THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0025

BETWEEN:

RBTT BANK CARIBBEAN LIMITED **CLAIMANT**

AND

MARIE ADAMS **DEFENDANT**
ALSO KNOWN AS MARIE HAZELL

Appearances:
Mrs. LaKeisha John-Farrell for the Claimant
Mr. Roderick Jones with Ms. Alana Cumberbatch for the Defendant
Mr. Andrew Robertson Representative for RBTT Bank Caribbean Limited present

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2020: 2nd April
23rd April

JUDGMENT

Byer, J.:

[1] By Fixed Date Claim Form filed on the 28 January 2019 the claimant herein sought the following relief:

i. An order for the payment of the balance of principal, interest and other charges due and owing by the Defendant as set out below:

Amount claimed in respect of Mortgage Loan Account:

Principal Balance	$23,470.90
Outstanding Interest	$ 3,381.94
Penalty	$ 7,866.53
Court Fees	$ 115.00
Legal Practitioner's fixed cost on issue	$ 1,000.00
Together with interest on the sum of $23,470.90 at the rate of 9.00% per annum from December 12, 2018 to date of payment (Daily rate thereafter = $5.79 per day)	
Total Claimed	**$35,834.37**

ii. Costs

iii. Further and/or in the alternative, an order that the claimant is entitled to vacant possession of the said Mortgaged Property; and

iv. Further and/or other relief as the Court deem fit.

[2] In support of the said fixed date claim form, the claimant filed an Affidavit by Andrew Robertson, the Retail banking associate of the said claimant (First Affidavit). To this Affidavit the witness Mr. Robertson exhibited the Mortgage Deed made between the claimant and the defendant dated the 3rd March 2008 and recorded as No.1476 of 2008 (the Mortgage Deed) together with the Demand Letter dated the 20th October 2018.

[3] The claimant also at the time of filing filed a Notice of Relief pursuant to Part 66.3 (b) (ii) CPR 2000 seeking final judgment at the first hearing of the fixed dated claim form reiterating the relief sought in the Fixed Date Claim Form.

[4] When the matter came on for case management, counsel for the defendant informed the court that the property the subject matter of the mortgage no longer existed, the same having been demolished. By Affidavit filed by the defendant on the 25th April 2019 and by Affidavit of one Raphael Cudjoe who stated his profession as being an engineer, the circumstances of the demolition were outlined. At the appearance of severe structural weaknesses in the structure the same was demolished. As a result the updated affidavit of the claimant by Andrew Robertson filed on the 20th March 2020 (Second Affidavit) made it clear that the claimant was now no longer in the position to seek vacant possession of the property but would still be seeking sale of the property pursuant to the breach of the conditions at paragraph 7 (1) (b) of the Mortgage Deed.

[5] At summary trial of the matter, the defendant led no evidence and the two affidavits of the claimant's witness were entered into evidence.

[6] At the conclusion of the trial, counsel for the defendant submitted on two issues. Firstly, that neither the First Affidavit nor the Second Affidavit contained the mandatory information as required under Part 66.4 (1) (c) (iii), (iv) and (v). Having failed to provide this information counsel submitted that the claimant was therefore not entitled to an order for payment of the debt and secondly that even if the claimant was entitled to their judgment (a fact which he did not concede) the claimant should not be allowed to sell the property valued at over $300,000.00[1] for a debt that was less than $40,000.00. The submission by counsel for the defendant was that it was not fair and reasonable in all the circumstances to allow for the sale to be effected especially when the defendant had always been prepared to pay the said sum evidenced by the filing of her application to pay by installments since 2019[2].

[7] Counsel for the claimant in response submitted that there being no issue on the question of the debt of the defendant, the defendant never having disputed the same, she posited that the claimant had proven that not only were they entitled to the judgment for the payment of the debt but that further the evidence presented satisfied the precondition for the operation of the power of sale. In the submission of counsel for the claimant, all the claimant had to prove to invoke this power was that there had been the occurrence of one of the conditions as contained in the said Mortgage

[1] Valuation Report dated 19/11/19 exhibited to the affidavit of Roxann Hadaway filed on the 30/1/2020

[2] Filed 25/4/19

Deed[3]. Counsel for the claimant submitted that there was evidence to substantiate that *"some interest under these presents is in arrears and unpaid for four weeks after becoming due",* by relying on the fact that the defendant had not made a payment since 2014. Counsel submitted that from this, the inference was clear that the interest was outstanding, and the claimant was therefore entitled not only to a judgment for payment but for the prayer for enforcement of their power of sale.

[8] The issues for the court are therefore:

i) Is the defendant liable to the claimant under the Mortgage Deed and

ii) To what remedies are the claimant entitled?

Is the defendant liable to the claimant under the Mortgage Deed?

[9] From the inception of this matter, the defendant has never disputed that she was indebted to the claimant, however she has never made an admission as to the quantum as claimed. Thus, all the defendant has said in the untested evidence as filed before the court was that she had *"…borrowed a loan from RBTT to finance the construction of her home. The mortgage was secured by her property."*[4]

[10] Thus the onus is on the claimant to prove their case to the satisfaction of this court to enable them to obtain the reliefs as sought.

[11] It was therefore incumbent upon them to establish that not only is there a right residing in themselves but that the evidence established their entitlement to enforce that right.

[12] By Part 66.4(1) of the CPR the claimant is mandated to file evidence which:

(1) On a claim for possession of the mortgaged property of **for payment of the mortgage debt** the claimant **must** file with the claim form evidence by affidavit –

(a) exhibiting a copy of the original mortgage;

(b) exhibiting a copy of any other document which sets out the terms of the mortgage; and

(c) giving particulars of –

(i) the amount of the advance;
(ii) the interest payable under the mortgage;
(iii) the amount of any periodic payments required to be made whether or not such payments include interest;
(iv) the amount of repayments that have been made;
(v) the amount of any repayments or interest due but unpaid at the date of the claim and at the date of affidavit;
(vi) if the claim includes a claim for interest to judgment – the daily rate at which such interest accrues. (My *emphasis added*)

[3] Paragraph 7 of the Mortgage Deed
[4] Paragraph 6 of the Affidavit of the Defendant filed 25/4/19

[13] I therefore agree with counsel for the defendant that this provision is mandatory in nature and must be fulfilled by a claimant seeking to obtain a judgment for the payment of a mortgage debt. It is irrelevant in this court's mind whether the defendant accepts that the debt is owing or not, as the burden always resides on the claimant to prove their case.

[14] Indeed, this court accepts the proposition that the right of the claimant is contained in the terms of the contractual agreement to pay, but the claimant is also mandated to ensure that the evidence is clear and concise as to the sums claimed and the basis for that sum as calculated. This court therefore finds that although the claimant did in the Second Affidavit of Mr. Robertson give some of requisite particulars as required under Part 66.4(1), the evidence did not address the amount of any periodic payment required to be made (whether such payments included interest or not)[5], did not state the number of repayments that had been made[6] nor did the evidence address the amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit[7].

[15] The bald assertion by the witness Mr. Robertson that the last payment was made in 2014[8] is not enough to answer this specific requirement. Having scoured the evidence that was adduced, this court is satisfied that the evidence of the witness is sorely lacking with the necessary particulars. The witness was required to give that specific evidence and having failed to do so, all that this court can find and agree with is that there was a mortgage that was in existence between these parties.

[16] In this court's mind Part 66.4 are provisions which must be adhered to by applicants before the court. In this court's mind, the requirement is mandatory as it is clear that in order to deprive an individual of property which has been mortgaged to a lending institution, that institution must clearly and precisely identify the extent of the complained of breach and therefore the entitlement thereunder. Having failed to do, this court is satisfied that the claimant has not proven their case to make a finding for an order of payment as against the defendant as pleaded.

<u>To what remedies is the claimant entitled?</u>

[17] In the alternative the claimant has sought at first an order for vacant possession[9] and then by affidavit filed on the 20th March 2020[10] for an order to enforce their power of sale and the payment of an additional sum of $16,729.17.

[18] It is without a doubt in this court's mind that the right of the claimant to enforce a power of sale as against the defendant is based on the contractual agreement as between the parties that is reduced into writing by the Mortgage Deed.

[19] The Mortgage Deed made provision for the claimant to invoke their power of sale if one of the following conditions was satisfied:

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[5] Part 66.4 (1) (c) (iii)
[6] Part 66.4 (1) (c) (iv)
[7] Part 66.4 (1) (c) (v)
[8] Paragraph 4 of the Affidavit of Andrew Robertson filed 20/3/2020
[9] Fixed Dated Claim Form filed 28/1/19
[10] Paragraph 11

1. that the claimant would have sent a notice requiring payment of the sum of two hundred thousand dollars which has been served on the defendant and default has been made in payment of the sum demanded for three calendar months ***or***

2. that some interest under the mortgage deed is in arrears and unpaid for four weeks after becoming due ***or***

3. there has been breach of some condition or provision contained in the mortgage deed. (My emphasis added)

[20] With regard to the first condition, there is evidence that a demand letter dated the 20th October 2018 was written to the defendant but there was no evidence given that the same was served or when the same was served. Therefore, there was no evidence before this court that the defendant was therefore given the requisite notice. Indeed, the difficulty of the claimant in this regard was compounded by the evident fact that the said document purporting to be a notice under the terms of the Mortgage Deed had not been signed by the attorney at law for the claimant but an individual unknown to the claimant's representative[11].

[21] Therefore wisely the claimant has not relied on breach of this condition in the Mortgage Deed but rather on the second condition of there being some interest in arrears and remaining unpaid for a period of four weeks. The evidence on this is as contained in the First Affidavit at paragraph 8 thereof: "*despite the written demand from the claimant to the defendant for the repayment of the outstanding balance on account held with the claimant, the defendant has failed and or refused to repay the sums outstanding to the claimant and have failed to make the agreed monthly interest payments in excess of four weeks."*

[22] However in this court's mind this evidence is woefully inadequate to ground reliance on breach of this second condition. The evidence failed to give evidence of service and it additionally failed to provide the necessary timeline of the requisite four weeks having passed. Therefore, in this court's mind, the claimant has not proven the breach as alleged. The claimant made no claim as to the third condition being breached and the court makes no finding on the same.

[23] That being said, it is therefore not necessary for this court to make a finding on the issue of whether the claimant would have been able to recover the sum of $16,729.17 as claimed in their affidavit of the 20th March 2020. However I wish to make a comment on the same that this court is not adverse to making an order for reimbursement of fees and expenses incurred in pursuing an action against a defaulting party but this sum must be properly substantiated and itemized so that the defendant is in a position to know the full extent of the case that they are being called to answer.

Order of the court is therefore as follows:

1. The claim by the claimant RBTT Bank Caribbean Limited for the payment of the sum of $36, 276.26 is dismissed.

2. The prayer in the alternative for the enforcement of the power of sale is denied.

[11] Answer given to the court by the witness Mr. Robertson at Summary Trial of the matter on 2/4/2020

3. In all the circumstances of this case, I am not of the opinion that the defendant should be rewarded for the claimant's fatal procedural failures and in the discretion of the court I make no order as to costs against the claimant.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar