

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division
2017/FAM/div/00105
BETWEEN**

**CR (nee G)
Petitioner**

AND

**GR
Respondent**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mrs. Cassietta McIntosh-Pelecanos for the Petitioner
Mr. Jethro L. Miller QC for the Respondent

HEARING DATES: July 3, August 3, 2021, September 24, December 8, 2021

DECISION

Hanna-Adderley, J

This is an application for the enforcement of the terms of a Consent Order

Introduction

1. By way of a Summons filed February 17, 2021 the Respondent seeks to enforce compliance with the terms of a Consent Order of the Court filed herein on May 29, 2019, which has been violated or breached by the Petitioner. This application is supported by the Respondent's Affidavits filed on February 17 and June 21, 2021. The Respondent further relies on Submissions filed on June 23, 2021.

2. The Petitioner meets the Respondent's application with her Affidavit filed on June 15, 2021. By a Summons filed on December 8, 2021 the Petitioner seeks a determination and Declaration of the amount of equity, if any, to which the Respondent may be entitled to in the former matrimonial home situate at Lot 50 Bristol Place, Sunrise Subdivision, Freeport, Grand Bahama. The Petitioner relies on the Affidavit filed herein on December 10, 2021. The Respondent has not filed a responsive affidavit to this Summons but relies on his Submissions filed December 11, 2022.

Statement of Facts

3. On May 29, 2019 the Court made a Consent Order in the following terms:
 - (1) That the Petitioner will purchase the Respondent's half interest in the matrimonial home situate at Lot 50 Bristol Place, Sunrise Subdivision, Freeport, Grand Bahama, Bahamas.
 - (2) That the property is to be appraised within three weeks by a mutually agreed professional appraiser to ascertain the current value and in turn the Respondent's entitlements in the matrimonial home. The costs of the appraisal to be equally shared between the parties.
 - (3) The Petitioner to pay the Respondent the monthly mortgage payment amount of Eleven Hundred Dollars commencing on or before October 31, 2018 until the Petitioner is able to qualify for a mortgage. This arrangement to continue for a maximum of one year. Should the Mortgage monthly payment be changed the amount due to the Respondent shall reflect such change and the Petitioner will be obligated to remit the new amount only to the Respondent.
 - (4) The monthly payments will be made to the Respondent's savings account # 7277403, Royal Bank of Bahamas.
 - (5) The Respondent will convey all of his right title and interest in the property to the Petitioner upon the payment of his interest therein. The Respondent will execute all documents necessary to complete the transfer of his

interest. Should the Petitioner fail to execute the documents it should be legal and valid for the Registrar to execute the same.

- (6) The Mortgage is currently in arrears for one month. Petitioner will pay the outstanding amount on or before 30th September 2018.
- (7) The service charges are currently outstanding in the amount of \$839.73 and the parties will each pay one half of this amount prior to closing of the transaction specified in paragraph 5 herein.
- (8) The parties agree that should the Petitioner fail to pay the monthly amount for a period of sixty days after the due date the previous terms will be deemed null and void and the matrimonial home is to sold.
- (9) In the event of the sale the parties agree that the monthly Mortgage payments will be shared equally until the sale is sold. Each party will make efforts to sell the home and not impede the commencement or progress of a sale.
- (10) Should the home be damaged by Hurricane, fire, or others acts of God or any other means that warrant payment under the homeowner's insurance the Respondent agrees that he will sign the proceeds over to the Petitioner to effect the necessary.
- (11) Should either party meet their demise during the course of this agreement and the balance owing on the home is to be shared equally between the surviving owner and the designated beneficiary of the deceased.
- (12) The Petitioner desires he beneficiary of her interest in the house to be her son TJD and the Respondent's beneficiary will be his son GRKR.
- (13) The Petitioner will allow an inspection of the exterior of the home once every six months by a person mutually agreed between the parties.

4. On September 24, 2021 I made the following Order:

- (1) The Petitioner will assign her salary to the Mortgagee within the next seven days.

- (2) The Petitioner shall pay to the Respondent the sum total of his Equity in the matrimonial home by way of mutually agreed monthly installments.
 - (3) Once the Respondent has been paid for his equity the Respondent's Attorney shall prepare the Conveyance of Equity of Redemption.
 - (4) The Petitioner shall indemnify the Respondent against any claims by the Mortgagee. The Respondent shall prepare the Indemnification.
 - (5) In default the property shall be sold and the parties' equity divided 50/50 after settlement of the Mortgage and the costs of any sales transaction.
5. The Petitioner has secured financing with Finance Corporation of The Bahamas ("**FINCO**") sufficient to settle the existing mortgage and free the Respondent of the same but because of the disagreement between the parties concerning their equity, the Respondent has refused to execute an Indenture of Conveyance transferring his interest to the Petitioner and she has not been able to complete the mortgage transaction.

Evidence

6. The Respondent's evidence is, in part, that while the Petitioner has continued to pay the mortgage, even if late, she has violated the Consent Order in that she refused to allow the realtor to enter or show the property to potential buyers, she has refused to agree to or co-operate with an Appraiser, she has failed to provide proof that she has tried to obtain a mortgage and any attempt by the Respondent to explain the urgency of his position has been rebuffed. He was prepared to pay the Petitioner for her interest based on the parties' equity being agreed between \$5,000.00 and \$8,000.00. That he has suffered the following loss because of the Petitioner's failure to comply with the Consent Order:
- (1) Because the loan payment is being deducted from his salary, he cannot qualify for a loan for a new home to accommodate his new family, his credit-worthiness is reduced;
 - (2) He is paying a monthly rent;
 - (3) He is being billed for the annual service charges which is in default and damages his credit.

He is 42 years old, which means he has less time to pay a financial institution back when he does secure a mortgage. He is the sole caregiver and provider of his 76 year old mother. He asks that he be permitted to pay the Petitioner for her interest or that the matrimonial home be sold, and that the Petitioner pays his costs.

7. The Petitioner's evidence in response to the Respondent's Summons is, in part, that since the making of the Consent Order she has been trying to obtain an accommodation from FINCO to carry out the terms of the Order. She outlined the steps taken and the challenges faced in this process. That she and the Respondent met with their loan manager in 2019 and sought to have the terms carried out but FINCO was unwilling to release the Respondent due to the stability of his job. That she had been in line for a promotion at work but that due to hurricane Dorian and the ongoing pandemic all promotions have been put on hold. The promotion would have increased her salary and put her in a better financial position. On another occasion she and the Respondent returned to the bank with the hope of getting the mortgage payment reduced so that she could assume the sole responsibility for paying it. Again, the Bank refused to release him but did agree to reduce the loan payment. She tried to transfer the Mortgage to Bank of The Bahamas but because the mortgage was obtained from FINCO during a mortgage promotion the transfer would attract severe penalties and make the new mortgage payment unsustainable.
8. The Petitioner's evidence is that since the Consent Order was made she has consistently paid the Respondent the monthly payments to ensure that he suffers no financial set back. That she wishes to retain the property and she continues to make every effort to get the Respondent released from the Bank. That when she swore her affidavit filed on June 15, 2021 she had an appointment at the Teachers Credit Union and was seeking one at the Bank of The Bahamas to make application for financing. She asked the Court to allow her until July 2022 to secure financing should she not be successful with the said institutions.
9. The Petitioner's evidence in support of her Summons is, in part, that in or about May 2018 the parties were ordered to have the matrimonial home appraised within

3 weeks and to share equally the cost of the appraisal. That the parties agreed to hire Mr. Floyd Armbrister to appraise the property and they shared the cost. On September 24, 2018, Mr. Armbrister appraised the matrimonial home for \$120,000.00. That at that time the balance of the Mortgage was \$117,549.67. The parties' equity was then \$2,450.33 or \$1,125.15 each.

10. That she has reimbursed the Respondent for the monthly payments and that she borrowed money to replace the kitchen cabinets with the ones that the Respondent insisted that she get. He said that he would pay her \$500.00 per month towards the cost but that he never did.
11. That at the instance FINCO in the mortgage transaction Mr. William Duncombe appraised the property on June 29, 2021 as having a market value of \$115,000.00.
12. That on October 25, 2021 at the instance of the Petitioner Mr. Spencer W. Mallory appraised the property as having a fair market value of \$120,000.00.
13. That at the instance of the Respondent on October 6, 2021 Mr. Bert Lightbourne appraised the property as having an appraised value of \$146,000.00 and a forced sale value of \$116,800.00.
14. That since the Consent Order was made she has made improvements to the matrimonial home with no contribution from the Respondent. She added a front step, a back porch, modern lighting, a concrete foundation for a shed and kitchen cabinets as hereinbefore mentioned.
15. That she also paid a lump sum payment on the principal of the loan in the sum of \$3,000.00 in or about August of 2021. That the loan balance as at the filing of her Affidavit of December 10, 2021 was \$108,604.86.
16. That she does not accept the value as presented in Mr. Lightbourne's Appraisal. That she believes it to be overstated. That even if the value has increased, the Respondent is not entitled to the benefit of that increase because he made no financial contribution towards it. That the mortgage transaction is ready to be completed but that the Respondent is attempting to hold her hostage to force her to agree to something that she cannot afford and that he is not entitled to. That

he seeks \$10,000.00. If this sum were to be added to her loan she would not qualify for it.

Submissions

17. Mr. Jethro Miller QC, Counsel for the Respondent, submitted, in part, that a party to a consent order has no right to ignore it however difficult or burdensome it became to carry out its terms. That he is not before the Court to argue contempt and waste more judicial time. He submits that there are only two options, (a) a sale forthwith of the Equity of Redemption by the Petitioner to the Respondent **OR** (b) Order a Sale of the house forthwith allowing inspection so that a realistic market price can be determined. Mr. Miller QC invited the court to revisit the consent order regarding inspection and the unwillingness to allow it by the Petitioner. That he was compelled to conclude that the effort to qualify for an individual mortgage is, on the facts distilled from both affidavits, a fool's errand and must no longer be used as a lynchpin to continue to "tie" the parties together.
18. Mr. Miller QC then invited the Court to consider what would happen (1) if the payment is prolonged until 2022 to allow more time to pursue an individual mortgage and the effort fails again; and (2) if the Respondent buys the Petitioner's Equity does the Petitioner continue to pay the mortgage until her interest is paid out AND she should be required to pay the service charges and water and keep them up to date. They are in the name of the Respondent. If the Court decides to adopt the sale of the home and the Respondent is obligated to pay half of the mortgage until the sale to a third party is completed, the Respondent wishes to move back into the home pending completion of sale because he would in effect have to pay his current rental as well as half the mortgage which he finds untenable.
19. Mr. Miller QC submitted that based on the above and the current market conditions, the sale of the equity to the Respondent is the only and most easily enforceable solution. Further, that to ask that the Respondent convey his equity to the Petitioner is not an ideal or practical solution. That this will only mean that she buys him out, but the bank still holds him as primary borrower. That the

mischief on which the entire present claim is based cannot be resolved unless and until the Respondent is released from the Mortgage. That the Court cannot force the bank to discharge the Respondent, but the Court has the power to order a sale OR to order the Petitioner to sell her equity. The Petitioner has moved on with her life, with a newborn child, and a new relationship while the Respondent is stuck. He cannot qualify for a new mortgage, and he wants to move on with his life.

20. In response to the Submissions by Mr. Miller QC, Mrs. Cassietta McIntsh-Pelecanos, Counsel for the Petitioner, submitted, in part, the if this was a situation where the Petitioner had made no effort since the making of the Consent Order, she would agree wholeheartedly with Mr. Miller QC. However, in this instance there have been a number of factors. The Petitioner, from the making of the Order, along with the Respondent, went to the Bank to try to have the Consent Order carried out. After having been denied, she would have made several requests of that institution to assist her, as well as other institutions.

21. Mrs. Pelecanos submitted that in addition, Hurricane Dorian threw everything off course. That additionally, the COVID19 pandemic happened. That these were two intervening factors that no one foresaw, or could rebound from and we are still going through it. Mrs. Pelecanos submitted that the Petitioner's promotion, which was scheduled to take effect, was cancelled. That all promotions straight across the board for all of the Government workers were cancelled. The Petitioner has been trying to resolve this matter and we are now seeing that there has been some advancement. For whatever reason initially Finance Corporation of Bahamas ("**FINCO**") was not entertaining her. However, FINCO is now willing to entertain her and she is also looking at other options but FINCO would be the most favorable because of the current circumstances of the Mortgage. This is not a case where the Petitioner has been sitting down and not trying. It is definitely not a case of willful neglect. But quite to the contrary. Whereas it may seem that the option put forward by Mr. Miller is the easiest, we have to ask if it is the most fair.

22. The Petitioner has been consistently paying Mr. R back every dollar so that he is not at a financial disadvantage; every dollar even though her salary is small, and

we say smaller than the Respondent's salary. She has been making the sacrifices to make sure that Mr. R is not financially disadvantaged. All Ms. R is saying is that, there are things that have happened that she could not control. She is asking for some time to continue to try to sort the matter out. She is not remarried. She is still on her own trying make ends meet and trying to maintain the home. She has been maintaining the home. She has been paying all of the life insurances, all of the house insurance; she has been paying everything since the making of this Order, without the assistance of Mr. R.

23. Mrs. Pelecanos submitted that even when talking about what the equity is, what formula are we going to use, because for two years now, she has been paying every dollar, as relates to this particular home. So, it is not a clean-cut formula that we can use to ascertain what the equity is. She has been living in the home. However, is it fair that Mr. Russell benefits from all of these payments that she has been making to pay down the Mortgage? It was not like this when they were married, and both of them were benefitting from the home, and possibly sharing expenses as relates to the home. The situation has now changed. And so, we are submitting to the Court that even in coming to what the equity is, we have to take into consideration all that has happened as per the Consent Order. The Petitioner is asking that she be given some time.

24. Mrs. McIntosh Pelecanos submitted that the Petitioner wants to sever all ties with Mr. Russell, for matters outside of this particular application. And so taking care of this as soon as possible is in her best interest all around. All Ms. Russell needs is some more time, due to the intervening factors that have happened, so that she can resolve the matter and comply with the Consent Order. She has complied with everything save paying the Respondent for his equity. That if it was in her power to pay him this money, she would pay him out tomorrow. She could not move the Mortgage and still sustain it. That has now come to an end, that five-year period. She has been successful in getting financing.

25. In response to the Petitioner's Summons filed herein on December 8, 2021, The Respondent filed no Affidavit evidence in response, but Mr. Miller QC laid over

written Submissions for the consideration of the Court indicating that the Respondent was prepared to leave the matter in the hands of the Court. Mr. Miller QC submitted that regrettably and unfortunately, this court is now left to make a decision based on some recently produced appraisals which he had not seen but were provided in summary form by his legal assistant while still out of the jurisdiction.

26. That the Respondent's position is that there were several attempts by Petitioner to use Appraisals as a method to lessen the Equity. The court will recall that the Petitioner produced, at the hearing, an unreadable copy of an appraisal that the Respondent had ever heard of giving the market value of \$120,000.00. They claimed the mortgage balance was \$110,000.00 leaving the equity for both as \$5,000.00. The equity of the Respondent was (by that valuation) \$2,500.00. Some other appraisal, supposedly done by or on behalf of the Petitioner soon after the Divorce (and not shared with the Respondent), was referred to but never produced. Now two appraisals were delivered to Counsel's staff a day or more ago but unlike the Summons, was not emailed to Counsel and as a result he will reserve assessing any value to any of this late attempt at achieving a zero equity for the Respondent. That the Court is now expected by the Petitioner, on some new theory of the application of the principle of Equity, eschewing all attempts at fairness, to support the claim that the Respondent must execute the Conveyance of his Equity of Redemption for either zero or \$1,000.00 dollars approximately at most.

27. That, being troubled if not offended by an appraisal supposedly procured by the Bank and shared by WhatsApp at an earlier hearing, the Respondent determined that he needed to locate a reputable appraiser whose work is universally accepted by Inland revenue and the Banks. Counsel made contact with the Department of Inland Revenue discovered that the appraisals of some of the local appraisers are no longer acceptable. In the course of that enquiry, we were advised to contact Mr. Bert Lightbourne as one appraiser known to be both fair and accurate. That is how an appraisal was obtained from Mr., Lightbourne. It listed a current market value at \$146,000.00 which is the average value of the homes in Sunrise Park.

28. It is therefore to position of the Respondent that consideration of his Equity begins with the Lightbourne Appraisal. If the value is \$146,000.00 and the Mortgage is still \$110,000.00 (having not been reduced from the number supplied months ago) the Equity becomes \$36,000.00 and the Respondent entitled to \$18,000.00. He offered to settle or accept \$10,000.00. That is rejected and now the Petitioner is attempting to convince this Court that she can justify paying about \$1,000.00 and get the Equity of Redemption.
29. That Counsel has no idea how much was approved by the lender but the Petitioner is now presenting to this Court, invoking a convoluted reasoning that she improved the home which the Respondent disputes, and that she has paid the approximately \$1,100.00 dollars previously deducted from his salary. With reference to improving the home, this improbable theory is voided by the Petitioner's own appraisal. The Petitioner contends that she made improvements yet produces an appraisal that gives a value lower than any home in the entire Subdivision. It can be determined from the Public Record that the entire Sunrise Subdivision was built after Hurricanes Jeanne and Frances. It is close to Hawksbill Subdivision but these homes are decidedly more upscale, newer and generally similar in lot size. Counsel therefore begged the Court to determine why there is such an attempt to deny what this Respondent has been denied for now over three years.
30. Mr. Miller QC invited the court to take into consideration that the terms of the Consent were violated. So, while the Petitioner was content to move on with her new life, new relationship and child the Petitioner had to live in rental accommodation from the date of his departure from the matrimonial home till this date. However, when the additional financial burden arose she should have agreed to sell this house once she found out she could not qualify for a mortgage on her own. She cannot and should not be allowed to use the generosity of the court this way.
31. That the Respondent should be granted some of his costs. That the notion that the Respondent's Equity be assessed at the value proposed be rejected and unless the Lightbourne Valuation can be disproven, that is the true market value. It is

from that starting point that Mr. Miller invited this court to begin to make the determination. He also asked that the Decree Absolute be granted.

Issue

32. The issues to be determined by the Court are whether the equity of the parties should be determined based on the 2018 appraisal and the mortgage debt at that time or on a more current appraised value and current mortgage debt, and if on a current appraised value, which appraisal should be accepted?

Analysis and Discussion

The Law

33. The Respondent has not commenced contempt proceedings against the Petitioner but seeks the aid of the Court in the exercise of its inherent jurisdiction to enforce the terms of the Consent Order. The Consent Order was made pursuant to the Court's powers under sections 27, 28 and 29 of the Matrimonial Causes Act. The Petitioner also seeks the exercise of the Court's inherent jurisdiction to determine the parties' equity in the matrimonial home.
34. The case of **Miller vs. Miller and Mc Farlene and McFarlene** addresses the issue of doing what is fair as relates to the parties. Lord Nicholls which states in part:

"Fairness is an elusive concept." This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party."

Discussion and Conclusions

35. There is no doubt and I accept as is submitted by Mr. Miller QC that the Petitioner has not complied with the terms of the Consent Order. I also accept however, as submitted Mrs. Pelecanos that her failure to comply was not a willful neglect or failure to comply. The Petitioner had until May of 2020 to secure a mortgage and pay the Respondent out before the default provisions of the Consent Order was triggered, that is the sale of the Matrimonial Home. I accept her evidence that the events of Hurricane Dorian and the Covid 19 Pandemic which is not yet a distant memory for all of us, delayed her efforts to secure a promotion and alternative financing. The Respondent cannot claim ignorance of these efforts and he accompanied her on at least 2 occasions to FINCO to attempt to resolve the matter. During the intervening years between the entering of the Consent Order and now the Petitioner has not only paid the mortgage herself but has maintained the house insurance, been responsible for the service charge, which if they are in arrears at the moment will have to be paid current from the mortgage proceeds, and made substantial improvements to the Matrimonial Home, with no contribution from the Respondent.
36. The Respondent has suffered some prejudice because of the delay, at least for the period May 2020 to date. He has not been able to purchase a home and move on financially with his life and he has had to pay rent although he did not disclose to the Court what this amount was. But if "fairness" is to be the yardstick to be applied, it could not be fair as submitted by Mrs. Pelecanos for the Respondent to benefit from the improvements made to the property and from the reduction of the mortgage debt without having contributed to the same. If the Respondent had been paid his equity in 2019 all he would have been entitled to \$1,125.15.
37. The Court has before it 3 appraisals prepared in 2021. The Duncombe and Mallory appraisals fall within the acceptable variance in market value between appraisers (that is, 10%). Save for the value expressed as the "forced sale value" of \$116,800.00, the market value of \$146,000.00 stated in the Lightbourne appraisal falls far outside the usual margin of variance between appraisers. I was unable to

discern from the face of the Lightbourne appraisal what could have accounted for such a disparity in value between this appraisal and the other two. The Mallory appraisal challenges it, but the Respondent did not call Mr. Lightbourne to give evidence on his assessment of the value. I am of the view that the fairest approach to determining the fair market value would be to apply the Median approach to the Duncombe and Mallory appraisals and deduct the current loan amount from this sum. This formula, I am of the view, compensates the Respondent for some of the inconvenience caused by the delay. The prejudice suffered by the Respondent does not include not having in hand the Decree Absolute as he was and is permitted by the RSC to make application for the same should the Petitioner fail to do so.

Disposition

38. Having considered all of the affidavit evidence filed herein, all of the relevant statutes and case authorities, having heard Counsel and having read their submissions I make the following Declaration and Orders that:

- (1) The appraised value of the Matrimonial Home is \$117,500.00.
- (2) The parties equity in the Matrimonial Home is the appraised value less the amount of the outstanding loan as at December 10, 2021 that is \$108,604.86 = \$8,895.14. The Respondent is entitled to 50% of this sum, that is \$4,447.57.
- (3) The Respondent shall execute all documents necessary to complete the Mortgage transaction forthwith and shall forward the same to the Petitioner's attorney. The said sum of \$4,447.57 which shall be paid by the Petitioner to the Respondent commencing with a good faith payment of \$500.00 on February 11, 2022 and thereafter by way of 4 equal monthly instalments in the sum of \$986.89 commencing March 30, 2022 and payable on or before the 30th day of the month. Should the Respondent fail to execute the said documents as ordered, the Deputy Registrar of the Supreme Court shall be and is hereby authorized to execute the said documents on his behalf.
- (4) The parties shall have liberty to apply.

Costs

39. Costs usually follow the event. I see no reason to depart from this principle in these circumstances. The Respondent is awarded his costs occasioned by his Summons to be taxed if not agreed. I make no order as to costs in respect of the Petitioner's Summons filed herein.

Dated this 10th day of February A. D. 2022

Petra M. Hanna-Adderley
Justice