

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**2011/CLE/GEN/01439**

**IN THE MATTER** of the property comprised in an Indenture of mortgage dated the 24th day of October 2002 and made between Pedro Entown Fox and Donalee Eleanor Fox as Borrowers and FirstCaribbean International Bank (Bahamas) Limited as Lendor

**AND IN THE MATTER** of the Conveyance and Law of Property Act, Chapter 138 of the Revised Statute Laws of the Commonwealth of The Bahamas

**B E T W E E N**

**FIRSTCARIBBEAN INTERNATIONAL BANK  
(BAHAMAS) LIMITED**

**Plaintiff**

**AND**

**PEDRO ENTOWN FOX**

**Defendant**

Before Hon Mr Justice Ian R Winder

Appearances: Raynard Rigby with Candice Ferguson for the Plaintiff

Romona Farquharson-Seymour with Quintin Percentie for the  
Defendant

**JUDGMENT**

WINDER, J

This is a claim for relief in a mortgage action by the plaintiff seeking to exercise its power of sale under the Mortgage Deed dated 24th October 2002, by reason of the defendant's (Fox's) default of payment under the said Mortgage Deed.

1. Fox and his wife had acquired Lot 346 Garden Hills Estates No. 2. At the time of the acquisition, a mortgage was secured from the plaintiff to facilitate the purchase. Fox chose Roger Minnis from a list of approved attorneys to do the legal work in the purchase of the property. Following upon the couple's divorce, in May 2006, Fox acquired the entire interest in Lot 346, with the assistance of a new mortgage from the plaintiff.
2. Fox says that in 2007 he learnt that there was a land issue. He was advised by the neighboring land owner (Lot 345), Monique Roker (Roker) that he was trespassing on part of her land. Roker's complaint, formally expressed by her lawyers Graham Thompson, in March 2008, was that Fox's "washhouse was located on a portion of Monique Roker's Lot 345". It appears that Fox's home was acquired from another bank in the exercise of their power of sale against Roker's father, Harvey Roker. As Harvey Roker owned both lots the home was not built squarely on Lot 346 and a very small portion straddled Lot 345.
3. It appears that initially Roker offered to sell Fox the entire Lot 345 but they couldn't agree on a price as Fox felt that the amounts sought was too high. Roker then offered to sell a portion of her Lot at \$9,000 in March 2008. When the offer was not taken up, within a month or so, Roker excavated her property to within a foot of Fox's house. As Roker's property was elevated, she levelled or excavated it to the street level.

4. Fox wrote to the plaintiff, at that stage, complaining that his structure was compromised by the cutting into the property by Roker. In the letter, dated 9 May 2008, Fox advised that he felt that he was let down by the Bank and that someone, whether the lawyers, the vendor bank or the plaintiff ought to have realized that the building was "not on the right property". Fox indicated that he was no longer interested in living or maintaining the property.
5. Fox has not paid anything on the mortgage since 5 June 2008.
6. This action was commenced by Originating Summons and was converted to a Writ Action. The plaintiff filed a Statement of Claim which provides, in part, as follows:
  1. The Plaintiff is a financial institution and is licensed under the Bank and Trust Companies Regulation Act to carry on the business of banking at its Receivables Management Department on Independence Highway, New Providence, The Bahamas and elsewhere within the jurisdiction of the Commonwealth of The Bahamas.
  2. At all material times the Defendant was and is a customer of the Plaintiff and is indebted to the Plaintiff pursuant to the Demand Loans more particularly described hereinafter.
  - ...
  8. On or about the 12<sup>th</sup> June, 2006 the Defendant entered into a loan facility with the Plaintiff and agreed to borrow the sum of \$203,500.00 representing a residential mortgage and agreed to make blended monthly payments of \$1,565.74. The Defendant agreed that the aforesaid property at Garden Hills will serve as collateral for the said loan as well as Lot No. 13, Turtle Rocks Subdivision near Leisure Lee, Abaco.
  9. In breach of the terms of the Loan granted in June, 2006, the Defendant has failed to make the agreed payments and has fallen into arrears thereunder whereupon an outstanding balance is payable and owed to the Plaintiff. The Defendant's last payment under the loan was in December, 2010 in the sum of \$4,000.00. However, the Defendant's account was in arrears in the amount of \$61,376.92.
  - ...
  12. Due to the non-payment by the Defendant as aforesaid the Plaintiff has suffered loss and damages occasioned by the state of the said account and by its being in arrears.

Particulars Pursuant to Order 73, Rule 2  
of the Rules of the Supreme Court, 1978

- (i) The Loan was originally made on or about the 24<sup>th</sup> October, 2002 and was restructured on the 12<sup>th</sup> June, 2006 and the terms were accepted by the Defendant on the 13<sup>th</sup> June, 2007;
  - (ii) The amount actually agreed to be lent on the restructuring was \$203,500.00 principal, plus interest at the rate of 7.75% per annum;
  - (iii) The interest rate charged is the rate aforesaid;
  - (iv) The restructuring contract for repayment was made on or about the 13<sup>th</sup> June, 2007;
  - (v) Contract dated the 13<sup>th</sup> June, 2007 was made and was signed by the Defendant and was delivered to the Defendant immediately after the execution thereof;
  - (vi) The amount of principal and interest repaid as of the 15<sup>th</sup> August, 2011 is \$39,331.38;
  - (vii) The amount of principal accrued due and unpaid is \$217,521.91 as of the 15<sup>th</sup> August, 2011;
  - (viii) The amount of interest accrued due and unpaid is \$54,607.72 as of the 15<sup>th</sup> August, 2011;
  - (ix) The amount of principal and interest outstanding as of the 15<sup>th</sup> August, 2011 is \$274,008.43;
  - (x) By reason of the foregoing the Defendant is indebted to the Plaintiff under the Loan as of the 15<sup>th</sup> August, 2011 in the sum of \$274,008.43.
13. The Plaintiff claims interest pursuant to Section 2 of Civil Procedure (Award of Interest) Act, 1992 on the amount found due and owing at such rate and for such period as the Honourable Court thinks just and equitable.

AND the Plaintiff claims as against the Defendant:

1. Delivery up of possession of ALL THAT piece parcel or lot of land lying within the Subdivision called and known as "Garden Hills Estates Number Two (2)" situate in the Southern District of the Island of New Providence being Lot Number Three Hundred and Forty-six (346) in the said Subdivision which said piece of land has such positions shape boundaries and marks and dimensions as are shown on the diagram or plan attached to the recorded plans of the said Subdivision and is thereon coloured Pink (sic)
2. Delivery up of possession of ALL THAT piece parcel or lot of land situate off Johnson Road in the Eastern District of the Island of New Providence and bounded as follows: on the North by land, the property of Jackson Jarrett and running thereon Sixty-three (63) feet on the West by a Ten (10) feet wide right of way and running thereon One hundred (100) feet on the South by land the property of John

Moss and running thereon Sixty-three (63) feet and on the East by land the property of Major H.P. Holt and running thereon one Hundred (100) feet.

3. Delivery up of possession of ALL THAT piece parcel or lot of land being Lot No. 13 in Turtle Rocks Subdivision having the dimensions of 106 feet by 200 feet situate between Treasure Cay and Marsh Harbour being about 600 feet from the coast and approximately 300 feet from the highway.
4. Payment of the sum of \$217,521.91 being principal and the sum of \$54,607.72 representing interest outstanding as of the 15<sup>th</sup> August, 2011 at the rate of 7.75% per annum and further interest at 7.75% until payment due to the Plaintiff under the respective covenants in the said Deed of Mortgage.
5. Alternatively, damages;
6. Costs;
7. Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992; and
8. Such further and other relief as the Court may deem just.

7. The defendant settled a Defence which provided, in part, as follows:

...

- 3) That the Defendant neither admits nor denies paragraphs 3 thru 8 and puts the Plaintiff to strict proof thereof.
- 4) That the Defendant admits paragraph 9 save and except he contends that he did not breach the terms of the loan, but rather the Plaintiff and or their agents did by failing to detect that the principal collateral had a severe Defeat in title....
- 7) That the Defendant contends that through his former Attorney then Senator The Honourable Mr. Jerome Fitzgerald many letters were sent and he the Defendant made many telephone calls to the Plaintiff via Mr. Stuart Burrows, employed as the Manger (sic) of Small Business at the Plaintiff's Palmdale Branch, pleading for assistance to solve the problem(s) created by the Plaintiff and its agents.
- 8) That the Defendant was informed by the Plaintiff's about two (2) years ago, sometime in 2010 that they had sold the Defendant's Turtle Rocks property....
- 10) That the Defendant puts the Plaintiff to strict proof of paragraph 12 & 13 (sic) and contends that much of if not all of the losses and damages sustained by the Plaintiff was due to their own negligence and failure to act when requested by the Defendant.
- 11) That the Defendant has suffered much loss and damages due to the negligence and breaches of the Mortgage contracts by the Plaintiff.

8. In Reply, the plaintiff says:

...

2. As to paragraph 4 of the Defence, the Plaintiff contends that it owed no duty to the Defendant to ascertain whether the mortgaged property had a defect in title. The Plaintiff contends that the said title is not defective, but however, there is a dispute pertaining to the boundary of the property.

...

4. As to paragraph 8 of the Defence, the Plaintiff avers that no sale has been completed in respect of the property situate at Turtle Rocks.

...

6. As to paragraph 10 of the Defence, the Plaintiff denies the allegations therein contained and puts the Defendant to strict proof thereof.

7. As to paragraph 11 of the Defence, the Plaintiff claims that it was not negligent nor did it breach the mortgage contract as alleged or at all and puts the Defendant to strict proof thereof.

9. At trial the plaintiff called Garth McDonald, its Manager, Client Credit Management and Harold Black, former employee, as witnesses in their case. The Defendant gave evidence in his case and called Attorney Jerome Fitzgerald as a witness.

10. The plaintiff's case is principally that the debt has been unpaid and it is entitled to exercise its rights under the mortgage, notwithstanding the land issue.

11. Fox says that:

(1) The plaintiff objected to the purchase of the portion of disputed land for Fourteen Thousand and Five Hundred (\$14,500.00) Dollars. This left him in a precarious position. As a result of the plaintiff's refusal to remedy this issue, Roker claimed her portion of the land and in doing so, she restricted his ability to access the home which became unusable.

(2) Despite the averments in the Affidavit of Mr. Garth McDonald of 4th January 2013 at paragraph 9, "that the Plaintiff made countless efforts to purchase the disputed strip of land for the Defendant", there is no evidence contained in the transcript of the hearing on 16<sup>th</sup> January 2019 from Mr. Garth McDonald that such "countless efforts" was the case. In fact, it was he who persistently reached out to the plaintiff to have the disputed strip of land remedied. Despite his persistent efforts, his pressing concerns were ignored.

12. In summary, Fox contends that:

- (a) The plaintiff was aware or ought to have known that the property which the Defendant had purchased and was financed by the plaintiff was subject to a land dispute;
- (b) That as a result of the disputed strip of land, this clearly does not represent the accurate square footage of land under the said Mortgage Deed and;
- (c) That the plaintiff had a continuing contractual duty to communicate with the Defendant to address the disputed strip of land until it was resolved.

13. On the evidence, the home which Fox purported to purchased, was built not only on Lot 346 from which he obtained title, subject to the mortgage, but also on a small portion of Lot 345 owned by Roker. Contrary to the suggestions put to the witnesses by Fox, the land issue was not a title defect as the title to Lot 346 was properly vested in Fox.
14. It is not disputed that Fox has breached the terms of the mortgage agreement. His case is that the plaintiff breached its duty of care and skill (to ensure the appropriate measurements of the property) and was negligent. This breach of duty and or negligence of the plaintiff, with respect the land issue, Fox says, affects his obligation to repay the loan.
15. I did not find, on the evidence, that the plaintiff or its servants or agents were responsible for the land issue. The plaintiff was approached by Fox to provide a loan facility to acquire Lot 346 Garden Hills, which it did. There is no issue as to the title to Lot 346 which vests in Fox, subject to the mortgage. The metes and bounds of Lot 346 remains as indicated in his conveyance which refers to a lot number in the subdivision. In any event, there was no evidence led as to any inaccuracy of the square footage stated in the mortgage deed. Where the problem lies is that the house is not situated only on Lot 346 but also slightly on Lot 345.
16. In the absence of engaging a surveyor or an appraiser (requiring the survey markers (stakes) to be located) there is no way for the Bank (or its attorneys) to have determined that the house was not squarely on Lot 346. There was no evidence advanced by Fox, which I accepted, that securing either of these services were an

obligation of the plaintiff as a term of the mortgage, or formed a part of some duty of care owed to Fox.

17. Certainly the Bank's attorneys, whose obligation was to ensure that the legal title vested in Fox, could not be faulted if the house was not squarely on Lot 346. Such did not form a part of the role of the conveyancing attorney in acting for a purchaser or borrower. Indeed Mr. Percentie, on behalf of Fox, accepted that surveying the land was outside of the remit of the conveyancing attorney. Additionally Fox's witness, attorney Jerome Fitzgerald, accepted as much during the course of his evidence. It would seem that the seller of Lot 346 may have been liable for some misrepresentation or some breach of warranty in selling the home to Fox and his former wife, but not the plaintiff in funding the purchase.
18. The plaintiff was as much a victim as Fox was. It is difficult to appreciate Fox's submission that the plaintiff had an obligation to acquire the additional strip of land. I readily accept that it would have been in the plaintiff's best interest to do so, in order to sure-up its security, but that did not create an obligation to do so.
19. Fox brought no evidence to support any of the allegations made by him as to breach of the contractual terms and negligence. His witness attorney Jerome Fitzgerald accepted under cross examination, that he mistakenly thought that the plaintiff was not just the lender but had sold the property to Fox. Fitzgerald accepted that the plaintiff would then only have responsibility to Fox "to the extent that the bank would have some responsibility with regard to the lawyers who were involved in choosing of the lawyers." When asked by the court as to whether the attorneys would be responsible to ensure that the building was squarely on the property, his response was, "No, not the attorneys, no sir". When asked which one of the banks professionals would be responsible for that, his response was that he didn't have an answer for that and that his belief was that it should not have been the purchaser.



20. These matters of breach of contract and negligence are raised by Fox by way of defence, it has to be proven by him. I do not find, on balance, that they have been so proven.
21. Fox has not paid the mortgage since 5 June 2008, in which case his default is spectacular. In all the circumstances, I give judgment for the plaintiff as prayed in the Statement of Claim to exercise its rights under the mortgage and for the outstanding mortgage sums.
22. The plaintiff shall have its reasonable costs, such costs to be taxed in default of agreement.

Dated the 5<sup>th</sup> day of March 2021

A handwritten signature in black ink, appearing to read 'I. R. Winder', written in a cursive style.

Ian R. Winder

Justice