

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2022/CLE/GEN/00297

IN THE MATTER OF Property Comprised in a mortgage Dated the 10th day of August, A. D., 2012 between Heidi Rolle of the one part and Teachers and Salaried Workers Cooperative Credit Union Limited of the other part And recorded in Book 12025 at pages 541 to 547 in the Registry of Records in the city of Nassau in the island of New Providence.

And IN THE MATTER of a Mortgage Action pursuant to Order 77 of the Rules of the Supreme Court 1978

BETWEEN

TEACHERS AND SALARIED WORKERS COOPERATIVE CREDIT UNION LIMITED

Applicant

AND

HEIDI LYNN ROLLE

Respondent

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Cedric Moss II for the Applicant

Wilfred Bain for the Respondent

Hearing Date: 13th March, 2024

Strike out action pursuant to Rule 26.6(1)(c) and/or the inherent jurisdiction of the Court – failure to comply with the Homeowners Protection Act, 2017 – sections 4(1) and 7(1) – action struck for failure to comply

RULING

Darville Gomez, J

The commencement of this action arose as a result of the default of the mortgage between the Applicant and the Respondent. The Applicant sought judgment, vacant possession and an order for sale of the Respondent's property located in High Vista ("the said property"). The Respondent on the other hand sought the dismissal of the action pursuant to the Supreme Court Civil Procedure Rule 26.6 (1)(c) and/or

the inherent jurisdiction of the Court and for relief pursuant to Section 6(1) of the Homeowner's Protection Act, 2017 (the "HPA").

Held: I have acceded to the Respondent's application to dismiss the action for failure to comply with the HPA and have refused the relief sought by the Applicant in its Originating Summons.

Introduction and Background

- [1.] The Applicant commenced this action against the Respondent on the 16th February, 2022 by way of Originating Summons and supporting Affidavit seeking the following relief:
- I. Judgment in the sum of \$226,920.76 as at the 15th day of September, A. D., 2021.
 - II. Delivery of possession to Teachers and Salaried Workers Co-operative Credit Union Limited all that piece parcel or lot of land referred to in the said Mortgage.
 - III. The said Mortgage be enforced by sale.
 - IV. Costs.
- [2.] The Respondent filed an Affidavit on October 26, 2022. In the said affidavit she raised a number of concerns particularly that she did not receive prior notice before the commencement of proceedings in accordance with the Homeowners Protection Act, 2017. In addition, she explained her financial challenges with servicing her mortgage account in 2014 when her contract with Ministry of Finance was not renewed and during the COVID-19 pandemic in 2020 followed by a traffic accident in December, 2021.
- [3.] On the October 19, 2023, she filed a Notice of Application along with a supporting Affidavit seeking the following relief:
- I. An Order that further proceedings in this action be dismissed pursuant to Supreme Court Civil Procedure Rule 26.6 (1)(c) and/or the inherent jurisdiction of the Court;
 - II. An order for relief pursuant to Section 6(1) of the Homeowner's Protection Act, 2017;
 - III. Directions to the parties regarding the peaceful and efficient resolution of this matter;
 - IV. Directions to the Respondent to review the Applicant's payment history and that adjustments be made to accurately reflect the Applicant payments;
 - V. Directions as to costs; and
 - VI. Further and other relief as the Court sees appropriate.
- [4.] The Respondent's grounds of the application are as follows:
- (a) That these proceedings are an abuse of the process of the Court as at the time this action was commenced, the Applicant has been in active discussions with the Respondent seeking a way forward in terms of payments in order to satisfy the outstanding amount and had provided all documentation requested of her;

- (b) The Respondent did not receive notice of the proceedings as required by section 4(1) and section 7(1) of the Homeowners Protection Act, 2017;
- (c) That from January 2023 to July 2023, the Respondent signed a temporary forbearance agreement with the Applicant and had been compliant with said agreement;
- (d) The Respondent is willing and able to resume full payment of the original mortgage amount as well as willing to apply lump sum payments in order to service and arrears;
- (e) That the Respondent is concerned that the correct amount owed by her is not properly reflected and that some payments were not properly applied to the loan amount.

The Issues

- [5.] The Respondent has set out a miscellany of grounds of relief, however, she admitted to being in arrears of her mortgage and making reduced payments. Notwithstanding this admission by the Respondent, she has inter alia, applied for a dismissal of the proceedings as an abuse of process and to complain that she did not receive notice of the proceedings in accordance with the Homeowners Protection Act, 2017.
- [6.] Therefore, the only issue to be determined is whether there are any grounds for the Court to strike out or dismiss the action against the Applicant on any of the grounds advanced by the Respondent because the Respondent by her own admission is in default of the mortgage and therefore, the Applicant is entitled to the relief it sought in its Originating Summons.
- [7.] The Respondent has submitted as follows:
 - (i) That the court has authority and discretion to set this matter aside or alternatively rule that the matter be resolved;
 - (ii) That the bringing of this matter is frivolous and vexatious and otherwise an abuse or the process of the court;
 - (iii) Abuse of the process of the Court – bringing this action while hesitating and/or refusing to meet with the Defendant to resolve the matter;
 - (iv) the purposes of section 4(1)/7(1) of the Homeowners Protection Act were not observed by the Applicant.

Analysis and Discussion

- [8.] At the outset, it is undisputed by the Respondent that her mortgage is in arrears.
- [9.] The Applicant in the Originating Summons filed on February 16, 2022 set out inter alia, the date that the loan was granted to the Respondent, viz. in August, 2012 for the sum of \$162,800 and monthly payments were \$1,387.16. At the date of the commencement of the action, the last payment made by the Respondent was for \$897.
- [10.] The Applicant by a letter dated October 5, 2021 (“the October 2021 letter”) demanded payment of the outstanding amount. The letter read as follows:

*Heidi Rolle
#7 Sea Sound Leewood East Drive
P O Box EE-15875
Nassau, The Bahamas*

Dear Madam,

Re: Teachers and Salaried Workers Co-operative Credit Union v. Heidi Rolle, Unit Number 15 of Condominium called and known as “ The High Vista Condominium” situate in the Eastern District of New Providence, The Bahamas Account No. 151833

We act for Teachers and Salaried Workers Co-operative Credit Union Limited and have been instructed by them that you are indebted to them in the amount of \$163,411.73 (Principal) and \$63,512.03 (Interest)

Your indebtedness arises by virtue of a loan dated the 28th August, 2012 wherein you were granted the sum of \$162,800.00. Interest accrued at the rate of 8.25% per annum. We are further instructed that the amount repaid by you is \$50,409.86. The Principal amount due and unpaid is \$163,411.73 together with accrued interest unpaid in the amount of \$63,512.03 as at the 21st September, 2021. Interest is accruing at the rate of \$0.00 per diem.

Our client contends that you have wrongfully failed and refused and continue to neglect and refuse to take any steps towards satisfying the said outstanding amount, notwithstanding repeated requests made by them.

By way of gratuitous advice, we should advise that the circumstances dictate that judgment can readily be entered against you and, thereafter execution of the same can be instituted. Our instructions are to obtain possession of Unit Number 15 of Condominium called and known as “The High Vista Condominium” situate in the Eastern District of New Providence, The Bahamas in the event payment is not made.

Accordingly, we are instructed to demand, as we hereby demand, payment of \$226,920,76 together with costs to date in the sum of \$150.00 within thirty (30) days of receipt hereof. Payment in full is to be made to Teachers and Salaried Workers Co-operative Credit Union Limited situate Independence Drive, Nassau, The Bahamas.

We therefore trust that you will see to the settlement of this matter immediately or forthwith reach an alternative agreement regarding the payment of the above debt. In this regard, you are advised to liaise with Mr. Jamison Davis, at telephone number 502-9200 at Teachers and Salaried Workers Co-operative Credit Union Limited.

Indeed, the matter (and its attendant’s costs) is now in your hands, please govern yourself accordingly.

[11.] In her Affidavit filed on October 19, 2023, the Respondent asserted that the October 2021 letter did not comply with sections 4(1) and 7(1) of the Homeowners protection Act because she was not given notice that the instant action would be commenced. She stated as follows:

“3. *That the current matter was instituted by the Plaintiff against me on 16 February 2022, however, I was not provided notice that the instant matter would be commenced.*

4. *Aside from the failure to provide me with notice, **at the time this matter was commenced, and for some considerable time before that, I was seeking to come to an agreement with the Plaintiff regarding the payments to be made by myself toward the mortgage amount.** Now produced and shown is an email chain showing the Defendant's efforts to resolve matter marked Exhibit HR-1"*
5. *That in the midst of said discussions with the Plaintiff/Respondent, I had on all occasions sought to cooperate with the Plaintiffs requests for meetings and information and on all occasions provided all documentation and information requested from me.*

[my emphasis added]

[12.] The Respondent referred to attempts and arrangements in the past with the Claimants to reach a solution concerning the payment of her mortgage payments. In fact, she admitted in her Affidavit filed on October 19, 2023 that "**up to late 2014 when the first default** would have taken place, the mortgage with the Plaintiff was being paid regularly and consistently. At this time, the default would have only taken place as I would have become unemployed and as a result unable to pay consistently. That by 2017 after obtaining a full time, salaried position I immediately made arrangements with the credit union to resume consistent mortgage payments. I would have found myself again in financial difficulties in 2020 when the pandemic commenced. As I was then self-employed, the resulting lockdowns and shutdowns severely hurt persons like myself who did not qualify for government assistance."

[my emphasis added]

[13.] Therefore, it is pellucid that prior to the October 2021 letter, the Respondent had been in default of her mortgage. In fact, from as early as two years after the mortgage had been granted she went into default and would remain so until 2017 when she obtained full time employment and recommenced consistent payments. Thereafter, she went into default again in 2020 when the pandemic commenced. On these occasions, her evidence was that the Applicant worked with her and did not commence legal action.

[14.] However, it is obvious that despite the October 2021 letter and the commencement of the action in February, 2022, the Applicant once again attempted to work with the Respondent. The parties entered into what was termed a "Temporary Forbearance Agreement" dated January 9, 2023 for the payment of a specified sum for a consecutive period of six months commencing January 2023 to June 2023.

[15.] Therefore, notwithstanding the action, the parties through this agreement had again attempted to resolve matters between them regarding the delinquent mortgage.

[16.] The Applicant by an affidavit filed on November 21, 2023 stated as follows:

- "5. *That the Plaintiff Credit Union has made every reasonable effort since the commencement of this action to negotiate with, compromise, re-structure payments, and to seek to assist the Applicant in meeting her lawfully incurred financial commitments. All to no avail.*
6. *At this time the account of the Applicant is 3,239 days delinquent (8.8 years).*

8. *In January of 2023, the Applicant signed a 6 months Forbearance Agreement, however, she only made five (5) payments for the period January 2023 to end of June 2023.*
9. *The Applicant was in default of payments to the Home Owners Association and was threatened with eviction. ("Exhibit "3"). The Claimant made payments of outstanding fees on behalf of the Applicant. (See: Exhibit "5").*
10. *I am also informed by the High Vista HOA that they are preparing to repossess the Unit and to sell the same in order to recover their unpaid fees.*
12. *Despite the assertion made in paragraph 1.d. of the Notice of Application, the payment history attached to the said Affidavit of Randolph Minnis is an accurate statement of all payments made to her mortgage account by the Applicant. If the Applicant has any additional receipts which she claims not to have been brought into account, she is always free to provide the same.*
14. *The Respondent is in default of payments for more than eight (8) years in the sum of \$147,328.63. Defaults commenced in February of 2014, after the Applicant resigned from the Ministry of Finance in order to commence her own business.*
22. *As to paragraph 6 of the said Affidavit, a reduced payment was agreed to by the Credit Union in April 2018 based upon a promise by the Applicant to permit the Credit Union to collect the rent from the Mortgaged Unit and to pay the additional sum of \$500 monthly. The Applicant prevented the Credit Union from collecting rent and ceased any payments. The Agreement was nullified by the non-compliance of the Applicant.*
23. *The Applicant made only nine (9) payment in 2019 after signing the Agreement, three (3) payments short. In 2020 the Applicant made one (1) payment, In 2021 she made two (2) payments, in 2022 she made two (2) payments. In 2023, pursuant to the Forbearance Agreement, the Applicant made only five (5) payments.*

[17.] It is both plain and obvious that the Respondent was in breach of the terms of her mortgage from 2014 and remains in breach to date. Therefore, she has failed to show that (i) the action is frivolous, vexatious and otherwise an abuse of the process of the Court.

[18.] However, sections 4(1) and 7(1) of the HPA impose a mandatory obligation on the mortgagee to inform a mortgagor of his or her rights as set out in these provisions. I am thereby constrained by these provisions.

[19.] I set the provisions out below and highlight those which the Respondent has asserted that the Claimant did not observe.

"4(1) Where a mortgagor is in breach of the mortgage agreement, the mortgagee shall not institute proceedings before the Court in respect of the breach, unless there has been served upon the mortgagor either personally or by registered post at least thirty days prior to instituting such proceedings a notice in writing stating –

- (a) The amount of any administrative or other costs, including any property tax
The nature of the breach of any covenant of the mortgage;*
- (b) The amount of arrears the mortgagor owes, if any, as well as all sums due under the mortgage;*

- (c) *The amount of any administrative or other costs, including any property tax and insurance costs, necessarily incurred by the mortgagee and chargeable to the mortgagor;*
- (d) *The actions the mortgagor must take by a stated time to cure the breach and avoid foreclosure and sale of the mortgaged property;*
- (e) **The rights of the mortgagor under this Act including the right to apply to the Court for relief;**
- (f) *The willingness of the mortgagee to discuss the breach with the mortgagor, with a view to entering into an agreement with the mortgagor regarding redress thereof, including modification of the mortgage terms if possible;*
- (g) *Contact information for the mortgagee, including an address to which a mortgagor may come in person and a telephone number.*

4(2) *The Court may as it sees fit upon an ex parte application by a mortgagee vary the method of service mentioned in subsection (1)."*

"7(1) Where a mortgagor is in breach of the mortgage agreement, the mortgagee shall not exercise the power of sale conferred by any other law, unless there has been served upon the mortgagor personally or by registered post at least thirty days prior written notice of the intention to exercise the power of sale.

7(2) *A notice referred to in subsection (1) shall contain the particulars referred to in section 4(1) (a) – (g)."*

[my emphasis added]

[20.] In *In RBC Royal Bank (Bahamas) Limited v. Lawson H. Hall and Rhonda E. Hall* 2020/CLE/gen/00236 Winder J (as he then was) stated as follows:

"The purpose of the Homeowners Protection Act legislation was to provide meaningful protection to homeowners by ensuring a true and proper disclosure between the Mortgagor and the Mortgagee prior to taking the significant and ultimate step of recovering the security through litigation. Its provisions ought to be strictly complied with otherwise mortgagees would be precluded from instituting proceedings."

[my emphasis added]

[21.] The October 2021 letter failed to notify the Respondent of her right to apply for relief from the Court as required pursuant to section 4(1)(e) of the HPA and to provide the Respondent with notice of the intention of the Claimant to exercise its power of sale pursuant to section 7(1). These provisions are mandatory and must be followed prior to the instituting of proceedings against the mortgagor.

- [22.] The Claimant has failed to observe the HPA and is therefore prohibited from instituting proceedings. Accordingly, the action is therefore struck out. The Claimant is free to commence fresh proceedings which comply with sections 4(1)(e) and 7(1) of the HPA.
- [23.] I have considered the other relief sought by the Respondent including: (i) directions to the parties regarding the peaceful and efficient resolution of this matter and (ii) directions to the Applicant to review the Respondents' payment history and that adjustments be made to accurately reflect the Respondent's payments.
- [24.] I have found that the Claimant had prior to and even after the institution of the proceedings attempted to peacefully and efficiently resolve matters between them. Further, I found no reason to give directions regarding the review of the Respondents' payment history and order that adjustments be made. Therefore, I make no order relative to either of these claims for relief.

Conclusion and Disposition

- [25.] Accordingly, for the above reasons, I make the following Orders:
- (i.) the action is hereby dismissed for failure to comply with sections 4(1) and 7(1) of the HPA;
 - (ii) all other relief claimed in the Respondents Notice of Application are hereby dismissed;
 - (iii.) the relief sought by the Claimant in its Originating Summons is hereby refused;
 - (iv) Costs to be paid to the Respondent by the Claimant to be fixed, if not agreed between the parties. If the parties are unable to agree costs, the Respondent is to lay over written submissions (not to exceed five (5) pages) on the costs claimed and the Claimant may respond within ten (10) days from the date of delivery of the written Ruling.

Dated the 11th day of October, 2024



Camille Darville Gomez
Justice