COMMONWEALTH OF THE BAHAMAS **2014/CLE/gen/1755**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

IN THE MATTER of property comprised in a Mortgage dated the 5th day of January, A.D, 2010 between Cutell Louise Miller and Scotiabank (Bahamas) Limited of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 10991 at pages 270 to 285,

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 138 of lie Revised Statute Laws of the Commonwealth of The Bahamas.

BETWEEN:

GATEWAY ASCENDANCY LTD.

Plaintiff

AND

CUTELL LOUISE MILLER

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Candice Hepburn for the Plaintiff

Rouschard Martin for the Defendant

DECISION

FACTUAL SUMMARY

1. On 19th January 2015 Scotiabank obtained an Order for vacant possession of a property at Lot Number 1372 in the subdivision known as Golden Gates Estate Section Two Addition situate in the Western District of the Island of New Providence, which was the subject of a mortgage between

the Defendant and Scotiabank. That mortgage was transferred to Gateway Financial Limited and then Gateway Ascendancy Limited, who thereafter obtained an Order on 30th October 2019 substituting Gateway Ascendancy Limited for the Scotiabank as Plaintiff in the matter. That Order was provided to counsel for the Defendant, who was advised of the intention to seek a Writ of Possession, and who requested time to take instructions. A Writ of Possession was then obtained, and was served on the Defendant by the Deputy Provost Marshall on 25th November 2020, along with the Order authorizing substitution and enforcement.

2. There followed discussions with the Defendant via counsel with a view to seeking alternate financing arrangements. Those efforts were not successful, and in February 2021 the Defendant was again advised of the intention to proceed with enforcement. New defence counsel then came in to the matter, and further discussions ensued. Again those discussions were not fruitful, and the Deputy Provost Marshall attempted to take possession of the subject property on 26th March 2021 by changing the locks on the premises. The Defendants personal effects were subsequently removed and placed in storage.

3. By Summons filed 26th March 2021 the Defendant seeks the following Order:

    1. Pursuant to Order 45 (11) of the Rules of the Supreme Court (RSC rules) and the inherent jurisdiction of the Court granting to the Defendant a stay of execution of the Order hereinafter mentioned pending the determination of the other relief sought under this Summons.

    2. Setting aside the Order made herein on the 30th October, 2019 (the Order) and the Plaintiffs Writ of Possession issued on the 6th October, 2020 and filed on the 14th October, 2021 on the ground that the Plaintiff as substituted party has no right of enforcement in this action subsequent to the Judgment or Order of the Court granted upon or in respect of the Originating Summons herein, AND there being nothing to be done in this action.

    3. Striking out Gateway as substituted party on the ground that there is a) nothing left in this action to be done; b) Gateway has no right of enforcement; and c) and pursuant to Order 18, r. 19 of the Rules of the Supreme Court, that Gateway's presence in this action is an abuse of the process.

    4. that the Plaintiff shall pay the Defendant's costs of this application to be taxed if not agreed.

DEFENDANT'S CASE

4. The Defendant submits that the Plaintiff as substituted has no right of enforcement of the judgment debt in this action, as a party may only be substituted after judgment as long as there is something left to be done, such as assessment of damages, but not inclusive of enforcement, and cite **Attorney General v. Corporation of Birmingham (1880) 15 Ch. D., 423.**

5. The Defendant also cites **Northern Electric Co. Ltd. v. Turko (1959) B.C.J. No. 27**, in which the plaintiff entered judgment by default against the defendant. A third party paid the judgment debt and the judgment creditor assigned the judgment to him and applied for him to be substituted in the action in place of the assignor. Collins J, dismissed the application and stated that the said Rule did not permit an assignee of a judgment debt to be substituted as the judgment creditor in a judgment already drawn up and entered.

6. The Defendant relies on **Canadian Imperial Bank of Commerce v. Garneu (1986) 1 B.C.L.R (2d) 53 (S.C.)** in which Southern J, relying on **Attorney-General v. Corporation of Birmingham (1880) 15 Ch. D. 423 (C.A.)**, ruled that persons or parties could not be added after a final judgment or order, and remarked at p.8:

"2. Generally, parties cannot be added after judgment. See Attorney-General v Corporation of Birmingham (1882)... in which Jessel MR, James and Brett L.JJ concurring, stated at p. 425:

"A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose....."

7. The Defendant suggests that Royal Bank of Canada v. Olson (1990) b.c.j. no. 359 (s.c.) supports the same principle, as in that case an application to have the assignee of the judgment of Royal Bank against the defendant substituted as the plaintiff was rejected on the basis that the rules for substitution and adding of parties do not apply after judgment. The Defendant therefore submits that there could be no substitution, and therefore no enforcement, after judgment.

8. The Defendant also submits that the Plaintiff required leave obtain a Writ of Possession, as a party had changed, and that such required leave was not obtained, and relies on Order 46 rule 2 (1) (b) which reads as follows:
2. (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say —
(a) where six years or more have elapsed since the date of the judgment or order;
(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order.

9. The Defendant therefore submits that the Order for substitution should not have been granted, but that even if it was properly made, leave was required before obtaining a Writ of Possession. They submit that as such leave was not sought, the Writ of Possession was irregularly obtained, and should be set aside.

10. The Defendant cites RSC Order 15, rule 8 (5) which states the following in reference to Order 15, rule 8 (2):
Any application to the Court by a person served with an Order made ex parte under this rule for the discharge or variation of the Order must be made within 14 days after the service of the order on the person."

11. The Defendant therefore submits that the ex parte Order of the 30th October, 2019 was required to be personally served on the Defendant to allow her an opportunity to be heard, but that she was not served with the Order. The Defendants further submit that there was no question of the Order for substitution being appealed, as the order was made ex parte with no right to be heard by the Defendant, and in such circumstances the Court of Appeal has stated that such orders should be the exception rather than the rule, and cite the decision of the Court of Appeal in ***Annishka Missick aka Annishka Hanchell v Larell R.L. Hanchell SCCivApp. No. 87 of 2020*** at paragraph 10 which reads as follows:

"10. Unless there was an immediate threat of harm to the safety and welfare of the children it is difficult to apprehend the basis for making the Order without any notice to the mother. I adopt the observation of Mostyn J in Re W (minors) [2016] EWHC 2226 (Fam) in relation to an ex parte non molestation order where he said:

'It has been stated time and again that ex parte relief of this nature must be very much the exception rather than the rule because it offends a fundamental principle of natural justice which is that judicial decisions should be made after having heard both sides. Lord Hoffmann has described the principle of Audi Alteram Partem as "salutary and important" but I would go further and say that it is a virtually indispensable ingredient of the administration of justice which can only be departed from in circumstances of grave risk of harm, and then when it is departed from should be mediated by the earliest possible inter partes hearing.'"

12. The Defendant further submits that it would not have been proper to seek to appeal the substitution order, as the Court of Appeal has indicated that parties should await the conclusion of the matter before embarking on an appeal. They cite ***Rubis Bahamas Limited v Cable Bahamas Limited & Fiorente Management & Investments Ltd SCCivApp No 31 of 2015***, an oral decision of Conteh J, who said as follows:

19 We are mindful that in the interests of justice the proceedings before the trial judge in the Supreme Court should run their full course. If, as it has been averred that

inadmissible evidence was admitted, that would be cured on appeal, if that inadmissible evidence was pertinent to the disposal of the case.

13. The Defendant finally cites the case of ***Aman v Southern Railway Company (1926) 1 KB 59***, and submit that once final judgment is perfected and entered, the mortgage and debt which were in issue merges into the final judgment, and that the only thing an assignee of the judgment can act on is the judgment itself, as opposed to the mortgage, as to do otherwise would be to raise the prospect of the final judgment being changed, which could not be done as a court of concurrent jurisdiction would be functus officio. They submit that changing parties would create new issues and offend against the principle that there should be finality to litigation, and that the Plaintiff would have to commence a new action to enforce the judgment.

PLAINTIFF'S CASE

14. The Plaintiff counters by submitting that Order 15 Rule 8 (2) of the Rules of the Supreme Court permits the court to grant an Order that another person be made a party where at "any stage" of the proceedings in any "cause or matter" the interest or liability is assigned or transmitted, and that in the instant case, Scotiabank (Bahamas) Limited could not seek a Writ of Possession as the full benefit of the Mortgage was transferred to Gateway Financial Ltd and subsequently to the Plaintiff. They therefore submit that the only party who could enforce the judgment is the Plaintiff.

15. The Plaintiff seeks to distinguish the case of Attorney General v Corporation of Birmingham (1880) 15 Ch.D.423, and suggest that the Plaintiff in that case was seeking to amend the defendant to enforce an injunction previously granted to another party, which would have had the effect of binding a defendant who had not had an opportunity to defend. The Plaintiff submits that in this case the Defendant had every opportunity to be heard when the order for judgment and vacant possession was made in her presence and in the presence of her counsel on 19th January 2015, and no new obligation is being imposed by the order for substitution.

16. The Plaintiff contends that the case of **Northern Electric Co. Ltd. V Turko (1959) B.C.J No. 27**, is also distinguishable, as in that case "a third party paid the judgment debt" and thereafter the Judgment Creditor assigned the Judgment to him. They submit that in the instant case the judgment debt has never been satisfied. The Plaintiff also seeks to distinguish the case of **Canadian Imperial Bank of Commerce v Garneu (1986) 1 B.C.L.R (2d) 53 (S.C.)**, on the basis that it again deals with a Plaintiff attempting to amend the Defendant/Respondent, as opposed to a substitution of Plaintiff.

17. The Plaintiff notes that at the time the mortgage was assigned, Scotiabank (Bahamas) Limited had not sold the mortgaged property nor received possession of the subject

property, so that, even if the court to considered the Defendant's argument that parties should only be amended "so long as these is something to be done," it is clear that there were things left to be done.

18. Finally, the Plaintiff asks the court to consider the actions of the Defendant during the entirety of the case, as the Defendant has been residing in the subject property, failing to make any payments toward the Judgment, and requested an opportunity to seek financing in order to settle the matter.

19. The Plaintiff suggests that the Defendant was given four (4) months in which to seek financing, but was unable to do so, and now instead seeks to delay the matter further, preventing the Plaintiff from realizing the fruits of the judgment, and suggesting that a new action would be necessary, which would lead to further costs and expense, when there still have been no efforts to satisfy the debt. The Plaintiff therefore asks that the Summons be dismissed with costs.

LAW & ANALYSIS

20. The Defendant contends that the order of Hilton J. had to be personally served on the Defendant, and that the granting of an ex parte order is in contravention of strictures laid down by the Court of Appeal in, for instance, the Anishka Missick decision, which, coupled with the alleged failure to serve, amounted to a denial of the right to be heard.

21. In my view, this submission is without substance. The Missick decision does not lay down any hard and fast rule that ex parte orders should not be granted. Such a finding would completely eviscerate numerous provisions in the law. What the decision implies, and what has long been recognized, is that in certain circumstances the court should require notice to be provided, as the consequences of some decisions are simply too grave to contemplate in the absence of both parties. This was the circumstance that existed in Missick, which involved the custody of minor children. It is also of note that the Court was of the view that the opportunity to be heard which occurred after the initial hearing cured any defects which might have flowed from the granting of the ex parte order.

22. The Defendant also suggests that the order of Hilton J could not have been appealed, as the Court of Appeal has indicated that parties should abide the completion of the case. It is my view that the oral decision of Conteh J in the Rubis case cited above simply does not assist the Defendant in the instant case. In this case, the complaint is that the learned judge had no jurisdiction to make the order for substitution which, though ex parte, was a final determination on that issue. The only thing remaining in the case is enforcement. There are no other substantive issues to be determined in the Supreme Court so, in my view, there is nothing to abide.

23. With respect to the issue of a lack of service, the Defendant cites the provisions of Order 15 Rule 5 and suggests that that Rule required personal service upon the Defendant. The rule reads as follows:
(5) Any application to the Court by a person served with an order made ex parte under this rule for the discharge or variation of the order must be made within 14 days after the service of the order on that person.

24. The Plaintiff has provided evidence that the Defendant was represented by counsel, who was served with the order. There is even more evidence of engagement with previous and current counsel for the Defendant prior to the attempts to enforce. There is no contention that the Order was not served on counsel for the Defendant, which is permitted pursuant to Order 61 Rule 5, unless personal service is mandated by some other rule. In my view the provision cited by the Defence cannot be said to require personal service on the Defendant, and there is no basis to the complaint that the Defendant was not served. Instead, what could be said is that the current application, which was filed in March 2021, should have been filed within fourteen days of receipt of that Order by counsel, which occurred in November 2019.

25. Order 15 Rule 8 (2) of the Rules of the Supreme Court provides as follows:
2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party. An application for an order under this paragraph may be made ex parte.

26. The Defendant relies on Attorney General v Birmingham Corporation, in which the Court determined that a party may be substituted with the leave of the Court at any stage of the proceedings but not after final judgment had been made. This conclusion was later considered against the provisions of the equivalent Order 15 Rule 8 in ***Millen v Brown and others [1984] Lexis Citation 2365***. In that case, the Court stated in the headnote that "(iii) A person may be added as a party under Order 15, rule 6(2)(b)(ii) at any stage of the proceedings and the proceedings were still in being until any necessary steps had been taken to enforce judgment against the insurers under article 98 of the 1981 Order." The reference is to any person, and is not limited to a Plaintiff or Defendant.

27. Most importantly, later in the decision the Court referred to another decision and said as follows:
One may also derive some assistance from the decision of Jessel M.R. in Campbell v. Holyland (1877) 7 Ch.D. 166, in which he allowed the joinder of the successors in title of a defendant mortgagor in a foreclosure action, some months after the decree was

made absolute, in order that they should take steps to redeem the mortgage. In ruling upon the application Jessel M.R. said at page 169:

"An order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute, nor can it be so now. In cases of great hardship a mortgagor might have obtained further time for payment, and the suit was allowed to go on after decree. The decree, though final in terms, was not final in fact, and the suit could not be considered as terminated."

The criterion upon which Jessel M.R. fixed his attention was the continuation in existence of the suit, not the more technical point of making of a judgment, and this appears equally to be the true foundation of his later rulings in the cases referred to above."

28. It is clear in my view that the provision permits substitution "at any stage of the proceedings" to ensure that the matter is completely adjudicated upon, which certainly encompasses enforcement proceedings or even, as in Millen, an appeal. What is also clear is that in such actions, there is something left to be done if the judgment had not been enforced, as the suit is therefore not final in fact. On the basis of that provision, as well as the authorities cited above, I do not agree with the Plaintiff's contention that the learned judge had no jurisdiction to grant the order for substitution.

29. The Defendant also submits that once the order for judgment was made, the debt merged with the mortgage into the final judgment, and that the assignee could act only on the judgment itself, in reliance on the case of Anan v Southern Railway. That case was recently considered in the case of ***Pearse v Revenue and Customs Commissioners [2018] EWHC 3422 (Ch)***, where the court said as follows:

> 27. I do not see that the decision in Aman really helps Mr Pearse. It shows that where a creditor agrees to accept payment in satisfaction of a debt which is expressed in a contract to be a debt due under a contract, he cannot then enforce a judgment that he has previously obtained for that debt and thereby get his money twice. The issue of what a phrase means must, of course, be construed in its context and the context in Aman required a reference to claims "under" the old debenture stock to be construed as including the enforcement of a judgment debt obtained in respect of such claim. That does not mean that every reference in a contract to a debt incorporates a judgment obtained to enforce that debt.

30. In the instant case, the debt has never been satisfied, and there is no question of the Plaintiff attempting to collect twice on the same debt. For this reason, and for the reasons set out above, I find that there is no substance to the contention that the court is functus officio, or that the Plaintiff must commence a new action to act on the judgment itself.

31. The Defendant also submits that no leave was sought to proceed with execution, pursuant to Order 46 Rule 2(1)(b). I note that while this was raised during the hearing, this issue was not mentioned in the Summons. The order granted by Hilton J states that Gateway was "entitled to enforce the Order for Vacant Possession." While it is not termed as a grant of leave, it gives the imprimatur of the court to the enforcement of the Order, which is the effect of a grant of leave. It is therefore my view that there is no substance in this submission.

32. What is clear in this case is that the Defendant on several occasions sought and obtained time from the Plaintiff to seek to organize new arrangements, but failed to follow through, and when all else failed, brought this application to further frustrate the efforts of the Plaintiff to enforce the judgment. For the reasons set out above, I dismiss the application brought by the Defendant, with costs to the Plaintiff to be taxed if not agreed.

Dated this 7th day of June A.D., 2023

Neil Brathwaite

Justice