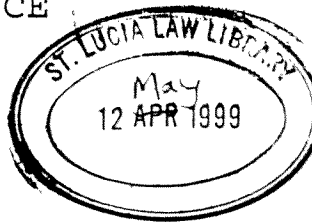


SAINT LUCIA

IN THE HIGH COURT OF JUSTICE (CIVIL)



Suit No. 865 of 1997

Between:

THE BANK OF NOVA SCOTIA

- Plaintiff

- vs

(1) D. J. EMMANUEL & ASSOCIATES LTD.

(2) DAVID JOSEPH EMMANUEL

- Defendants

Mrs. K. Roheman for the Plaintiff
Mr. R. Innocent for Defendants

1999: April 30th
May 7th

JUDGMENT

d'Auvergne, J

The background to this case is that the first named Defendant executed two hypothecary obligations in favour of the Plaintiff and they are registered as Instrument No. 1721/96 and Instrument No. 3629/96.

The second named Defendant, on the other hand, executed a guarantee in favour of the Plaintiff guaranteeing payment to the Plaintiff of all debts, by the first named Defendant.

The hypothecs were not serviced and therefore the Plaintiff brought an action against the Defendants claiming jointly and severally the following:

The principal sum of \$137,433.30

Interest in the sum of \$14,960.27 and

Interest on the Principal Sum at the rate of 12% per annum

(The Interest and Principal were calculated up to the 6th day of August, 1997) and the costs of the action. An appearance was entered on behalf of the Defendants and four months later the Plaintiff entered Judgment in default of defence against them. The said Judgment reads as follows:

It is this day adjudged that the Defendants do jointly and severally pay to the Plaintiff:

- (1) The Principal sum of \$137,433.30 as at 6th August, 1997*
- (2) Interest in the sum of \$14,960.27 as at 6th August, 1997*
- (3) Interest on \$137,433.30 at the rate of 12% per annum from 6th August, 1997 to date of payment.*
- (4) The costs thereof.*

Subsequently, a Writ of Execution was filed on one of the properties of the second named Defendant. This property is situated at Rodney Bay, Gros Islet, measures 15,110.00 square feet and is registered as Block No. 1255B Parcel 61. On the 3rd day of June 1998 an Upset Price was set at \$300,000.

A perusal of the court file will indicate that there is a Summons to extend the period for the execution of the Writ of Execution filed on the 24th day of March, 1998 but that no Order has yet been ~~filed.~~

On the 3rd day of March, 1999 a Judgment Summons supported by an Affidavit was filed under Section 2135 of the Civil Code, seeking an examination of the second named Defendant as to his means in order to satisfy the above noted debt to the Plaintiff.

On the 10th day of March, 1999 the second named Defendant filed an Affidavit in reply which I have reproduced.

I, David Emmanuel of Gros Islet in the State of Saint Lucia
make oath and say as follows:

1. I have seen and read the Affidavit of Brian Willet in this matter.
2. That I am indebted to the Plaintiff as alleged in paragraph 2 of the said Affidavit.
3. That the Plaintiff on 24th March 1998 filed a Writ of Execution against my immovable property, Block 1255B Parcel No. 61 situate at Rodney Bay, Gros Islet.
4. That on April 14, 1998 the Plaintiff issued a Summons to Fix Upset Price with supporting Affidavit and an exhibited valuation of the said property.
5. That by a Court Order dated May 15th, 1998 and filed June 3, 1998 an Upset Price of \$300,000 was set for the said property.
6. That notwithstanding the Default Judgment the Writ of Execution and the Court Order for Upset Price of \$300,000 the Plaintiff has failed without good reason to exercise its power of seizure and sale of the property and satisfy the said debt, to the prejudice of the Defendant.
7. That I have done nothing to impede the Defendant's exercise of its power of seizure and sale of the said property.
8. That I have since the date of the said Judgment offered to make a contribution to the Plaintiff towards the judgment debt, but my offer was not accepted.

9. That the said Mr. Willet has discouraged me from accepting an offer to buy the said property at a price below the Upset Price but more than sufficient to discharge the said debt.

10. In the premises I humbly pray this Honourable Court to dismiss, with cost to the Defendant, the Plaintiff's application in this matter.

ARGUMENTS:

Learned Counsel for the Plaintiff stated that the second named Defendant effected the sale of a piece of land registered as Block 1256D Parcel 118 and despite a Caution by the Plaintiff disbursed the balance of the proceeds of sale (thought to be over \$170,000) without satisfying the said debt and submitted that the said Defendant should be ordered to pay the proceeds of sale to the Plaintiff.

Learned Counsel for the Defendants commenced his argument by likening the Plaintiff to Sherlock, the merchant in "Merchant of Venice," pound of flesh with blood. He argued vociferously that the Plaintiff had standing in its favour a Default Judgment, a Writ of Execution and a Court Order for the Upset Price of \$300,000 on the property Block 1255B No. 61 and was seeking an Order for the balance of the proceeds of sale from another piece of land viz 1256D 118.

Learned Counsel repeated paragraph nine (9) of second named Defendant's Affidavit where he states that he sought permission from the deponent of the Affidavit supporting the Summons (under review) namely Mr. Brian Willet the Account Manager of the Plaintiff for permission to sell the property (noted earlier) at a price below the Upset Price but sufficient to discharge the said debt but the offer was refused.

Learned Counsel for the Defendants beseeched the Court to note that a Caution was placed on the property registered as land 1256D 118 after it was sold and the Summons under review was filed.

Learned Counsel for Plaintiff replied by reminding the Court that "those who came to Equity must come with clean hands" and that a Judicial Hypothec attached to all lands of the Judgment debtor.

She quoted a Saint Lucian case Suit 727/94 in which Justice Ian Donald Mitchel affirmed that a bank has a right to pursue whatever means necessary to satisfy a debt.

CONCLUSION:

Under examination the second named Defendant informed the Court that the property Registered as 1256D 118 was sold for \$350,000.00, that he paid off Barclays Bank in the sum of \$170,000.00 and paid all his other debts; that he offered the Account Manager of the Plaintiff \$50,000.00 on the amount owed and sought that the loan be rescheduled; that he also informed the said Manager that he was offered the sum of \$250.00 for the land held as security viz Block 1255B Parcel 61 but the said Manager refused the offer.

Article 1908 of the Civil Code provides:

"Hypothec is a real right and is a charge upon immovables specially pledged by it for the fulfillment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this code."

Article 1909:

"Hypothec is indivisible and binds in entirety all the immovables subject to it and each and every portion of them."

Article 1912:

"Hypothec may be either Legal, Judicial or Conventional."

Article 1913:

"Legal Hypothec is that which results from the law alone. Judicial Hypothec is that which results from Judicial acts and Conventional Hypothec results from agreements."

In my Judgment the case under review concerns a judicial hypothec.

Article 1923 of the Civil Code provides:

"Judicial Hypothec affects generally the immovables owned by the debtor at the time of registration of such hypothec and those subsequently owned by him unless the same are exempt from seizure or are incapable of alienation otherwise."

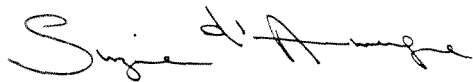
While I agree that Judicial Hypothec affects generally the immovables owned by the debtor it is trite law that every case must be decided on its merits.

On the 6th day of March, 1998 the Creditor that is the Plaintiff obtained Judgment in default of defence against the second named Defendant and on the 24th day of March, 1998 filed a Writ of Execution against his property registered as 1255B Parcel 61 which means that a specific immovable was chosen and therefore that

Judicial Hypothec attaches to it and no other, to allow otherwise
would be oppressive.

The Summons is dismissed.

There will be no Order as to Costs.



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SUZIE d'AUVERGNE
HIGH COURT JUDGE