintiff the sum of \$91,391.20 together with interest thereon at the rate of \$20.17 per day from 21 January 2014 until payment, the defendant is to deliver to the plaintiff vacant possession of the mortgaged premises, namely, Apartment 605 Lucayan Towers North Condominium situate at Greening Glade Subdivision, Freeport, Grand Bahama, no later than 7 June 2014.

57. The defendant is to pay the plaintiff's costs of this action, to be taxed if not agreed.

Delivered this 6th day of March A.D. 2014

Estelle G. Gray Evans
Justice