

**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2011/CLE/gen/00699**

**B E T W E E N**

**BANK OF THE BAHAMAS LIMITED**

Claimant

**AND**

**FRANCES LERECE MUSGROVE**

Defendant

**Before:**                   **The Honorable Madam Justice Carla Card-Stubbs**

**Appearances:**       Mr. Jamal Davis, Counsel for the Claimant  
                              Mr. Charles Mckay, Counsel for the Defendant

**Hearing date:**       June 27, 2023

*Appeal from the decision of the Registrar to grant the Claimant leave to issue a writ of possession – Defendant averring accounting deficiencies leading to judgment figure – judgment not appealed – whether mathematical error is sufficient to deprive Claimant of right to enforce judgment*

*HELD: Appeal dismissed.*

*The Defendant's grounds do not challenge the existence of the mortgage, the occurrence of default, or the validity of the judgment. A mathematical error does not establish an irregularity which vitiates the security itself. A dispute regarding the arithmetic of the indebtedness does not constitute evidence that the debt has been discharged, nor does it diminish the legal significance of an outstanding judgment. A judgment was entered and not appealed. A court is slow to deny a successful party the fruits of its judgment and any stay of execution must rest on proper grounds. There was no evidence before the court justifying a conclusion that the Claimant has forfeited the benefits of its mortgage, its judgment, or its right to possession. It is noted that a mortgagee in possession has certain accounting duties.*

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## RULING

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### **Introduction**

- [1.] Before this court is the Defendant's appeal from the decision of the Registrar to grant the Claimant leave to issue a writ of possession.
- [2.] This matter concerns the enforcement of a mortgage and a judgment obtained by the Claimant against the Defendant in respect of residential property described as Lot Number D-37 in Block Number 8 of the subdivision known as Faith Gardens, Southern District of New Providence. This is the Defendant's appeal, challenging the issue of a writ of possession in respect of the said property.
- [3.] For the reasons given below, the Defendant's appeal is dismissed.

### **Background**

- [4.] The material facts are not in dispute.
- [5.] On May 30, 2011 the Bank of the Bahamas ('Claimant') brought an action against Frances Lerece Musgrove ('Defendant') by filing an Originating Summons. The Claimant's action was in respect of an Indenture of First Demand Legal Mortgage dated February 26, 2007 between the Bank of The Bahamas Limited as lender and Frances Lerece Musgrove as borrower, relating to the Faith Gardens property.
- [6.] The mortgage relationship is not in dispute.
- [7.] By Amended Originating Summons filed on March 5, 2012, the Claimant sought judgment for sums due under the mortgage, possession of the mortgaged property, further relief, and costs. On March 30, 2012, judgment was entered in favour of the Claimant against the Defendant in the sum of \$355,301.43, together with possession, interest, and costs.
- [8.] Subsequent to judgment being entered, the parties engaged in a prolonged course of accommodation and attempted repayment. The Defendant gives evidence of temporary

forbearance or payment arrangements dated 15th December 2009, 14th November 2014, and 15th December 2016.

[9.] The Claimant filed a writ of possession on March 28, 2019. In response, the Defendant filed an *ex parte* summons on July 1, 2019 seeking an injunction restraining execution of that writ until the parties had an opportunity to negotiate new terms of the mortgage arrangement. By Order dated July 2, 2019, the Claimants were restrained from executing the writ of possession. The Claimant filed subsequent applications on October 12, 2021 and on July 29, 2022 for the issue of the writ of possession. The writ of possession was not issued.

[10.] On September 8, 2022, the Claimant filed an *ex parte* summons for the issue of a writ of possession, supported by an affidavit of Ms. Paulette Butterfield filed on September 28, 2021. By Order of the Registrar dated August 12, 2022, leave was granted to the Claimant for the issue of a writ of possession.

[11.] The Defendant remained in possession of the premises. On November 18, 2022 the Defendant filed an *ex parte* summons seeking to set aside the Registrar's order, or, in the alternative, injunctive relief. That application is supported by the Affidavit of Ms. Frances Lerece Musgrove, Defendant, filed on November 18, 2022. On November 22, 2022, the Defendant filed a Notice of Motion appealing the Registrar's Order. That appeal is the subject of this ruling. For the record, both applications sought to challenge the Deputy Registrar's order permitting issuance of the writ.

## **The Appeal**

[12.] The application on appeal is supported by the Affidavit of Ms. Frances Lerece Musgrove, Defendant, filed on May 26, 2023. In essence, the case of the Defendant is that, *inter alia*,

- (1) the Claimant entered into temporary payment or forbearance arrangements with her;
- (2) The Defendant made substantial payments pursuant to those arrangements and over the life of the loan;
- (4) the Claimant failed to adjust or explain its accounting properly, with the consequence that penalties, late fees, and other charges continued to accrue or

appear on statements; and  
(5) the Claimant did not provide a proper accounting or amortization when requested.

[13.] Notably, the Defendant did not deny the existence of the mortgage nor that judgment was entered against her on March 30, 2012. There is no suggestion that the judgment debt was discharged in full.

### **Submissions of the Parties**

[14.] At the hearing of the appeal, Counsel for the Defendant conceded that there was a judgment that had not been appealed and which, therefore, was effective. Counsel proposed that, at the very least, there ought to be a proper calculation of the true amount of the debt owed by the Defendant. He noted the long outstanding requests by the Defendant and pointed out the admission made by the Claimant's witness in a recent affidavit that there had been a miscalculation of the amount of money owed by the Defendant. Counsel for the Defendant candidly reflected that lack of proper accounting may not be an effective answer to a judgment which had not been appealed.

[15.] The Claimant's case is that a default had occurred, judgment was secured, and the debt remains outstanding. Addressing the matters raised in the Defendant's affidavit, the Claimant asserted that any subsequent accommodation or forbearance was explicitly temporary and did not affect its enforcement rights. Furthermore, the Claimant maintained that any mathematical miscalculation would not impede the issuance of the writ of possession, given that the judgment had neither been set aside nor appealed.

### **ISSUES**

[16.] It is apparent that the core dispute does not concern the existence of the outstanding debt. Rather, it pertains to whether the issues raised by the Defendant provide a valid legal basis for preventing the Claimant from enforcing its right to possession at this time.

[17.] The issues before me are:

(1) Whether the temporary forbearance arrangements altered, waived, or suspended the Claimant's substantive right to possession;

(2) Whether the accounting complaints raised by the Defendant are of such a character as to defeat or postpone the Claimant's right to enforce the judgment; and

(3) Whether the Defendant has shown any serious issue or legal ground sufficient to justify setting aside the writ of possession.

## LAW AND ANALYSIS

[18.] The principles of law are not in dispute. The parties are agreed on the applicable principles.

[19.] In **Citibank, N.A. v. Major No. 28 of 1996, [2001] BHS J. No. 6**, the Court of Appeal emphasized that a mortgagee is not ordinarily to be deprived of the benefit of its security absent fraud, irregularity, or a serious question going to the validity of the mortgage transaction itself. In that case, His Lordship Ganpatsigh J.A. held, at paragraphs 10 - 11:

10. ...The position at law is that where under a legal mortgage being an installment mortgage, the whole mortgage money becomes payable by reason of the default of the mortgagor and the legal mortgagee is entitled to possession of the mortgaged property, the Court has no jurisdiction to refuse to make an order for possession or to adjourn the summons, either on terms or not on terms as to keeping up payments or paying arrears, if the mortgagee does not agree to that course; but this does not exclude power to direct an adjournment for a short time to enable the mortgagor to pay off the mortgagee in full or otherwise satisfy the mortgagee if there is a reasonable prospect of the mortgagor being able to do so: See *Birmingham Citizens Permanent Building Society v Caunt* (1962) 1 AER 163, in which Russell J at p. 172 stated the position thus:

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

11 It is pellucidly clear therefore that there could be no power in the Court to vary contractual rights or to deny one party the benefit of the remedies which flow from the default of the mortgagor. The mortgagee in such an event is entitled not only to possession, but as well the mortgage moneys which become presently payable as a

lump sum and no longer by installments. The mortgagor in order to get relief must necessarily raise an action on the mortgage transaction itself.

[20.] The case of **Four-Maids Ltd. v. Dudley Marshall (Properties) Ltd. [1957] Ch. 317**, is authority for the proposition that, absent contrary contractual provision, a mortgagee is entitled to possession as of right.

[21.] Collectively, these authorities establish a prevailing principle: courts are generally reluctant to prevent a mortgagee from exercising its security rights, particularly when the mortgagor's objections do not pertain to the existence, validity, or enforceability of the security itself.

#### *The effect of the judgment*

[22.] The existence of the March 30, 2012 judgment is of central importance. Once judgment was entered for the Claimant, including for possession, the legal relationship between the parties was materially altered. The Claimant was no longer merely asserting an unadjudicated claim under a mortgage instrument. It had obtained judgment of the Court.

[23.] The Defendant's case is not that this judgment was ever satisfied. On the contrary, her own evidence by affidavit is that she continued to make payments after judgment. Such evidence indicates that the liability remained, and remains, extant.

#### *Issue 1: The forbearance agreements*

[24.] The Defendant's affidavit evidence spells out the history of forbearance and reduced payment arrangements. I accept that those arrangements existed and that they formed a significant part of the parties' practical dealings over time. I also accept that the Defendant's position is, in substance, that she relied on those arrangements, made payments under them, and reasonably believed that her continued compliance should have postponed or moderated enforcement.

[25.] That submission is understandable as a matter of fairness. It is not sustainable as a matter of law based on the documentary evidence before the Court. Exhibit 'FM5' to the Defendant's affidavit shows the terms of the 2016 "Temporary Forbearance Agreement". It is clear from the construction of those terms that the indulgence granted to the Defendant was expressly temporary and expressly without prejudice to the Defendant's default and to the Claimant's rights and remedies.

[26.] I accept the Claimant's contention that the agreements did not constitute a restructuring or replacement of the mortgage obligations, but merely delayed strict enforcement for a limited period subject to compliance. There is nothing in the agreement or in any other evidence before this court that would support a finding that the Claimant agreed to waive its right to possession, to abandon the judgment, or to accept indefinitely reduced instalments in substitution for the obligations already established by the judgment.

[27.] The Temporary Forbearance Agreement, and any other accommodation made by the Claimant does not, in this case, amount to a forfeiture of the lender's rights. The forbearance agreements did not extinguish the Claimant's rights.

### *Issue 2: Accounting complaints*

[28.] The Defendant's primary concern pertains to the accounting of the loan. She contends that she continued to make payments "despite being provided with incorrect and inconsistent accounting information." She asserts, inter alia, that charges and allocations of her payments were insufficiently explained and she maintains that a proper amortization schedule was not furnished.

[29.] I do not minimize those concerns. That there were repeated requests for a clearer explanation of the alleged indebtedness has not been denied by the Claimant.

[30.] On review of the affidavit evidence, there are competing figures as to the amount outstanding. The Claimant's affidavit refer to an outstanding sum of \$509, 977.04 by affidavit filed May 2, 2023. As to that figure, by affidavit of Ms. Paulette Butterfield filed June 9, 2023, she swears at paragraph 9:

9. The amount due under the said Judgment using my calculation thereunder in Paragraph 5 of my said Affidavit filed herein on the said 2nd day of May, A.D., 2023 *should be \$462,243.73 (\$568,465.60 - \$106,221.87) instead of \$509,977.04.* I verily believe that on the very best case for the Defendant, namely to apply her payments post the said Judgment of \$106,221.87 to the principal sum outstanding under that said Judgment at its entry, would leave a principal balance thereunder of \$188,985.30 (\$295,207.17 - \$106,221.87). Further, using the present prevailing interest rate of 6.25% on that said principal sum of \$188,985.30 would yield an annual interest of \$11,811.58 (\$188,985.30 x 6.25%) or accumulated interest over a period of 11 years and 69 days of \$132,160.25 (\$188,985.30 x 6.25% x 11 years) plus (\$188,985.30 x 6.25% x 69/365 days). Consequently, using those minimum

figures for reference only but not accepting them, I verily believe the amount outstanding would be \$381,239.81 ( $\$188,985.30 + \$191,344.51 + 910.00$ ).

[Emphasis supplied]

[31.] In essence, the Claimant admits an arithmetical miscalculation. Counsel for the Claimant explained that the Claimant “had neglected to consider part of the payment made by the Defendant”. In other words, there was an accounting error.

[32.] As a matter of principle, a mortgagee ought to take steps to ensure that, especially in the absence of a party, the judgment figure is accurately calculated. A mortgagee ought not to seek to recover more than is due to them by virtue of their contractual arrangement with the mortgagor.

[33.] The Claimant’s response in relation to the miscalculation was that the judgment had not been appealed. While this may be accurate, it does not preclude a mortgagee from recording the correct amount due when such an error is discovered after judgment. In accordance with the duty to act in good faith, the mortgagee is entitled to secure the accurate sum by way of judgment. The mortgagee now intends to take possession. It should be noted that a mortgagee in possession is required to account upon redemption, which provides further motivation to correct any inaccuracies in the records, notwithstanding the existence of a prior judgment. Although the mortgage merges into the judgment, recoverable amounts under the mortgagee’s contractual arrangement with the mortgagor must not be unjustly increased due to mathematical errors.

[34.] The question that remains is whether an arithmetical error is sufficient to amount to a legal basis to deny possession. In my judgment, it does not. It appears that, in argument, Defendant’s Counsel conceded this point.

[35.] A dispute regarding the arithmetic of the indebtedness does not constitute evidence that the debt has been discharged, nor does it diminish the legal significance of an outstanding judgment. At most, the Defendant contends that the balance requires adjustment or clarification, not that no amount remains owing. The Court must consider the substantive matter at hand. The pertinent issue is not whether each entry in the account has been reconciled to the Defendant’s approval, but whether the Claimant, as a judgment creditor and mortgagee with an unpaid debt, should be barred from exercising the right to possession. In this case, the answer is unequivocally “no”.

[36.] The Defendant’s evidence is consistent with the continuing existence of the debt. Her case is not “I owe nothing”. Her case is “I owe less than the bank says, and the bank

has not properly accounted.” This may be a basis for an accounting exercise or for a dispute about the final amount payable. However it is not, without more, a basis for depriving the mortgagee of possession where the mortgage debt and judgment debt remain unsatisfied. The underlying liability is acknowledged on the Defendant’s own evidence. The actual amount recoverable and recovered can be made subject to scrutiny based on the accounting duty of a mortgagee in possession. To the extent that the Defendant says the balance requires explanation, that may be true in an accounting sense, but it does not go to the enforceability of the mortgage or the judgment.

[37.] I consider that this case is covered by the principles in the cases cited above. The court may intervene where there is a genuine issue as to the validity of the mortgage transaction, or fraud, or irregularity in the exercise of the mortgagee’s powers. It does not intervene merely because the mortgagor disputes the arithmetic of the debt while conceding the continuing existence of substantial indebtedness.

#### *Other Grounds*

[38.] There is a suggestion in the Defendant’s affidavit that the failure of the Claimant to provide an amortization of the loan, prevented her from obtaining financing from another institution. It is unnecessary for this Court to enquire into those circumstances since the matter before me is essentially for the enforcement of a judgment. This legal objection, if it can be termed that, does not address the issue of the Defendant’s default and obligations under the mortgage nor the fact that there is a judgment against the Defendant. A court is slow to deny a successful party the fruits of its judgment and any stay of execution must rest on proper grounds.

[39.] I find that the Defendant has not shown any sufficient basis to set aside, stay, or otherwise restrain the Claimant’s continued enforcement of its rights, including by writ of possession.

#### **CONCLUSION**

[40.] The Defendant’s substantive grounds were directed to the composition and calculation of the debt and the provision of accounting records. Those grounds do not address the existence of the mortgage, the occurrence of default, or the validity of the judgment. There is no allegation of fraud in the creation of the mortgage. A mathematical error does not establish an irregularity which vitiates the security itself.

[41.] This case is not one in which the Defendant has demonstrated any legal defect in the mortgage, judgment, fraud, or irregular exercise of the Claimant's security rights as contemplated by relevant authorities. Instead, the Defendant has presented a history of difficulties fulfilling mortgage obligations, evidence of the Claimant's accommodation, and an ongoing dispute concerning accounting and fairness. The Court must ensure that "equitable sympathy" is not mistaken for legal entitlement. Based on the evidence before me, there is no reason to conclude that the Claimant has forfeited the benefits of its mortgage, its judgment, or its right to possession.

[42.] In summary, the Defendant has not shown that the Claimant's right to possession has been extinguished. The Claimant is a mortgagee and judgment creditor. The debt has not been discharged. The Defendant's complaints do not impeach the underlying security or judgment. This Court cannot convert indulgence into waiver, nor can it permit unresolved accounting issues, in circumstances of admitted continuing indebtedness, to become a mechanism for indefinite postponement of enforcement.

[43.] In my judgment, the Claimant is entitled to the fruits of its judgment and to proceed with the writ of possession.

## **COSTS**

[44.] I take into account the provisions of Part 71 of The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR'), including Rule 71.6 and Rule 71.9. Although the Defendant's appeal was unsuccessful, it appears that the primary motivation for the appeal concerned issues related to accounting, which was also a point raised by Counsel for the Claimant. Furthermore, Counsel for the Defendant conceded early in the proceedings that an existing judgment had not been appealed, subsequently choosing not to pursue certain grounds but instead seeking a review and accounting based on the evidence provided by Ms. Paulette Butterfield's affidavit. It should be noted that the explanation contained in the affidavit was submitted several months after the appeal was initiated. Additionally, any clarification regarding the error made by Counsel for the Claimant during argument does not appear to have been communicated to the Defendant prior to the hearing.

[45.] In considering the position taken by Counsel for the Defendant at the hearing, it appears that if the Claimant had responded appropriately to the Defendant's reasonable request for recalculation and accounting, the expenses associated with filing an appeal and conducting the hearing might have been avoided or substantially reduced.

[46.] In this case, the parties will bear their own costs.

**ORDER**

[47.] The ORDER and directions of this Court are as follows.

- (i) The Defendant's appeal and application to set aside the order of August 12, 2022 granting leave to issue the writ of possession is dismissed.
- (ii) The Claimant is at liberty to proceed with enforcement.
- (iii) Each party shall bear its own costs of the application.

Dated this 12<sup>th</sup> day of May 2026

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs, J.', with a stylized flourish at the end.

**Carla D. Card-Stubbs, J**

Justice