IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL)

DOMHCV2014/0204

BETWEEN:-

BANK OF NOVA SCOTIA

Claimant

ANTHEA JOSEPH

FRANKLYN JOSEPH

Defendants

Appearances:

Mrs Noelize Knight – Didier for the Claimant

Mr Lennox Lawrence for the Defendants

RULING

[1] **Stephenson J.:** This is an application by the defendants to pay a judgment order by installments. On the 30th March 2015, I ruled that the application to pay by installments was not granted and undertook to provide a written ruling and I do so now.

Background

[2] The Bank of Nova Scotia (The claimant) on the 13th June 2014 filed a mortgage claim by way of Fixed Date Claim Form against the defendants for the sum of $509,824.33 being the balance due and owing (inclusive of interest and damages and other charges) as at the 14th of March 2014 on a mortgage loan granted by the

claimant to the defendants on the 25th May 2012 and of which the defendants are in breach, plus interest accruing at the rate of 7.5% per annum on the principal sum (daily interest rate of $95.96) till the date of judgment and thereafter at the rate of 5% per annum on the judgment until payment.[1]

[3] An affidavit in support of the claim sworn by Mervin Burton on behalf of the claimant was filed on the said 13th June 2014. The Personal Credit Agreement, the Certificate of title with the caveat in favour of the bank and the memorandum of deposit of title deeds with the intent to create an equitable mortgage upon the property were filed as exhibits to the affidavit in support of the legal relations between the parties herein.

[4] On the 24th September 2014 the documents were served on Mrs Charm Bell-Bardouille on behalf of the claimants.[2]

[5] On the 26th September 2014 an acknowledgement of service was filed for and on behalf of the defendants by Mr Lennox Lawrence Attorney at law.

[6] On the 21st November 2014 an application to pay by installments was made for and on behalf of the defendants. This application was supported by an affidavit filed on the 29th November 2014 by both defendants.

[7] In that affidavit, the defendants admit owing the debt as claimed by the claimants. However, they claim that judgment interest should not attach to the entire amount due but only to the outstanding principal at the date of judgement.

[8] The defendants stated their individual earnings with expenses and exhibited their salary slips, billing history at DOWASCO, the purchase history for their electricity meter and other variable expenses in support of their claim that they are experiencing adverse financial circumstances which they expect to continue for the next seven years.

[9] The Defendants are asking the court's approval for them to pay off their indebtedness in the sum of $1800.00 over the next seven years.

The application to pay by installments

[10] The application is made by the defendants pursuant to the provisions of Part 14 of CPR 2000 (CPR).

[11] Part 14.9 (1) makes provision for a defendant to apply to the court for time to pay the judgment and for the procedure to be utilised by the defendant to avail themselves of this relief.

[12] Part 14.10 makes provision for the procedure where the time and rate is agreed by the parties.

[13] Part 14.11 makes provision for the procedure to be followed where the parties do not agree.

[14] In the claim at bar it is clear from their application, that the defendants are making an application to pay by installments based on the fact they say, that the judgment obtained was obtained on admission as is stated on the face of the Court's order[3]. The claimant is actively opposing this application.

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[1] Fixed Date Claim Form dated 13 June 2014

[2] Affidavit of service filed on the 26 September 2014.

[15] The parties were ordered to file written submissions in support of their positions. I wish to assure learned counsel on both sides that I have reviewed and taken into account their submissions in their entirety even if the said submissions or cases were not mentioned in this ruling.

ISSUES OF LAW AND LEGAL SUBMISSIONS

[16] Mr Lennox Lawrence Counsel for the defendant submitted that the claim in the case at bar is not a mortgage claim. He submitted that upon filing of the mortgage claim the original claim in the original mortgage crystalized into a cause of action and becomes a claim for money owed. Learned Counsel Mr Lawrence further submitted that the only remedy that was therefore available to the claimant is no longer a mortgage but a claim for final judgment.

[17] Essentially I understand Mr Lawrence to be submitting that the claim has morphed into an ordinary claim for money owed.[4] Part 66 of CPR 2000 deals with Mortgage Claims. A Mortgage, Mortgage Claim, Mortgagor and Mortgagee are defined at Part 66.2 as follows:

> ""**mortgage**" includes a legal or equitable charge and a legal or equitable mortgage;
>
> "**mortgage claims**" means the claims by a mortgagee or mortgagor for any of the forms of relief referred to in paragraph (1);
>
> "**mortgagee**" means the person to whom the mortgage was granted;
>
> And "**mortgagor**" means the person who has granted a mortgage of the mortgaged property."

[18] Part 66.1 of CPR states

> "(1) This Part deals with claims by a mortgagor or mortgagee for any of the following forms of relief
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> –
>
> (a) foreclosure;
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> (b) delivery of possession by the mortgagee;
>
> (c) payment of moneys secured by a mortgage;
>
> (d) possession of a mortgaged property;

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[3] See Order of Court dated the 16th December 2015 and filed on the 10th April 2014. It is noted that some time has elapsed between the date that the order was made and the date that it was filed, a perusal of the file by the Judge it was noted that this was as a result of an administrative oversight by the Registry. However it is also noted that pursuant to Part 42.8 of CPR the order took effect from the day that it was made that is from the 16th December 2015.

[4] Para 6 of the Amended submissions file on behalf of the Defendants on the 26 March 2015.

(e) reconveyance of the property or release from the mortgage;

(f) redemption of a mortgage; and

(g) sale of a mortgaged property.

[19] In the case at bar, the claim is by a mortgagor against a mortgagee for payments of moneys secured by a mortgage and for sale of the mortgaged property. It therefore follows that the claim in the case at bar has not crystalized into a claim for money as submitted by Learned Counsel Mr Lawrence. I therefore do not agree with his submission in this regard. I therefore hold that the case at bar is a mortgage claim as provided for by Part 66 of CPR 2000 and for avoidance of doubt according to the judgment granted by His Lordship Justice E Thomas on the 16thDecember 2014, judgment was not only for the money due and owing under the mortgage agreement between the parties herein but also for the mortgaged property to be sold in accordance with the Title by Registration Act Chapter 56:50.[5]

[20] This application is opposed by the claimant who on the 12th February 2015 filed an affidavit in response to the defendants' application to pay by installments. The affiant Mr Mervin Burton states *inter alia* that the claimant obtained judgement on admissions on the 16th December 2014 from Mr Justice Errol Thomas in Chambers.

[21] The bank's position as stated in Burton's affidavit[6] is that the claim was a mortgage claim and that the bank has been advised by their solicitors and verily believe that once the judgement was obtained by the bank, as mortgagees, they were entitled to convert its equitable mortgage to a legal mortgagee. The affiant also stated the bank's intention to realise the banks security by exercising its power of sale of the mortgaged property.

[22] The affiant then goes on to state the reasons why the defendants' proposal is unacceptable to the bank as follows:[7]

"(i) *At the rate of $1,800 a month the customers would only be paying interest, at the 5% judgment rate, and not decreasing the judgment sum itself at all. This would not make any financial sense for the Defendant since they would not be decreasing their principal indebtedness, and further, would take the Court's judgment nowhere. Interest on the judgment at 5% amounts to $2,169.78 a month.*

(ii) *At this rate also, the amount owed to the bank, as at the date of the judgment, would not decrease and this would of course be of no benefit at all to the bank, which holds the judgment.*

(iii) *Before filing this claim against the Defendant, the Claimant was receiving just about $2,000.00 a month towards the loan, instead of the $3,395.35 agreed. That this is what put the loan into arrears and caused us to seek relief from the Court. An order for an installment payment of $1,800.00now therefore, would make other efforts futile.*

[5] See Order of Court dated the 16 December 2014 op cit

[6] Affidavit of the 12 February 2015

[7] Paragraph 5 of the affidavit of Mervin Burton Cross border adjustor of the claimant filed on the 12 February 2015.

(iv) *We fear that being under the force of an Order of the Court to accept payment of the judgment obtained by the installments requested by the defendants, would prevent us from otherwise pursuing the liquidation of this judgment with the security that the customers/defendants have pledged to us.*

(v) *As part of the defendants' agreement with us, they had ordered their employers to deduct their Scotia Bank Loan payment from their salaries and send it directly to the bank. This was in fact being done during the first few months of the loan, but we eventually stopped receiving payment from the 1st Defendant's employer. When I look at her salary slip (exhibited to the defendant's affidavit as (AJ & FJ2"), I note that several other debt payments are being deducted and made, which I do not recall being present at the time of taking out the mortgage. There is no deduction to the Bank of Nova Scotia. It appears therefore that there was a deliberate abandonment by the defendant of her obligations to the bank in favour of other creditors."*

[23] Pursuant to an order of Court dated 16 January 2015, the Claimant filed written submissions. Learned Counsel Mrs Knight Didier submitted that the banks reasons for objecting to the defendants' proposal are most sensible in that the amounts paid would be in the defendants' interest really and not in the bank's interest; that the amount being proposed is less than the agreed mortgage payments and even less than the reduced payments that were being paid by the defendant which is what caused the mortgage to go into default resulting in the court proceedings.

[24] Mrs Knight Didier further submitted that, it is the defendants' deliberate action that caused the situation that they got themselves into that is into further debt after the mortgage loan and that the defendants have not averred that they lost their jobs or ceased being employed yet the salary deduction to the claimant which was in place was stopped and replaced by another debt obligation. Counsel further submitted that to allow the defendants to pay by installments as requested would operate to deny the claimants the opportunity to realise their mortgage security which is an integral part of the bank's decision to grant the loan. It is noted that the mortgage sum was indeed a big sum and I unhesitatingly agree with counsel Mrs Knight Didier that the bank's ability to realise its security is integral to the bank's agreement to make the loan.

[25] Learned Counsel Mrs Knight Didier further submitted in essence, that the claim before the court is a mortgage claim and the claimant's right to foreclosure is derived from the Title by Registration Act[8]. Section 66 of the Act provides for the conversion of *the equitable mortgage into a legal mortgage and this is done by*

> *"... by the equitable mortgagee obtaining the judgment of the Court fixing the amount due to him by the registered proprietor or obtaining from the debtor a writing accepting a specific sum therein stated as being due by him to the creditor under the equitable mortgage"*

[8] Chapter 56:50 of the Laws of Dominica.

[26] Mrs Knight Didier stated that after the judgment is obtained it is presented to the registrar and a legal mortgage is then noted on the Certificate of Title for the amount due. It is noted that this is the procedure that is referred to by Justice Thomas in **Bank of Nova Scotia –v- Jedany's Comfort et al**[9]

[27] After a mortgagor has obtained its judgment and has presented and registered same it becomes a legal mortgage,[10] the mortgagor can then proceed to enforce it security. There is no requirement for them to commence or institute enforcement proceedings. The mortgagors who precede this way will then approached the court to settle the articles of sale and to fix the sale price[11].

[28] Learned counsel Mrs Knight Didier submitted[12] that under CPR 2000 applications to pay by installments are not applicable to mortgage claims. Counsel submitted that installments are applicable only where the claim is a claim for a specified amount of money[13].

[29] Counsel further made reference to the definition of a claim for a specified sum of money as stated in Part 2:4 as follows.

> *"A claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract..."*

[30] It is noted that Part 2:4 also states what is a claim for specified sum of money for purposes of Parts 12 and 14 which is as follows:

> *(i)the cost of repairs executed to a vehicle;*
> *(ii)the cost of repairs executed to any property in, on or abutting a road; or*
> *(iii) any other actual financial loss other than loss of wages or other income;*
> *claimed as a result of damage which is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim.*

[31] Learned Counsel Mrs Knight Didier submitted[14] that a mortgage claim is not a normal claim for debt collection or for breach of contract. Mortgage claims are provided for at part 66 of the CPR. Counsel submitted that the mortgage claim is a specialty debt. The covenant to pay the mortgage which is what characterizes the debt as a specialty debt was given by the defendants in the case at bar in the Personal Credit agreement which was

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[9] DOMHCV2014/0011
[10] Section 66 of Title by Registration Act
[11] CPR 2000 Part
[12] See paragraph 12 and 13 of the Claimant's written submissions
[13] Ibid Part 14:10 and 14:11
[14] See paragraph 14 – 16 of Claimant's written submissions

exhibited in the affidavit of Mr Burton on behalf of the claimant. Counsel submitted that because debt in this case falls within the definition of specialty debt as stated in Halsburys Laws of England[15] the claim in the case at bar cannot be considered a repayment for money due under a mortgage outside of the definition of a claim for a specified amount as defined by CPR and is not an amount due under a contract.

[32] Learned Counsel submitted that CPR makes special provision for mortgage claims in Part 66 which defined a mortgage claim as including a claim for repayment " *of money due under a mortgage*" thereby distinguishing it from a claim for a specified sum of money simpliciter.

[33] The case **National Westminster Bank PLC v Kitch**[16] shows the importance of distinguishing between a claim for payment of money secured by a mortgage and a claim for payment of money not relying on the existence of the mortgage.

CONCLUSION

[34] It is noted that part 14 of CPR only applies where the only remedy which the claimant seeks is the payment of a sum of money together with interests and costs. It is noted that the claim here is not solely for the payment of money but also to enforce the security by way of sale of the mortgage property pursuant to the terms and provisions of the Title by Registration Act as has been dealt with extensively by Learned Counsel Mrs Knight Didier in her submissions, and therefore the procedure available to a defendant to pay by installments is clearly not available to the defendants in this matter and I so rule. In the premises and for the foregoing reasons it is the determination of the court that the application herein to pay by installments is denied.

[35] It is noted that Learned Counsel Mr Lennox Lawrence made submissions regarding the interest which should be paid on the judgment and also that the alternative remedy for the sale of the mortgage property should not be granted. Unfortunately judgment and the terms of same have already been made and I am not at liberty to interfere with it even if I were inclined so to do. In any event I am of the view that the claimant in the case at bar is entitled to the said order for sale as claimed.

[36] It is also noted that in the case cited by Mr Lawrence **Bank of Nova Scotia –v- Jedany's Comfort et al**[17] the learned trial Judge did order that the claimant is entitled to the an order for sale of the property used as security for the loans not that they were not so entitled, Mr Justice Thomas merely indicated what was in his judgment the procedure to be used so to do.

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[15] Vol 32 paras 401 to 402

[16] [1996] 1 WLR 1316 cited in the White Book (Civil Procedure) 2000 Vol 1

[17] Op cit

[37] The judgment Order obtained by the claimant herein includes an order that is "that the mortgaged property be sold in accordance with the title by Registration Act Chapter 56:50"[18] and therefore in the circumstances the Claimant is at liberty to take the necessary steps to sell the mortgaged property.

ORDER

IT IS HEREBY ORDERED as follows:

1) That since the claim in this matter is a mortgage claim as provided for by Part 66 of CPR 2000 and the claim is for payments of moneys secured by mortgage and for sale of the mortgaged property, the claim therefore is not a claim where the only remedy being sought by the claimant is for the payment of a sum of money together with interests and costs and consequently the provisions of Part 14.9, 14.10 and 14.11 of CPR 2000 are not available to the defendant's herein.
2) The application to pay by installments made by the Defendants herein is therefore not granted.
3) Costs to be prescribed costs if not agreed between the parties.

M E Birnie Stephenson
High Court Judge

[18] Order of Court dated 16th December 2014.