

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2016/CLE/gen/00040

**IN THE MATTER** of an Indenture of Mortgage dated the 25<sup>th</sup> day of August, A. D. 2004 and made between Juliamae Evelyn Johnson and Finance Corporation of Bahamas Limited and recorded in the Registry of Records of the Commonwealth of The Bahamas in Volume 11083 at pages 561 to 569

**AND IN THE MATTER** of the Conveyancing and Law of Property Act, Chapter 138 of the Revised Laws

**BETWEEN**  
**FINANCE CORPORATION OF BAHAMAS LIMITED**  
**Plaintiff**

**AND**  
**JULIAMAE EVELYN JOHNSON**  
**Defendant**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Mrs. Karen Brown for the Plaintiff  
Miss Meryl Ginton for the Defendant

**HEARING DATE:** February, 20 and June 26, 2020

**DECISION**

## **Hanna-Adderley, J**

### **Introduction**

1. This is an application by the Plaintiff commenced by way of Originating Summons filed February 4, 2016 and supported by the Affidavit of Mrs. Jennifer Styles filed on March, 29, 2017 ("**the Affidavit**"), the Second Affidavit filed April 5, 2018 and a supplemental Affidavit filed February 14, 2020 seeking pursuant to Order 77, Rule (1) (a) (b) and (d) of The Rules of The Supreme Court ("**RSC**") various Declarations set out in the Originating Summons and an Order for vacant possession of Lot 4, Block 6, Unit 1, Lincoln Green Subdivision, Freeport, Grand Bahama ("**the Mortgaged Property**") and payment of the sum of \$115,132.00 being the principal sum due and \$50,171.40 as to the sum of interest due as at February 14, 2020, together with interest continuing to accrue at the rate of 7.5% per annum and further per diem at \$32.81 until payment to the Plaintiff under an Indenture of Mortgage dated August 25, 2004 and recorded in the Registry of Records in the City of Nassau in Volume 11083 pages 561 to 569 ("**the Mortgage**"); interest, costs and such further and other relief as the Court may deem just.
2. The Plaintiff's application is met by the Defendant who relies on her Affidavit filed herein on October 19, 2017 ("**the Defendant's Affidavit**").
3. The Court must determine whether the Defendant has breached the terms of the Mortgage hereinbefore referred to and whether the Plaintiff is entitled to an Order requiring the Defendant to deliver up possession of the Mortgaged Property to the Plaintiff and further, to the Declarations and for Judgment in the sums sought in the Originating Summons, interest and costs.
4. The Plaintiff's application is granted as prayed for the reasons set out below.

### **Statement of Facts**

#### **The Plaintiff**

5. The Plaintiff's claim in the Originating Summons is as follows:

(1) A Declaration that upon the true construction of Clause 5(a)(i), 5(a)(iii), 5(a)(v) of the Mortgage that the Plaintiff is entitled to possession of the Mortgaged Property.

(2) A Declaration that the Plaintiff is entitled to exercise its power of sale over the Mortgaged Property.

(3) An Order directing the Defendant, Juliamae Evelyn Johnson, mortgagor under the Mortgage to deliver up vacant possession of the Mortgaged Property within 28 days.

(4) Judgment for the sums outstanding under the Mortgage.

(5) That the Court order further or other relief as deemed expedient.

(6) That provisions be made for the costs of this application.

6. **The Plaintiff's** evidence contained in the Affidavits of Mrs. Jennifer Styles is, in part, that on August, 25, 2004 pursuant to the Mortgage the Defendant borrowed the principal sum of \$190,000.00 from the Plaintiff and agreed to repay the same by way of monthly installments of \$1,678.75 together with interest thereon at the rate of 8¾% reduced to 7 ½% per annum on August 12, 2011. The Mortgage was secured by the Mortgaged Property.
7. The Plaintiff also states that the said monthly payments fell into arrears and by a letter dated May 27, 2015 the Defendant was notified of her breach of the terms of the Mortgage and the Plaintiff demanded full payment of the sums due and owing under the Mortgage.
8. The Plaintiff's evidence is that the Defendant has failed and or refused to pay the said total sum and remains in breach of the loan and the Mortgage. That the Plaintiff has incurred collection realization expenses in the sum of \$4,461.82 as at February 20, 2020. That the Defendant has failed and or refused to vacate the Mortgaged Property so as to permit the Plaintiff to exercise its power of sale over the Mortgaged Property. That the Mortgaged Property has been appraised in the sum of \$165,000.00 with a foreclosure value of \$98,000.00 as at August 14, 2015. As at February 14, 2020 the Defendant was indebted to the Plaintiff under the Mortgage in the sum specifically the principal balance the sum of \$115, 132.00;

the accrued interest in the sum of \$50,171.40; the collection realization expenses in the sum of \$4,461.82 and late fees in the sum of \$2,675.68 the total sum of \$172,440.90. Also exhibited to the Affidavits is a copy of a Mortgage Loan Account History. That the Plaintiff is entitled in the circumstances to an order for, inter alia, vacant possession.

### **The Defendant**

9. **The Defendant's** evidence, in part, is contained in the Defendant's Affidavit and is that when she entered into the Mortgage Agreement she was employed as a public school teacher and agreed with the Plaintiff to pay her monthly mortgage payments via salary deduction. That in 2015 she retired from teaching and expected to receive her pension from the Treasury Department shortly thereafter however this did not happen. That after not receiving her pension when expected she spoke with an agent of the Plaintiff and explained her situation but as a result she did not make any mortgage payments between August 2015 through March 2016. That in November 2016 she spoke with Ms. Sylvia Carey, an agent of the Plaintiff to discuss her arrears and was advised she was in arrears of \$20,000.00. That on or about December 2, 2015 she made a payment of \$6,000.00 towards her mortgage account and informed Ms. Carey that she would pay the balance after she received her pension.
10. She also stated that sometime in February, 2016 she was visited by a Mr. Johnson of Churchill and Jones whereby he informed her that he was there to conduct an appraisal of the property but she refused him entry. That she immediately contacted Ms. Carey to inquire about Mr. Johnson's visit to conduct the appraisal however Ms. Carey informed her that whilst she was sympathetic to her situation, no payments had been made so the Plaintiff would do what it had to do. That several days later a couple stopped by to view the property as it was advertised for sale but she refused them entry to view the property. That sometime later she was served with the Originating Summons in this action. That when she received her pension in March, 2016 she engaged the services of Attorney, Mr. Stephen

Wilchombe who attended the Plaintiff bank with her whereby they spoke to Ms. Carey to discuss the balance of arrears on her account but was presented with a letter informing her of the Plaintiff's intention to proceed under its power of sale. That she made an agreement with Ms. Carey at this time and Mr. Wilchombe witnessed that she would pay a further \$14,000.00 in full and final payment of her arrears and legal costs expended by the Plaintiff and that the arrangement also made provision for the consolidation of her credit card account. That by a bank draft dated March 10, 2016 she paid \$14,000.00 to the Plaintiff to settle her arrears and after inquiring from Ms. Carey as to what her monthly amounts would be going forward she was informed that the \$20,000.00 had cancelled her arrears in full and that going forward she would make payments in the amount of \$1,167.07 beginning in June 2016. That in July 2016 before leaving the island for recreational reasons she attended the Plaintiff to confirm the requirements under the Mortgage Agreement so payment of such could be arranged during her absence but was informed that her monthly payments were actually \$1,212.38. That since that date she made arrangement for payments from her Commonwealth Bank account to be transferred to the Plaintiff in the amount of \$1,212.38 and that during the months of July and August, 2016 there was overpayment of her mortgage payment from a bank error which was rectified by December, 2017.

11. Ms. Johnson's evidence was also that in April, 2017 she received a Notice of Intention to Proceed in the action and was surprised to receive such as she believed her account was up to date. That afterwards she contacted Ms. Carey who advised her that she was no longer dealing with her file and referred her to Mrs. Styles who informed her that her account was in arrears of \$69,000.00. That she was also informed by another agent of the Plaintiff that she did not qualify for the Mortgage Relief Program. That she contacted Mr. Wilchombe to confirm her recollection of events in March, 2016 and that he too understood the \$20,000.00 payment at that time was to be in full and final settlement of all arrears at that time and provided a letter containing his recollection of those events. That she

takes issue with her account being in arrears as to her knowledge she had been making the required payments.

12. In **response** to the Defendant's Affidavit Mrs. Styles responded in her second Affidavit that to regularize the Defendant's account, in addition to the payment of \$20,000.00, the Defendant was also required to make 3 to 6 consecutive monthly payments commencing June 2016 to show her ability to service the debt on an ongoing basis and thereafter the account would be reviewed for restructuring. That the Defendant failed to make any payments in June, October and November, 2016 which thereby rendered her ineligible for restructuring of the loan at that time. That in April, 2017 the Defendant was assessed for suitability for the Mortgage Relief Plan however she did not qualify due to the Defendant's failure to inform the Plaintiff about a loan facility she had with Commonwealth Bank to which she paid \$600.00 a month, the Defendant's monthly pension in the amount of \$1,500.00 and her monthly payment under the Mortgage Relief Plan would have been \$1,267.07 to the Plaintiff which showed that the Defendant's monthly income would have been insufficient to service both loans; moreover the Defendant's negative total debt servicing ratio would have been outside the Plaintiff's guidelines. That the Plaintiff suggested to the Defendant that she request a reduction in monthly payment from Commonwealth Bank and procure a tenant at the Mortgaged Property, thereafter the Plaintiff would reassess her account with a view to restructuring however, no further communication was forthcoming.

## **Submissions**

### **The Defendant**

13. Miss Meryl Ginton, Counsel for the Defendant submits, in part, that the Affidavits of Mrs. Jennifer Styles and the exhibited Mortgage Accounts in particular the Defendant's Loan Balance Information and Transaction History for the period beginning August 27, 2004 to March 1, 2017; the Defendant's Mortgage Account for the period January 1, 2016 to December 19, 2016 and the Defendant's Savings Account for the period June to November 2016 and the Defendant's Mortgage

Account for the period beginning March 20, 2017 to February 1, 2020, demonstrate that over time the late fees and interest charged by the Plaintiff created a large debt payable by the Defendant. Further, Miss Ginton submits that the Defendant relied on the arrangement made between herself and the Plaintiff through its agent to her detriment when she paid the sum of \$20,000.00 in March 2016 in exchange for the cancellation of all of the arrears on her mortgage and that the amount of her monthly mortgage payments were reduced. It is Miss Ginton's submission that the principle of detrimental reliance creates a promissory estoppel which prevents the Plaintiff from now acting inconsistently with the promise made by its agent. In support of her submission she refers the Court to Snell's Principles of Equity whereby the law of detrimental reliance (i.e. promissory estoppel) was discussed by P.V. Baker and Another. At paragraph 16 of her Submissions she states:-

**'During the nineteenth century equity extended the doctrine of estoppel to cases where instead of a representation of an existing fact there was a representation of intention or promise. [...]**

**(a)The rule. Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it."**

14. She submits that having acted on this representation to the Defendant's detriment, the Plaintiff is estopped from acting in a contradictory manner.
15. Counsel for the Defendant submits that the Plaintiff has not met its evidential burden to establish the Defendant's indebtedness in the amount claimed as the Plaintiff failed to produce and or provide a full account of the Defendant's savings account. She submits that while the Plaintiff provided the Defendant's Mortgage Account covering the entirety of their contractual relationship, the production of the Defendant's savings account is relevant as it would show the deductions made from her salary. It is her submission that a comparison of both accounts will show a difference in that the Plaintiff was responsible for drawing down the funds

necessary from the savings account and the true question is whether and when funds were available to sufficiently satisfy the mortgage.

16. Lastly, she submits that the Court has a discretion in mortgage actions to afford the Defendant a period of time to satisfy the debt and in the exercise of its discretion to consider that the Mortgaged Property is the Defendant's home, the said property is the subject of other litigation which the end result may satisfy the mortgage debt and is a case that is the letter of the Homeowner's Protection Act, 2017.
17. Mrs. Brown, Counsel for the Plaintiff submits that a mortgagee's statutory powers in particular their power of sale in respect of the mortgaged property is set out in the provisions of the Conveyancing and Law of Property Act ("the Act"), respectively sections 21, 22, 23 and 27. Moreover, she submits that the Defendant did not dispute the Court's jurisdiction to grant the relief sought in the event the Defendant defaulted in her obligations under the Mortgage. She further submits that the evidence produced by the Defendant by way of her sworn Affidavit and the Affidavits of Mrs. Jennifer Styles show that the Defendant defaulted either by non-payment or partial payment of the monthly amount as stipulated by the mortgage agreement, that the Plaintiff demanded all sums due under the Mortgage and advised the Defendant of the Plaintiff's intention to exercise its power of sale and that the Defendant was given at least two opportunities to remedy her default in 2016 and 2017. She submitted that by the Defendant's own evidence, the Plaintiff showed clear and unequivocal intention to exercise its right to enforce the Plaintiff's security under the Mortgage. She further submits that the Defendant failed to produce any evidence of an agreement between the Plaintiff and Defendant of forbearance and that the Plaintiff did not agree to the forbearance implicitly alleged by the Defendant.
18. In response to the Defendant's submissions, Mrs. Brown submits that the Defendant has failed to establish detrimental reliance in light of the evidence before the Court. In particular, she submits that clause 27 of the Mortgage provides that the document itself constituted the entire understanding between



the parties and that any amendments or variations to any terms should be in writing and signed by both parties. It is her submission that if the parties had entered into an arrangement to accept the \$20,000.00 from the Defendant in exchange to cancel all of the arrears of her mortgage the parties would have been required to execute the appropriate document to vary the terms of the Mortgage. She further submits that the Defendant has failed to produce a Deed of Variation or any other evidence in writing showing such. Additionally, she submits that the Defendant's mortgage account shows a history of numerous partial and complete defaults in payment before and after March 2016.

19. Mrs. Brown submits that the Plaintiff was entitled to charge late fees in accordance with the Mortgage as payments by the Defendant were made later than the agreed payment date each month and/or in amounts less than the monthly installment. She also submits that the Plaintiff's payment of homeowner's insurance premiums on several occasions was charged to the principal due on the Mortgage therefore the amount of interest payable also increased as interest is charged on the principal balance. Mrs. Brown further submits that the burden of proof rests on the party making any allegation and referred the Court to Section 82 of the Evidence Act. It is her submission that the Defendant failed to produce any evidence for her request for an accounting made prior to the commencement of this action and the request referred to in her Affidavit relates to the Mortgage account and not any other account of the Defendant at the Plaintiff bank. Moreover, she submits that the burden to prove the Defendant's defence that her payments under the Mortgage are current rests on the Defendant alone.
20. Miss Ginton, in response to the Plaintiff's submissions, stated that in the exercise of the Plaintiff's power of sale the Plaintiff must be able to show the amount that is owed by the Defendant and in the circumstances the Defendant has not been given that.

## Issues

21. The Court must determine whether the Defendant failed to pay any of the monthly instalments or any part thereof due to the Plaintiff pursuant to the terms of the Mortgage and whether, if this is the case, the Plaintiff is entitled to the remedies set forth in the Mortgage and as prayed in the Originating Summons, or whether the Plaintiff is estopped by its conduct by enforcing its rights under the mortgage.

## Analysis and Conclusions

### The Law

22. Order 77 Rule (1) (a), (b) and (d) of the RCS provides as follows:

“1. (1) This 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 any of the following reliefs, namely —

**(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;”**

23. Clause 5 (a)(i), 5 (a)(iii) and 5 (a) (v) of the Mortgage sets out the default provisions, the rights of the Mortgagee to obtain appraisals and powers of reentry and sale of the Mortgagee.

24. The Court is satisfied that the Plaintiff has proceeded under the relevant section of the RSC for bringing this action before the Court. The Plaintiff has the burden of proving on a balance of probabilities that the Defendant has breached Clause 5 of the Mortgage and that the Plaintiff is entitled to exercise the remedies under the Mortgage.

25. By the Defendant's own admission in her Affidavit, there is no dispute that the Defendant had defaulted on the covenant under the Mortgage to pay the monthly instalments when the action was commenced. It was at that time the Mortgage was called and the full sum outstanding was due.
26. Having reviewed the evidence adduced by Ms. Johnson against the loan history payments adduced by the Plaintiff the Court is satisfied that the Defendant continued to default by failing to pay the monthly instalments after the commencement of this action.
27. Counsel for both parties referred the Court to the rule of detrimental reliance in Snell's Principles of Equity however while the text provides a general understanding surrounding the rule of detrimental reliance, the qualifying factor on which the person acted to their detriment is that the promise or assurance must be unambiguous. To my mind the promise or assurance must be well-defined between the parties, leaving no room for any other interpretation to be made. Therefore, in considering the Defendant's evidence I accept that two bank drafts one in the amount of \$6,000.00 and the other in the amount of \$14,000.00 was paid to the Plaintiff bank. However, I do not find that there was an agreement between the Plaintiff bank and the Defendant whereby the payment of the \$20,000.00 was in full and final settlement of the Defendant's arrears at that time. Moreover, the burden of proving that such an agreement was made between the Plaintiff and the Defendant falls on the Defendant and not the Plaintiff. Additionally, I find that the Defendant failed to produce any evidence to this Court by way of a written agreement between the parties confirming that the payment of that sum was in full and final payment of her arrears or that the Plaintiff's conduct was such that its actions following the purported agreement resulted in the Defendant acting to her detriment. Further, to date the Defendant has not adduced any further evidence showing her ability to facilitate the repayment of the sums now owed and due.
28. I also find that the evidence of Ms. Johnson was not helpful or conclusive to the submissions laid over by Miss Ginton, particularly the issues raised in Miss Ginton's

submissions regarding the Plaintiff's practice of applying late fees and the Plaintiff's alleged failure to provide a full account of the Defendant's savings account with the Plaintiff bank. The onus was not on the Plaintiff to provide that evidence, if that evidence was helpful to the Defendant she was free to furnish copies or a record of her savings account if it demonstrated payments made on the Mortgage account, however she failed to do so.

29. The Court in short, accepts the evidence of the Plaintiff and adopts the Plaintiff's submissions.

30. In the well known case of Bahamas Law Reports/2001/Citibank, N.A. v. Major - [2001] BHS J. No. 6 Court of Appeal Justice Ganpatsingh (as he then was) read the Judgment of the Court which sets out among other things the law as relates to the position of a Mortgagee upon the default by the Mortgagor of the covenant to repay the mortgage in instalments:

**"...The position at law is that where under a legal mortgage being an installment mortgage, the whole mortgage 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 for possession or to adjourn the summons, either on terms or not on terms as to keeping up payments or paying arrears, if the mortgagee does not agree to that course; but this does not exclude power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgagee in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so: See Birmingham Citizens Permanent Building Society v Caunt (1962) 1 AER 163, in which Russell J at p. 172 stated the position thus:**

**" There was, however, no principle on which equity had ever attempted or could ever rightly attempt to interfere with the security as a security or to destroy or suspend or nullify any rights of the mortgagee which were part and parcel of that**

**security. The whole purpose of equity was, by insisting that the transaction was a security for the repayment of money, to shield the mortgagor from attempts in reliance on strict legal right to turn it into something more. Equity was never and should never be in the hands of the judges a sword to attack any part of the security itself, and the right to possession was an important part of that security, more particularly in association with the ability to give vacant possession on the exercise of the power of sale. These appear to me to be sound answers to an attempt to give reasons for the existence of a jurisdiction such as is suggested. I think that there was and is no such jurisdiction."**

**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 installments. The mortgagor in order to get relief must necessarily raise an action on the mortgage transaction itself."**

31. Applying the principles discussed in **Citibank N. A. v Major** there are no factors in this case that would justify interference by the Court with the rights of the Mortgagee under the Mortgage by granting any further adjournments or time for discussions in favour of the Defendant.

### **Disposition**

32. The Court having read the pleadings and the submissions by Counsel for the Plaintiff and the Defendant and having considered the applicable case law the Court makes the following Order:

The Defendant shall pay to the Plaintiff the sums due to the Plaintiff under the Mortgage herein within 120 days of the date hereof failing which the Defendant

shall deliver up vacant possession of the Mortgaged Property to the Plaintiff upon the expiration of the said 120 days. The Plaintiff shall be at liberty to enter judgment against the Defendant for all sums due and owing to the Plaintiff specifically the total sum of \$172,440.90 together with interest at the mortgage rate until payment of the debt. The Declarations sought in the Originating Summons herein are granted. The Defendant shall pay the Plaintiff's costs herein to be taxed if not agreed.

Dated this 29<sup>th</sup> day of September, A. D. 2020

**Petra M. Hanna-Adderley**  
**Justice**