

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2012/CLE/GEN/FP00414

BETWEEN

CORAL BEACH MANAGEMENT COMPANY LIMITED
Plaintiff

AND

TYRONE LIVINGSTONE ANDERSON
1st Defendant

AND

MARIE CAROLINE ANDERSON
2nd Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

For the plaintiff: Mr R. Dawson Malone and Mr Carey E. Leonard

Hearing dates: 29 October 2013 and 7 November 2013

JUDGMENT
(Summary judgment application)

Gray Evans, J.

1. This an application by summons filed 18 February 2013 on behalf of the plaintiff pursuant to Rules of the Supreme Court (RSC) Order 14 for leave to enter final judgment against the defendant for the claim set out in the writ and statement of claim.

2. After hearing the application in the absence of the defendants and their counsel, but before ruling thereon, the defendants applied by summons for me to recuse myself from hearing further matters involving the parties hereto.

3. In a written decision of even date herewith, I refused the defendants' application and indicated that I would proceed to rule on the plaintiff's application for summary judgment.

4. This I now do.

5. On 11 May 2012 this Court in Supreme Court Action No. 2010/CLE/GEN/FP00266 granted, inter alia, a declaration that the plaintiff is entitled to hold Barefoot Postman Limited as the owner of Unit 2714 Coral Beach Condominium notwithstanding the purported sale thereof to the defendants, the defendants having failed to obtain the approval of the plaintiff for the said sale.

6. The plaintiff commenced this action on 14 December 2012 by a specially indorsed writ of summons in which it seeks possession of the said Unit 2714 to enable it to seal off the interconnecting door or doorway between Units 2714 and 2716 Coral Beach Condominium and to enable the plaintiff to sell Unit 2714 with vacant possession pursuant to its statutory power of sale under the Law of Property and Conveyancing (Condominium) Act, and costs.

7. According to its statement of claim, the plaintiff, on 7 December 2010, lodged for record in the said Registry of Records a notice of charge over Unit 2714 as a result of Barefoot Postman Limited's failure to pay maintenance and assessment fees; that the notice of charge was addressed to Barefoot Postman Limited as the owner of Unit 2714 since the plaintiff did not recognize Barefoot Postman Limited's purported sale of Unit 2714 to the defendants; that by virtue of the notice of charge it is entitled to take possession of Unit 2714 for the purpose of exercising its statutory power of sale; that on or about 1 November 2012, the plaintiff wrote to the defendants requesting them to vacate the said unit within 30 days to enable the plaintiff firstly, to seal off the interconnecting door between Units 2714 and 2716 and secondly, to sell Unit 2714 with vacant possession. The plaintiff alleges further that the defendants have refused to vacate the said Unit 2714 or allow the plaintiff to seal off the said interconnecting door without the plaintiff first obtaining a court order there for.

8. The plaintiff, therefore, claims that it has been constrained to commence these proceedings as a result of the defendants' refusal voluntarily to grant the plaintiff possession of Unit 2714.

9. Appearance was entered on behalf of the defendants on 29 January 2013. No defence was filed and on 18 February 2013 the plaintiff filed its summons for summary judgment which was set down for hearing on 29 October 2013.

10. By letter dated 28 October 2013, received on the morning of 29 October 2013, Mr Maynard, counsel for the defendants, wrote to the Clerk of the Court, informing him that he was unable to attend Court for the scheduled hearing for the following reasons:

"I have to attend a dentist urgently to obtain treatment which I expect would render me unable to perform my duty in court; also, I have to render assistance, to the extent that I am able to do so, in making arrangements for the funeral of a person who has been like a family member."

11. In that letter, counsel for the defendants also requested an adjournment and suggested that the plaintiff's summons could be combined and dealt with the hearing of another fixture involving the same parties in Supreme Court Action No. 2010/COM/COM/FP0002, which is an action by the first defendant against the plaintiff to remedy oppression of the minority, commenced by a notice of motion on 22 January 2010 and which was scheduled for trial on 18 November 2013.

12. There is no indication in the letter from Mr Maynard that it had been copied to counsel for the plaintiff, who appeared for the hearing at the scheduled time and objected to the adjournment. However, in light of the reasons proffered by counsel for the defendants, the matter was adjourned to 3:30 p.m. on 7 November 2013.

13. By a notice filed 29 October 2013, counsel for the defendants was provided with notice of the adjourned hearing scheduled for 3:30 p.m. on Thursday, 7 November 2013. Service of the aforesaid notice, along with the order granting the adjournment, upon counsel for the defendants, was effected on 29 October 2013 as evidenced by the affidavit of Bouvarde Forbes filed herein on 4 November 2013.

14. Counsel for the defendants did not appear on the adjourned hearing of the plaintiff's said summons and after being satisfied that notice thereof had been duly served on the chambers of counsel for the defendants, I heard the plaintiff's application for summary judgment and reserved my decision in the matter.

15. The plaintiff's summons is supported by the affidavit of Leslie E. Kincaid filed on 8 March 2013, in which she deposes, inter alia, as follows:

- 1) The defendants purport to occupy Unit 2714 by virtue of a conveyance from Barefoot Postman Limited ("Barefoot") which conveyance is described as a Deed of Rectification and Confirmation ("Deed of Rectification") dated 18th May 2009 and recorded in the Registry of Records in Volume 11002 at pages 436 to 445.
- 2) On 10th November 2010, the plaintiff commenced legal proceedings in this Honourable Court vide Action No. 2010/CLE/gen/FP/00266 ("the Plaintiff's previous Action") against Barefoot and the defendants seeking inter alia a declaration that the purported sale of Unit 2714 by Barefoot to the defendants by way of the Deed of Rectification was null and void for lack of prior Board approval.
- 3) Notwithstanding that the defendants stood to be prejudiced by the plaintiff's previous Action, the defendants nonetheless sought to be removed as parties to the plaintiff's previous action by making an application to this Honourable Court for an order that the plaintiff's previous action be struck out as against the defendants on the basis inter alia that the plaintiff's previous action disclosed no reasonable cause of action against them.
- 4) This Honourable Court found that the defendants had an interest in the plaintiff's previous action and that the reason for joining them as parties was to give them an opportunity to be heard with respect to that interest. This Honourable Court went on to hold that in light of the fact that the defendants had chosen not to participate in the plaintiff's previous action and in light of their application, the Court had no choice but to dismiss the plaintiff's previous action as against the defendants.

- 5) By the same Ruling, this Honourable Court declared in the plaintiff's previous action, inter alia, that the plaintiff was entitled to hold Barefoot as the owner of Unit 2714 notwithstanding the purported sale of the said Unit by Barefoot to the defendants as Barefoot had failed to obtain the prior approval of the Board for the said sale.
- 6) Meanwhile, on 7th December 2010 that is, shortly after the plaintiff had commenced the plaintiff's previous action, the plaintiff lodged for record in the Registry of Records a Notice of Charge (addressed to Barefoot) over Unit 2714 ("the Notice of Charge") as a result of Barefoot's failure to pay maintenance and assessment fees levied by the plaintiff against Unit 2714 in the aggregate sum of \$3,781.76.
- 7) By virtue of section 21(1) of the Law of Property and Conveyancing (Condominium) Act, 1965 ("the Act") the charge underlying the Notice of Charge is a legal charge which ranks prior to all other encumbrances on Unit 2714 except any charge under section 256(1) of the Real Property Tax Act or any Act amending or replacing the same ("the RPT Act").
- 8) I am advised by the plaintiff and I verily believe that Unit 2714 is not subject to any charge imposed under the RPT Act.
- 9) The defendants do however purport to have taken out a mortgage over Unit 2714 by way of a Deed of Confirmatory Mortgage dated 18th May 2009 and recorded in the Registry of Records in Volume 11002 at pages 446 to 450.
- 10) Upon the plaintiff lodging the Notice of Charge as aforesaid, the legal title in Unit 2714 vested in the plaintiff by operation of law.
- 11) For the purpose of enforcing the charge which underlies the Notice of Charge, the plaintiff by virtue of Section 21 (4) of the Act has the same powers of sale (over Unit 2714) as a legal mortgagee under the provisions of the Conveyancing and Law of Property Act.
- 12) And, as an incident to the legal title that the plaintiff holds by virtue of the charge which underlies the Notice of Charge, the plaintiff (like a legal mortgagee) is entitled to take possession of Unit 2714 for the purpose of exercising its statutory power of sale.
- 13) Like a legal mortgagee, the plaintiff is entitled to exercise its right of possession in order for the plaintiff to sell Unit 2714 with vacant possession.
- 14) Accordingly, on or about 1st November 2012, the plaintiff wrote to the defendants requesting them to vacate Unit 2714 within 30 days to enable the plaintiff to seal off the interconnecting door between Unit 2714 and 2716 and to enable the plaintiff to sell Unit 2714 with vacant possession.
- 15) I am advised by the plaintiff and verily believe that on or about 5th November 2012, the 2nd defendant informed the plaintiff that the defendants would not vacate Unit 2714 nor allow the plaintiff to seal off

the interconnecting door between Unit 2714 and 2716 without the plaintiff first obtaining a court Order.

- 16) As a result of the defendants' refusal to voluntarily grant the plaintiff possession of Unit 2714 for the purposes aforesaid, the plaintiff has been constrained to commence these proceedings for inter alia an order for possession.
- 17) I verily believe that there is no defence to this action.

16. Counsel for the plaintiff points out that the plaintiff having on 7 December 2010 lodged for record in the Registry of Records a notice of charge over Unit 2714 as a result of the failure to pay maintenance and assessment fees levied by the plaintiff against Unit 2714, the legal title in Unit 2714 became vested in the plaintiff by operation of law (the Law of Property and Conveyancing (Condominium) Act, 1965): See *Triple Ecstasy Ltd v Bay View Village Management Ltd.* [1988-89] Caribbean Commercial Law Reports 344, where Sabola, C.J. (as he then was) declared at page 350 that upon lodging a notice of charge the legal title in the subject unit vested in the respondent body corporate.

17. Consequently, counsel submits, the plaintiff is entitled to take possession of Unit 2714 for the purpose of selling the same pursuant to its statutory power of sale in the same manner in which a legal mortgage holder is entitled to enter into possession of a mortgaged property.

18. For that submission counsel relies on section 21(4) of the Law of Property and Conveyancing (Condominium) Act which provides as follows:

"The body-corporate shall have the same powers of sale for the purpose of enforcing the charge created by subsection (1) of this section as a mortgagee under the provisions of the Conveyancing and Law of Property Act".

19. Counsel for the plaintiff points out that under the common law a legal mortgagee has a right to take possession of the mortgaged premises upon execution ("before the ink is dry on the mortgage") unless there is something in the contract whereby he has contracted himself out of that right. See *Commonwealth Caribbean Property Law*, 2nd ed., Gilbert Kodilyne, p238.

20. In that regard, counsel submits, as a legal mortgagee/chargee, the plaintiff is entitled as of right to possession of the said unit and to exercise its right to enter thereon peaceably or by bringing an action for possession if for any reason peaceable entry is impossible. However, he points out, the evidence is that the defendants have refused to vacate the said unit unless the plaintiff obtains an order there for

21. Furthermore, counsel points out, no defence has been filed and, in his submission, there is no plausible reason why the plaintiff should be put to the unnecessary expense of a full blown trial.

22. Therefore, counsel for the plaintiff submits, the Court should accede to the plaintiff's request and grant leave to enter summary judgment.

23. The purpose of RSC Order 14 is to enable a plaintiff to obtain summary judgment, without trial, provided he can prove his claim clearly and provided the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried. (See *Roberts v Plant* [1895] 1 QB 597 at 603, 604 CA). The policy of the Order is to avoid delay in cases where there is no defence (per Robert Goff LJ in *European Asian Bank AG v Punjab and Sind Bank (No. 2)* [1983] 1 WRL 642 at 654; and the power to give summary judgment under RSC Order 14 is intended to apply only to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay (*Jones v Stone* [1989] AC 122 at 124).

24. A review of the file reveals that on 19 February 2013 the defendants filed a summons seeking an order, pursuant to the provisions of RSC Order 18 rule 19 (1)(a), (b) and (d), that the plaintiff's writ and statement of claim be struck out. That summons is supported by the affidavit of Marva Moxey filed on 15 April 2013.

25. Then, by an ex parte summons for interlocutory injunction filed on behalf of the defendants on 16 April 2013, the defendants seek an order restraining the defendants from interfering with the electrical supply to the defendants' condominium unit at Coral Beach Hotel. That summons was also supported by the affidavit of Marva Moxey filed on 16 April 2013.

26. It does not appear that a date was sought or obtained for the hearing of either of the defendants' mentioned summonses.

27. Additionally, on the date that the defendants filed a summons for me to recuse myself from hearing further proceedings in this action, they also filed a counterclaim seeking damages and an injunction restraining the plaintiff from turning off the electrical supply to their unit and from interfering with their quiet enjoyment thereof.

28. In that regard, and as I understand the plaintiff's case, if I were to accede to its application for summary judgment and gave the order for its possession of Unit 2714, access thereto would necessarily have to be gained through Unit 2716, the defendants' ownership of which is not disputed, as there is an interconnecting door between them, which the plaintiff is seeking to seal off.

29. Additionally, although the plaintiff claims to be entitled to possession of Unit 2714 by virtue of Barefoot Postman Limited's failure to pay maintenance fees, it is not disputed that the defendants also claim to be the owners of that Unit and in that regard, I note Ms Kincaid's averment that the defendants purport to occupy Unit 2714 by virtue of a conveyance/Deed of Rectification and Confirmation from Barefoot Postman Limited.

30. As indicated, the defendants nor their counsel appeared at the hearing of the plaintiff's summons; no defence has been filed by the defendants; no affidavit in response or opposition to the plaintiff's claim has been filed by the defendants; no application has been made by the defendants for a re-hearing of the plaintiff's application and or an opportunity to respond thereto.

31. However, in light of the foregoing, it seems to me that the defendants ought to be given an opportunity to be heard in this matter.

32. In the circumstances, I refuse the plaintiff's application for summary judgment and give the defendants fourteen days within which to file a defence and/or to proceed to have their aforesaid summonses set down for hearing.

33. Costs will be in the cause.

DELIVERED this 30th of May A.D. 2014

Estelle G. Gray Evans

Justice