

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
Claim No. 2021/CLE/gen/00034

B E T W E E N

MARION WRIGHT

Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant

Before: The Honourable Mr. Justice Neil Brathwaite

Appearances: Attorney Monique Gomez for the Plaintiff
 Attorneys Raynard Rigby KC and Asha Lewis for the Defendant

DECISION

BRATHWAITE, J

INTRODUCTION

- [1.] This action arises from a dispute between the Plaintiff and the Defendant concerning whether the Plaintiff’s mortgage indebtedness to the Defendant, in respect of Loan No. 1745641 (the “mortgage”) was fully satisfied before it was sold and assigned to Gateway Financial Ltd by the Defendant pursuant to an asset sale.
- [2.] The Plaintiff contends that, following the death of her husband, with whom she had jointly obtained various loan and mortgage facilities from the Defendant, the Defendant

misapplied the proceeds of one of the deceased's life insurance policies and misled her into believing that the mortgage had been fully discharged. It is the Plaintiff's position, that she is entitled to a full accounting of all mortgage payments made by the couple as well as a Deed of Satisfaction.

[3.] The Defendant disputes the Plaintiff's position, and maintains that a full accounting of the Plaintiff's account is unnecessary. Further, the Defendant asserts that the Plaintiff is not entitled to a Deed of Satisfaction, as the mortgage was not satisfied at the time of its transfer.

[4.] With no prospect of resolution, the Plaintiff commenced these proceedings by Specially Indorsed Writ of Summons filed 20th January 2021, together with her Statement of Claim. By her Statement of Claim, the Plaintiff seeks a Deed of Satisfaction and the following reliefs:

- i. A Declaration that the Mortgage was satisfied;
- ii. An accounting of the payments;
- iii. Such further or other relief as this Honourable Court deems just;
- iv. Interest pursuant to the Civil Award of Interest Act;
- v. Costs; and
- vi. Damages

BACKGROUND

[5.] The Plaintiff and her late husband, Mr. Robin Wright, were customers of the Defendant Bank's East Bay Street branch. Between 1986 and 2008, they obtained a series of loan and mortgage facilities over their residential property from the Defendant. The principal mortgage facilities were maintained under Loan Account No 1745641, and a further loan and promissory note were recorded under Loan Account No. 1748289 (the "smaller loan"). The loans were secured by various life insurance policies of the Plaintiff and her husband and were partly serviced by way of monthly salary deductions from their respective earnings.

[6.] The insurance policies the Plaintiff and her husband assigned to the Defendant included the:

- i. American Life Insurance Co. life insurance policy of Robin Wright with face value of Fifty Thousand Dollars (\$50,000.00);

- ii. American Life Insurance Co. life insurance policy of Marion Wright with face value of Thirty Thousand Dollars (\$30,000.00);
 - iii. Colina life insurance policy of Robin Wright with death benefit of Twenty Seven Thousand Three Hundred Eighty One Dollars and One Cent (\$27,381.01); and
 - iv. Sagicor Capital Life Insurance Company Limited life insurance policy of Robin Wright with face value of One Hundred Seventy Thousand Dollars (\$170,000.00).
- [7.] The Plaintiff and her husband were both employees of the Bahamas Government. On 18th May 2011 Mr. Wright died, and his salary deductions ceased. However, the Plaintiff's contributions continued for five (5) months thereafter until her deductions ceased as well.
- [8.] Upon notifying the Defendant of her husband's passing, the Plaintiff claims that she was advised by one of the Defendant's representatives that the mortgage would be satisfied from inter alia the proceeds of the deceased's Sagicor life insurance policy. The Plaintiff contends that she believed the mortgage had been fully repaid because although she continued to make payments on the mortgage for five (5) months following her husband's death, all of those payments were subsequently refunded to her. She further claims that she was informed that the smaller loan was not covered by insurance and would remain her responsibility to discharge. It is undisputed that this loan was ultimately satisfied, though in her Closing Submissions, the Plaintiff alleges that she never received a formal Deed of Satisfaction for the same.
- [9.] Despite the Plaintiff's initial claim that she believed the mortgage was fully discharged, she acknowledges that in 2013, the Defendant advised her that because of her late husband's undisclosed pre-existing medical conditions, Sagicor had declined to pay off the outstanding balance on the loan. The Plaintiff disputes this position, maintaining that the policy was obtained in 1988, well before her late husband's 1995 hypertension and diabetes diagnosis.
- [10.] Further, by letter dated 17th April 2014, the Defendant advised the Plaintiff that her mortgage was in arrears in the amount of Twenty Two Thousand Four Hundred Forty Nine Dollars and Eighty Five Cents (\$22,449.85) and that the principal sum of One Hundred and Eight Thousand Five Hundred Sixty Eight Dollars and Seventy Eight Cents (\$108,568.78) was due and owing.
- [11.] With no further payments being made on the mortgage by the Plaintiff or on her behalf, the Defendant sold and assigned the mortgage to Gateway Financial Limited ("Gateway") effective 31st October 2016 pursuant to an asset sale. The mortgage was thereafter formally transferred to Gateway by Deed of Transfer on 26th February 2018. The Plaintiff contends that she was never notified of the transfer, despite evidence of the notice having

been produced. She maintains that in any event, she is entitled to both an accounting of all payments made by her and her late husband on the mortgage and a Deed of Satisfaction.

PLAINTIFF'S CASE

- [12.] The Plaintiff filed a Witness Statement on 31st March 2023, which stood as her evidence in chief at trial, in which she averred that she and her late husband purchased Lot 234, Winton Meadows Estates (the “residential property”), by way of a mortgage facility obtained from the Defendant on 7th October 1986.
- [13.] Under cross-examination, the Plaintiff clarified that the amount obtained under that mortgage facility was Ten Thousand Dollars (\$10,000.00). She further clarified, that at all material times, she maintained two separate loan accounts with the Defendant, viz. Loan Account No 1745641 and Loan Account No 1748289.
- [14.] It was her evidence, that in addition to the 1986 Mortgage, she obtained the following additional facilities from the Defendant along with her late husband, all of which were recorded under Loan Account No 1745641:
- i. **1st February 1988** - Second mortgage loan over the residential property of One Hundred Thousand Dollars (\$100,000.00);
 - ii. **11th September 1996** – Deed of Variation and Further Charge on the residential property of Thirty Nine Thousand Seven Hundred Ninety Five Dollars (\$39,795.00);
 - iii. **2nd September 2002** - Second Further Charge on the residential property of Thirty Three Thousand Two Hundred Ninety Five Dollars (B\$33,295.00); and
 - iv. **22nd July 2008** – Third Further Charge on the residential property of Sixty Thousand Dollars (\$60,000.00).
- [15.] The Plaintiff further testified that she and her husband executed a Promissory Note dated 3rd July 2008, for an additional loan facility from the Defendant in the amount of Sixty Thousand Dollars (\$60,000.00), which was recorded under Loan Account No. 1748289.
- [16.] In her witness statement, the Plaintiff averred that she and her husband serviced the various facilities by way of salary deduction from their respective earnings. Under cross examination, it was her evidence that the loan repayment amounts varied between “\$1,085.00 and at other times [...] \$1,057.00”, and that Five Hundred Dollars (\$500.00) deducted from her husband’s salary and Three Hundred Forty Six Dollars and Fifty Eight Cents (\$346.58) deducted from hers, were specifically allocated towards repayment of the smaller loan.

- [17.] The Plaintiff testified that until her husband's passing on 18th May 2011, his monthly contribution towards the loan repayments was One Thousand Eighty-Five Dollars (\$1,085.00). She conceded that following his death, "*his salary deductions ceased*", effectively reducing the total monthly loan repayments received by the Defendant by half.
- [18.] In her Witness Statement, the Plaintiff further asserted that she fully repaid the smaller loan on 30th July 2016. Under cross-examination, she clarified that she made this payment "*between 2011 and 2012*" using Sixty Thousand Dollars (\$60,000.00) derived from her late husband's accumulated vacation pay from his employer, the Department of Environmental Health. It was her evidence that she possessed a receipt evidencing this payment, however, no such receipt was produced.
- [19.] Nonetheless, the Plaintiff accepted that according to the documentary evidence, the Defendant applied the sum of Twenty Seven Thousand Three Hundred Eighty One Dollars and One Cent (B\$27,381.01) received from her late husband's Colina life insurance policy to the smaller loan. She maintained, however, that the Defendant misapplied the funds which she averred ought to have been credited to the mortgage loan. In any event, the Court acknowledges that based on the documentary evidence, it is clear that this loan was paid off in full on 26th April 2013.
- [20.] Turning then to the status of the mortgage loan, the Plaintiff averred in her Witness Statement that she had been "*advised by Ms McKenzie*", a senior loan officer of the Defendant, that the loan would be paid off, inter alia, by the Sagicor life insurance policy taken out on her late husband. It was her evidence, that this policy had been arranged by the Defendant with the intention that it would cover the mortgage in the event of her husband's death. She initially maintained that she believed "*the insurance paid off the mortgage*", but later conceded that she was advised by the Defendant that it did not.
- [21.] It was the Plaintiff's further evidence, that as at 29th September 2015, she accepted that an outstanding mortgage balance of Seventy Thousand Four Hundred Thirty- Eight Dollars and Ninety Nine Cents (\$70,438.99) remained. She also testified that "*there was no possibility*" she could have paid off the mortgage, as the only payment received by the Defendant from her or from any insurance company on her behalf was the sum of Twenty Seven Thousand Three Hundred Eighty One Dollars and One Cent (\$27, 381.01), which had been applied to the smaller loan. In light of this, it was the Plaintiff's own evidence that the mortgage was "*never paid off*".
- [22.] With respect to the subsequent transfer of the mortgage to Gateway, the Plaintiff testified that she was never notified by the Defendant that the mortgage would be transferred. She averred that she first became aware of the transfer when a representative of Gateway visited

the residential property, took photographs, and instructed her to contact a representative of Gateway for further information.

- [23.] The Plaintiff explained that following her husband's death, she experienced significant emotional distress and, for approximately two (2) years thereafter, she was unable to manage her personal affairs, including the collection of her mail. As such, she averred that she did not personally receive the Defendant's letter dated 19th December 2016 notifying her of the mortgage transfer, although a copy of the letter issued to her and her late husband was produced in evidence.
- [24.] In any event, the Plaintiff asserted that she had ongoing queries regarding the payments she and her late husband had made on the mortgage about which she had been in communication with "*numerous officers of the Defendant*". However, it was her evidence, that the mortgage was transferred to Gateway before these queries were resolved.
- [25.] The Plaintiff testified that, following her husband's death, she suffered from "*depression and anxiety*", and that the Defendant's alleged "*lie*" that the mortgage had been discharged caused her such significant distress that she contemplated suicide. It was her further evidence that, even as at the date of trial, she was still "*getting over [it] gradually*", and that as a result of the emotional distress and "*trauma*" she attributes to the Defendant, she has incurred, and continues to incur, medical expenses.

Plaintiff's Closing Submissions

- [26.] In Closing Submissions, Counsel for the Plaintiff submitted that it is the Plaintiff's position that on a balance of probabilities she has proved her case against the Defendant and therefore a Satisfaction should be issued "*on the loan that has been satisfied*" and she should "*have an accounting of funds paid to Scotia Bank*".
- [27.] Counsel submitted that "*the evidence shows that there were two mortgages*" represented by Loan Account No 1748289 and Loan Account No 1745641, respectively. However, Counsel submitted that while it is undisputed that the smaller loan was "*paid off*", the Plaintiff "*was not given a Satisfaction*" for it. Further, Counsel argued that although the smaller loan was satisfied, on the evidence, no adjustments were made to the Plaintiff's account once it was.
- [28.] Counsel submitted that correspondence between the parties, which were produced in evidence, demonstrates that the Plaintiff had been "*in discussions*" with the Defendant regarding the "*amounts outstanding on the Mortgage*" and how the Defendant arrived at the figures that it did. Counsel argued that the Defendant has not disputed the Plaintiff's allegations in this regard and submits that the Plaintiff "*never stopped*" her monthly One

Thousand and Fifty Dollar (\$1,050.00) salary deductions, although the Plaintiff's oral evidence was that she "*wasn't making no more deductions*" after being told the mortgage was paid off.

- [29.] Rather, Counsel submitted, that on the evidence before the Court, the Defendant transferred funds to the Plaintiff, corroborating both the Plaintiff's assertion that she was advised by a representative of the Defendant that "*the mortgage had been paid off*", and her evidence that the funds she was continuing to pay on the mortgage following her husband's death were "*returned to her by the bank*".
- [30.] In any event, Counsel submitted that despite the Plaintiff's "*many requests for a print out of the loan account*", the Defendant "*never responded*". Therefore, Counsel submits that "*in all the circumstances of the case*", the Plaintiff has proven her case against the Defendant and is entitled to the reliefs she seeks.

DEFENDANT'S CASE

- [31.] The Defendant filed its Defence on 31st May 2021. The Witness Statement of Joseph Albury filed 31st January 2023, the Witness Statement of Sherelle Minnis filed 19th April 2023 and the Supplemental Witness Statement of Sherelle Minnis filed 21st April 2023 were filed in support.
- [32.] By its Defence, the Defendant admits, that at all material times, the Plaintiff was a customer of the Defendant and maintained accounts at its East Bay Street Branch. The Defendant further admits that the Plaintiff and her late husband jointly obtained the loan and mortgage facilities recorded under Loan Account No 1748289 and Loan Account No 1745641.
- [33.] The Defendant accepts that the said facilities were partly serviced by way of salary deductions from the earnings of the Plaintiff and her husband, until her husband died on 18th May 2011 and his salary deductions ceased.
- [34.] Following his death, Ms Sherelle Minnis, Former Assistant Manager of Service and Support - East Bay Branch, averred in her Witness Statement that the proceeds of the deceased's life insurance policy with Colina, in the sum of Twenty Seven Thousand Three Hundred Eighty One Dollars and One Cent (\$27,381.01), received by the Defendant was applied "*to the Plaintiff's loan number 1748289*".
- [35.] The Defendant concedes that Loan Account No 1748289 was fully discharged but maintains through the Witness Statement of Ms Minnis, that it was the "*only*" loan account

that was “settled by the proceeds of the [Colina] insurance policy after Mr Wright’s death”.

- [36.] The Defendant further admits that the Plaintiff continued to remit payments toward the mortgage by way of salary deduction for a few months after her husband’s death. However, the Defendant contends that the payments made were less than the agreed contractual instalments and were therefore returned.
- [37.] In any event, the Defendant avers that the Plaintiff was duly notified that the Mortgage Loan Account had fallen into arrears in the amount of Twenty Two Thousand Four Hundred Eighty Nine Dollars and Eighty Five Cents (\$22,489.85), with the principal sum of One Hundred and Eight Thousand Five Hundred Sixty Eight Dollars and Seventy Eight Cents (B\$108,568.78) remaining due and owing. In support of its position, the Defendant relies on the correspondence dated 17th April 2014 issued by its attorneys to the Plaintiff, which also indicated that no payments had been received on the account since 26th April 2013.
- [38.] The Defendant acknowledged in its Defence that the Plaintiff disputed the alleged arrears, maintained that the mortgage had been repaid through the insurance proceeds of herself and her late husband, and further alleged that the Defendant refunded certain payments she made onto the mortgage Loan Account because the Loan had been discharged. The Defendant makes no admission, however, that any discussions were held with the Plaintiff regarding these matters and expressly denies that the mortgage was ever fully discharged.
- [39.] The Defendant further denies that any of its officers represented to the Plaintiff that the mortgage would be extinguished upon receipt of the proceeds from her late husband’s Sagicor life insurance policy or that any funds returned to the Plaintiff were returned because of the reason the Plaintiff alleges.
- [40.] Rather, in its Defence, the Defendant asserts that the sufficiency of the insurance proceeds to discharge the mortgage debt was contingent upon several factors, including the scope of coverage under the policy, the outstanding balance then remaining on the loan account, and the face value of the policy at the material time.
- [41.] In its Opening Submissions, the Defendant acknowledged that the deceased had a life insurance policy with Sagicor but contends that Sagicor declined to honour the death claim due to the deceased’s undisclosed pre-existing conditions. Accordingly, the Defendant avers that at no material time was any payment ever received from Sagicor in respect of that policy, and in any event, any dispute the Plaintiff has with the Insurer’s refusal to pay, is a matter between the Plaintiff and the insurer, and not one for which an action against the Defendant could succeed.

- [42.] In light of the foregoing, the Defendant admits that the mortgage was indeed transferred to Gateway on 26th February 2018. This is corroborated in the Witness Statement of Mr Joseph Albury, former Power of Sale Officer of the Defendant, who averred that the Loan was transferred to Gateway and thereafter Gateway “*became responsible for the collection of the debt*”. The Defendant relied on a letter dated 19th December 2016, purportedly “*sent to the Plaintiff and her deceased husband*”, which notified them of the sale and assignment of the Loan to Gateway effective 31st October 2016.
- [43.] According to the further evidence of Mr Albury in his Witness Statement, the outstanding balance on the mortgage at the time of transfer was Seventy Thousand Four Hundred Thirty Eight Dollars and Sixty Two Cents (\$70,438.62), albeit during re-examination it was his evidence that when he prepared the mortgage package for transfer to Gateway, he did not check balances.
- [44.] Notwithstanding, the Defendant maintains that on the totality of the evidence, it is clear that the mortgage was never paid in full and that a debt remained “*due and owing to the Bank*” at the time of transfer. In the circumstances, the Defendant contends that “*the Plaintiff was not entitled to a Satisfaction of the Mortgage*” from the Defendant nor an accounting of her mortgage payments as claimed.
- [45.] As regards the accounting of the Plaintiff’s payments, in its Opening Submissions, the Defendant submitted that this remedy is only warranted where incomplete documentary evidence has been presented to the Court, or where the Plaintiff has demonstrated that she was entitled to monies that were owed to her by the Bank.
- [46.] The Defendant contends that not only does the evidence adduced establish the status of the Plaintiff’s account at the time of transfer, but it also establishes that the Plaintiff has failed to prove that she is owed any money by the Bank, and that in any event, as the principal issue for determination is whether the Plaintiff fully discharged the mortgage loan, relying on the Deed of Transfer, the Defendant’s position is that the proper party for the Plaintiff to bring a cause of action against is not the Defendant but Gateway, the current legal owner of the mortgage debt.

Closing Submissions

- [47.] In its closing submissions, Counsel for the Defendant submitted that (i) the Plaintiff failed to discharge the burden of proof required to obtain the declarations sought; (ii) Loan Account No 1745641 was not satisfied in full prior to its transfer to Gateway; and consequently, (iii) the Plaintiff is not entitled to a Deed of Satisfaction from the Defendant.

- [48.] Counsel argued that the Plaintiff failed to discharge the evidential burden placed upon her by law, and relied on sections 82 to 84 of the *Evidence Act*, which provide that the party asserting the existence of a fact bears the onus of proving it. Counsel further cited *Gardiner v Emerald Bay Resort Limited [2009] 1 BHS J No.25*, in which Adderley J (as he then was) held that in a civil action, a Plaintiff must “*prove her case on the balance of probabilities*”, and “*the burden remains at the end of the case as it was at the beginning*”.
- [49.] Counsel submitted that the Plaintiff failed to adduce any cogent or reliable evidence demonstrating that the mortgage had been fully repaid prior to its transfer to Gateway. On the contrary, Counsel submitted that the evidence adduced supports the Defendant’s position that an outstanding balance remained due on the loan account at the time of transfer, and that no Deed of Satisfaction or full accounting was therefore warranted (**Civil Livingstone Minnis v Commonwealth Bank Limited and others; Dennison v Talbot and another [2017] 2 BHS J No 56**).
- [50.] Counsel further argued that the Plaintiff’s own evidence undermined her claim. Counsel submitted that although the Plaintiff averred in her Witness Statement that the “*mortgage was paid by salary deduction*”, paragraphs 13 and 14 of her Witness Statement record that she was advised the loan would be satisfied by her husband’s insurance, and that she was later informed it was in arrears after the insurer declined to honour the claim. Counsel submitted that it is therefore clear that the Plaintiff expected the loan to be extinguished by a certain insurance benefit, rather than by salary deduction, and that when the insurance claim was rejected, no corresponding payment was applied to the mortgage account. This position, Counsel argues, was corroborated, *inter alia*, by the sworn testimony of the witnesses for the Defence during their respective cross-examination.
- [51.] Most significantly, Counsel highlighted that it was the Plaintiff’s own admission that the loan had never been fully paid off following the death of her husband, which subsequently resulted in the account falling into arrears.
- [52.] Counsel further emphasized that even the documentary evidence produced supports the foregoing conclusion, including, *inter alia* (i) The SPL/Mortgage History record demonstrating that as at 2017, the mortgage remained unsatisfied, with an outstanding balance of approximately Seventy Thousand Dollars (\$70,000); (ii) The Plaintiff’s Statement of Earnings and Deductions, which showed a reduction in the loan payments after the Plaintiff’s husband passed; and (iii) The Loan Transaction History Display, which revealed that while the smaller loan was paid off, the mortgage remained outstanding as late as 2016.
- [53.] On the totality of the evidence, Counsel for the Defendant urged the Court to find that the Plaintiff was not entitled to a Deed of Satisfaction or to the equitable relief sought. Further

the Defendant submitted that the claim ought to be dismissed as the Plaintiff failed to meet the burden of proving that the mortgage was satisfied in full.

[54.] Counsel also invited the Court to consider that as no complaint was made in this action in respect of the transfer to Gateway, because the mortgage debt is now vested in Gateway, any relief that involves the mortgage is “*in essence a relief that can only be sought against Gateway and not the Defendant Bank*”. In support of this contention, the Defendant relied on the provisions of *Halsbury Laws of England* which provide that :

“ *So far as the security consists of the mortgage debt, it is a chose or thing in action, and is only assignable in accordance with the rule that a transferee of a chose in action take subject to any equities and rights of set-off existing between the debtor and the transferor. As the mortgage of the property is incident to the debt, the same rule extends to this portion of the security, and the transferee can only hold the property as security for repayment of the amount properly due from the mortgagor to the mortgagee at the date of assignment, allowing for any claims which the mortgagor may on his side have against the mortgagee and which are part of the mortgage transaction...* ”

THE ISSUES

[55.] The Closing Submissions of the Parties served to narrow the matters in dispute. Having regard to those Submissions, the Court must determine:

- i. Whether the Plaintiff has, on a balance of probabilities, discharged the burden of proof placed upon her to seek the declaration sought;
- ii. Whether Mortgage Loan Account No 1745641 had been satisfied in full prior to its transfer to Gateway;
- iii. If a balance remained outstanding at the time of transfer, whether the Plaintiff is (and was) entitled to a Deed of Satisfaction from the Defendant;
- iv. Whether the Defendant is obligated to provide the Plaintiff with a full accounting of all payments made on the Mortgage Account; and
- v. Whether the present proceedings ought to have been brought against Gateway, the transferee and current holder of the Mortgage Loan.

THE LAW

[56.] It is trite law that he who asserts must prove (**Gardiner v Emerald Bay Resort Limited [2009] 1 BHS J No. 25**). In civil proceedings, the party who seeks the Court’s intervention must establish the facts necessary to obtain the relief claimed. This principle is of particular importance where a mortgagor seeks relief against a mortgagee, as the mortgagor-mortgagee relationship is governed by contractual terms, as well as certain rights and obligations that arise both at common law and in equity.

Nature of a Mortgage and Equity of Redemption

[57.] The classic definition of a mortgage was articulated by Lord Lindley in **Santley v Wilde** [1899] 2 Ch 474, who described it as a “conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given.”

[58.] The contractual nature of the mortgage relationship was emphasized by Lyons J in **CIBC Bahamas Ltd v City Lodge Ltd Action** [2003] BHS J No 45, where His Lordship explained that:

“... the mortgage is a contract (if I may put it in simple terms). The crucial part to be performed by the mortgagor is to meet the repayments. If not then the contract is breached. As in any contract, once it is breached by one party, the other party has certain rights. In a mortgage, one of those rights is that the mortgagee can move into possession and sell the property in an effort to recover the amount outstanding.

[59.] The equitable framework regarding redemption was outlined by Brooks JA (as he then was) in **Forbes and Forbes v Miller’s Liquor Store (Dist) Limited** [2016] JMCA Civ 1. His Lordship explained beginning at [35] that:

“under the common law, a mortgagee became the owner of the property. Equity, however, allowed the mortgagor, upon repayment of all monies due under the mortgage, to redeem the property and regain ownership of it. The mortgagor was therefore said to have, an “equity of redemption”. Where the mortgagee sold the property, however, the mortgagor’s equity of redemption was extinguished.”

[60.] As to the consequences of repayment, Gray-Evans J summarised the governing principle in **Cyril Livingstone Minnis v Commonwealth Bank Limited and others; Dennison v Talbot and another** [2017] 2 BHS J No 50, holding that:

“There is no dispute that upon payment of a loan secured by a mortgage over real property, the borrower is entitled to the return of all documents held by the lender as security for the loan, along with a duly executed satisfaction of mortgage or re-conveyance of the property in his favour, unless the borrower directs otherwise.”

Burden of Proof

[61.] Section 84 of the *Evidence Act* codifies the general rule that:

“84. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

[62.] The common law position aligns with statute, as evidenced in **Gardiner v Emerald Bay Resort Limited [2009] 1 BHS J No. 25**, where Adderley J reaffirmed at [11] that:

“11. In accordance with the general law the burden of proof is on he who asserts unless the burden has been shifted by statute [...].”

[63.] **Halsbury Laws of England (Vol. 11, 2015)** similarly describes the legal burden as the:

“... burden of persuasion, [...] which remains constant throughout a trial; ... the burden of establishing the facts and contentions which will support a party’s case, or persuade the tribunal of the correctness of a party’s allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the statements of case, it usually being incumbent upon the claimant to prove what he contends.

Entitlement to Accounting

[64.] The Defendant also relied on **RBTT Bank Jamaica Limited Claimant v YP Seaton et al [2014] JMSC Civ 34**, where Sykes J referencing the comments of Dr Lushington in *Doss v Doss (1843)* 3 Moo Ind App 175 at 176-90; 18 ER 464 at 472 held beginning at [257] that:

“a decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

Improper Party

[65.] A further legal issue raised by the Defendant concerns whether it is the proper party against whom the present claim should have been brought. The Defendant submits that the Mortgage Loan was transferred to Gateway and that, upon such transfer, any rights or liabilities connected with the mortgage relationship thereafter vested in Gateway.

Accordingly, the Defendant contends that any relief concerning the mortgage should be properly sought against Gateway as transferee and current holder of the loan.

[66.] **Halsbury Laws of England** is instructive on the effect of an assignment of mortgage rights. Halsbury provides that:

“So far as the security consists of the mortgage debt, it is a chose or thing in action, and is only assignable in accordance with the rule that a transferee of a chose in action takes subject to any equities and rights of set-off existing between the debtor and the transferor. As the mortgage of the property is incident to the debt, the same rule extends to this portion of the security, and the transferee can only hold the property as security for repayment of the amount properly due from the mortgagor to the mortgagee at the date of assignment, allowing for any claims which the mortgagor may on his side have against the mortgagee and which are part of the mortgage transaction...”

ANALYSIS AND DISPOSITION

[67.] A mortgage is a contractual arrangement securing repayment of a debt (**Santley v Wilde [1899] 2 Ch 474; CIBC Bahamas Ltd v City Lodge Ltd Action [2003] BHS J No 45**). A mortgagor who discharges all indebtedness is entitled to the equity of redemption and to a Satisfaction of Mortgage (**Cyril Livingstone Minnis v Commonwealth Bank Limited and others; Dennison v Talbot and another [2017] 2 BHS J No 50**). Until that point, the mortgagee retains contractual and equitable rights, including the right of possession and sale upon default.

[68.] In the present case, it is undisputed that the smaller loan recorded under Loan Account No 1748289 was fully satisfied in 2013. The loan transaction history confirms this, and so does the Plaintiff. Her contention that she is entitled to a Satisfaction for this loan does not, however, precede the Court’s determination of the gravamen of this dispute, which concerns the separate mortgage loan recorded under Loan Account No 1745641 and whether or not it was fully discharged prior to its transfer to Gateway.

Whether the Plaintiff Discharged the Burden of Proof

[69.] It is trite law that the Plaintiff bears the burden of proving the facts necessary to sustain the declaration she seeks (**Evidence Act, s 84; Gardiner v Emerald Bay Resort Limited [2009] 1 BHS J No 25**). The authorities emphasize that this burden remains constant throughout the trial (**Halsbury Laws of England Volume 11, 2015; Currie v Dempsey [1967] 2 NSW 532**). In mortgage related litigation, the burden is particularly important because the mortgagor must establish the facts entitling her to relief against the mortgagee (**Santley v Wilde [1899] 2 Ch 474; Forbes and Forbes v Miller’s Liquor Store (Dist) Limited [2016] JMCA Civ 1**).

[70.] The Plaintiff's assertion that the mortgage loan was satisfied prior to its transfer to Gateway therefore attracts the legal burden, and acting only upon the evidence placed before it (**Colco Electric Co v Gold Circle Co [2003] BHS I No 53**), the Court is obliged to find that for the reasons that follow, the burden has not been discharged.

Whether Mortgage Loan was Satisfied Before Transfer

[71.] The Plaintiff's own evidence is that the mortgage "*was never paid off*". She explained that she was unable to settle the mortgage balance because an anticipated life insurance payout was declined due to the undisclosed pre-existing conditions of her husband.

[72.] The Court finds that the documentary evidence supports this admission. In particular, the Mortgage Loan History shows a continuing outstanding balance; the Plaintiff's Statement of Earnings and Deductions reflects that mortgage payments were reduced following her husband's death; and the Loan Transaction History confirms that the mortgage balance remained outstanding as late as 2016. Further, as the Plaintiff has produced no documentary evidence demonstrating repayment of the mortgage loan, the Court finds as a fact that the mortgage loan was not satisfied prior to its assignment.

[73.] The Court considers it necessary to clarify the effect of the satisfaction of the smaller loan at this juncture. Although this loan was recorded under a separate account number, the evidence is that both the smaller loan and the primary mortgage loan were secured by the same mortgaged property. Under the governing common law and equitable principles outlined in **Santley v Wilde** and **Forbes and Forbes v Miller's Liquor Store (supra)**, it is provided that a Satisfaction of Mortgage operates to release the mortgage security in its entirety and to restore the legal and equitable estate to the mortgagor.

[74.] These authorities further provide that a mortgagee may only issue such a satisfaction when all indebtedness secured by the mortgage has been repaid in full (**Cyril Livingstone Minnis v Commonwealth Bank Limited and others; Dennison v Talbot and another [2017] 2 BHS J No 50**). Repayment of one of several secured debts therefore does not extinguish the mortgagee's security if another secured debt remains outstanding. In fact, to issue a Satisfaction of Mortgage in these circumstances would unjustifiably deprive the mortgagee of its security interest for the unsatisfied loan and would contradict both the contractual terms of the mortgage deed and the equitable doctrine of redemption.

[75.] Consequently, the Court finds that the discharge of the smaller loan in 2013 did not entitle the Plaintiff to a Satisfaction of Mortgage. Rather, it is my view that because the principal mortgage debt remained "*due and owing*", the Plaintiff had and has no entitlement to such relief.

Notice of Mortgage Discharge

- [76.] The Plaintiff asserts that she was advised by the Defendant that the mortgage had been discharged. She provided no documentary proof of such advice, however, the various correspondence she did produce shows that she queried the outstanding balance on the mortgage loan before it was transferred and sought clarification on how the balance was derived. In the circumstances, the Court finds that her assertion is inconsistent with her evidence and does not accept that she was informed that the mortgage had been discharged at any material time.

Entitlement to an Accounting

- [77.] The Plaintiff seeks an accounting. In **RBTT Bank Jamaica Limited Claimant v YP Seaton et al [2014] JMSC Civ 34**, the Court held that an accounting is only to be granted where the Plaintiff has demonstrated an underlying entitlement to monies due. In other words, it is not to an investigative tool. On the evidence, the Defendant produced the loan histories, payment statements, and documents showing the outstanding balance at the date of the loan's transfer. However, the Court is not satisfied that the Plaintiff has demonstrated an entitlement to any monies held by the Defendant and determined to be due. As such, the Court finds that the remedy of accounting does not arise and the Plaintiff is not entitled to the accounting she seeks.

Whether Defendant is the Proper Party

- [78.] On the evidence, the mortgage loan was lawfully sold and assigned to Gateway effective 31st October 2016, with the physical transfer of the file effected pursuant to a Deed of Transfer on 26th February 2018. The delay in the physical handover, however, does not affect the legal operation of the assignment. As **Halsbury** explains, a mortgage debt is a chose in action, and upon assignment, all rights and liabilities incident to the mortgage pass to the assignee, who thereafter holds the security subject to any existing equities.
- [79.] Accordingly, by the time these proceedings were commenced, Gateway had already assumed the position of mortgagee and was the entity legally entitled to enforce or respond to claims concerning the mortgage. With respect to the issue of notice of assignment, the Court accepts that the Defendant issued the notice to the Plaintiff's P.O. Box, although the Plaintiff asserts she was unable to collect her mail during that time for personal reasons. The Plaintiff's failure to collect the correspondence does not, in the Court's view, negate the fact that the notice was properly issued and that the Defendant discharged any duty of notice that may have arisen.

[80.] Having regard to the disposition of this matter, I do not consider it necessary to ultimately determine whether the Defendant is a proper party to these proceedings, although I note that the relief sought by the Plaintiff relates to matters which occurred prior to the transfer, so that if there was an entitlement to a satisfaction, that entitlement would have arisen prior to the transfer, which might have occasioned some doubt on whether the Defendant could legally transfer a debt that was already satisfied. In any event, as I have said, it is not necessary to resolve this issue.

CONCLUSION


[81.] Having heard the witnesses and considered their evidence, the Court finds that on a balance of probabilities, the Plaintiff has failed to establish that the mortgage loan (Loan Account No 1745641) was satisfied prior to its transfer to Gateway. The Plaintiff produced no documentary evidence confirming full repayment, her own testimony confirms that the mortgage was never paid off, and the documentary record corroborates this position.

[82.] While it is undisputed that the smaller loan was fully satisfied, the Court emphasizes that both loans were secured by the same residential property, and as a debt remained due and owing on the mortgage loan, a Deed of Satisfaction could not be issued until all obligations secured by the property were discharged.

[83.] In light of the foregoing, the Plaintiff's claim fails in its entirety, and the Court hereby orders that:

- i. The Plaintiff's claim is dismissed; and
- ii. The Plaintiff shall pay the Defendant's costs, such costs to be taxed if not agreed.

Dated this 4th day of December, A.D. 2025


Neil Brathwaite
Justice