

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 2117 of 1998

BETWEEN

FIRST CITIZENS BANK LIMITED

Applicant

AND

PEARL BRAITHWAITE-MAPP

Respondent

Before the Honourable Mr. Justice P. Moosai

Appearances:

Ms. Rachel Laquis for the Plaintiff

Mr. Desmond Warner for the Defendant

JUDGMENT

The Applicant on 25th September 1998 filed an Originating Summons compelling the Respondent, pursuant to section 126 of the Real Property Ordinance, to show cause why her caveat dated 15th April, 1998 should not be removed.

By Memorandum of Mortgage dated 10th October, 1984 entered at Volume 2917 Folio 391 of the Register Book the Respondent as registered proprietor mortgaged certain property to the Applicant's predecessors-in-title.

By H.C.A No. 950 of 1995 the Applicant brought an action against the Respondent for possession of the said property and monies due and owing under the said mortgage. On 6th November, 1996 Mr. Justice Blackman ordered, inter alia, that the Respondent delivered vacant possession of the said property and that

the Respondent pay to the Applicant the sum of four hundred and thirty-one thousand, eight hundred and ninety dollars and three cents (\$431,890.03) together with interest accruing on the sum of one hundred and eighty thousand dollars (\$180,000.00) at the rate of 15.5% per annum continuing from 23rd March, 1995 to the date of payment or judgment. The Applicant, pursuant to its Writ of possession, obtained possession of the said property on 11th August, 1997.

On 8th August, 1997 the Respondent, commenced H.C.A No. 2005 of 1997 seeking to question the validity of the judgment of Mr. Justice Blackman's said order. No further step has been taken by the Respondent with respect to the said action.

On 15th April, 1998 the Respondent caused a caveat to be lodged with the Registrar General forbidding the registration of any change in proprietorship or any dealings with the estate or interest in the said property.

On 1st May, 1998 the Applicant sold the said property to Rafina Hosein, Patricia Hosein and Naresh Fulchan.

The Applicant contends that there are no valid grounds upon which the Respondent can prevent dealings with the said property and that the lodging of the caveat is an abuse of the process calculated to prevent the lawful exercise by the Applicant of its powers as mortgagee.

The Respondent contends that Order 85 proceedings do not extinguish the equity of redemption, the interest of the Respondent is clearly an interest in the equity of redemption. The purported sale took place after the caveat was lodged and that the important date to look at was the date the caveat was lodged.

Section 125 of Real Property Ordinance (“R.P.O.”) Chapter 27 No. 11

provides:

“Any beneficiary or other person claiming any estate or interest in land under the provisions of this Ordinance may lodge a caveat with the Registrar General in form Q of the First Schedule or as near thereto as circumstances permit, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest, either absolutely or until after notice of the intended registration or dealing is given to the caveator, or unless such instrument is expressed to be subject to the claim of the caveator as is required in such caveat, or unless the caveator consent in writing thereto.”

Section 126 of R.P.O. provides:

“Upon receipt of such caveat the Registrar General shall notify the same to the person against whose application to be registered as proprietor, or, as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged; and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks, take out a summons to compel the caveator or the person on whose behalf such caveat has been lodged to show cause why such

caveat should not be removed; and it shall be lawful for the Court or Judge to make such order either *ex parte* or otherwise, as to the Court or Judge may seem fit.”

The Respondent must therefore show cause why such caveat should not be removed. The Court may make such order as seems fit.

The first question that I must therefore determine is whether the Respondent has an estate or interest in the said property.

A mortgage consists of two things. It is a personal contract for a debt and an estate pledged as a security for the debt: Quarrell v Beckford (1846), 1 Madd. 269, per Plummer V.C. at p. 278. Incident to every mortgage is the right of the debtor to redeem, a right which is called his “equity of redemption,” and which continues notwithstanding that the mortgagor fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate: Halsbury’s Laws of England, Volume 21 1st Edition para. 125.

The right of a mortgagor to redeem his property upon payment of principal interest and costs is not a mere right but an equitable estate or interest in the property mortgaged: Santley v. Wilde [1879] 2 Ch. 474, 475, C.A.

In the House of Lords decision of G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd. [1914] A.C. 25 Lord Parker described the equity of redemption thus:

“Taking the simple case of a mortgage by way of conveyance with

a proviso for reconveyance on payment of a sum of money upon a specified date, two events might happen. The mortgagor might pay the money on the specified date, in which case equity would specifically perform the contract for reconveyance. On the other hand, the mortgagor might fail to pay the money on the date specified for that purpose. In this case the property conveyed became at law an absolute interest in the mortgagee. Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem there arose an equity to redeem, notwithstanding the specific date had passed. Till this date had passed there was no equity to redeem, and a bill either to redeem or foreclose would have been demurrable. The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption.”

In Cotterell v Price and others [1960] 3 All E.R. 315, a second mortgagee’s right of action against the mortgagor became statute-barred. Buckley J. at page 318 stated:

“In my judgment, on the second mortgagee’s rights against the mortgagor becoming statute-barred, the second mortgagee lost all

estate and interest in the mortgaged property. He could no longer foreclose as against the third defendant; he could no longer sue for possession, and as a result of the provisions of s.16 (to which I have referred) his estate in the land came to an end. It seems to me that the result was that he lost his status as a mortgagee. An equity of redemption is an incident of the status of mortgagor or puisne encumbrancer having the right to redeem the higher mortgage. It is part of the machinery provided by equity to enable anyone who is mortgagor of land, or who stands to any extent in the shoes of the mortgagor of lands, to redeem the pledge of the land. The very term “equity of redemption” suggests that that is the character of the right. The equity of redemption exists for the purpose of assisting him who has a right to redeem the land, to get the land back.”

In the instant case the Applicant obtained possession pursuant to the Order of Mr. Justice Blackman on 11th August, 1997. What then is the effect of an order for possession?

In Regina v Judge Dutton Briant [1957] 2 Q.B. 497, C.A. Lord Goddard C.J. at pages 505 and 506, stated:

“Although that right of the mortgagee exists at law and he can treat the mortgagor as a trespasser and bring an action for ejectment, it

is to be remembered that from very early days the Court of Equity put this restriction upon the mortgagee's rights: it did not prevent him from bringing the action - and it could not, for that was a common law right - but it regarded the mortgage transaction as a loan on security and, whatever the provisions in the mortgage deed, the mortgagee was always liable to be stopped by equity from enforcing his rights if the mortgagor could redeem the property by payments. A mortgagor, therefore, always has his equity of redemption but nevertheless, the mortgagee can always maintain an action at law to obtain possession of the land, although, when he does recover it, the right of the mortgagor to redeem still remains and the judgment for possession will always be liable to be controlled by the equitable doctrine that the mortgagor may come forward and pay the money." (Emphasis Added).

After the mortgagee has obtained possession of the land it seems that the right of the mortgagor to redeem still remains and the judgment for possession will always be liable to be controlled by the equitable doctrine that the mortgagor may come forward and pay the money. It follows that in the instant case after the Applicant obtained possession of the land, the Respondent still had the right to redeem the said mortgage and would also have had her equity of redemption. The equity of redemption being an equitable estate or interest in the said property, I

am of the view that, at the date the caveat was lodged (15th April, 1998), the Respondent was a person claiming an “estate or interest in land under the provisions of” s.125 of R.P.O. However, that equity of redemption exists for the purpose of assisting the Respondent who has a right to redeem, to get the said property back. As was stated in Regina v Judge Dutton Briant (supra) the judgment for possession will always be controlled by the equitable doctrine that the Mortgagor may come forward and pay the money.

Should equity intervene to prevent the Mortgagee from enforcing his rights?

There is nothing in the Respondent’s Affidavit nor has it been suggested that the Respondent can redeem the said property by payments. The Respondent has therefore not shown cause why the caveat should not be removed. In addition the Applicant deposes that it has sold the said property. It is clear that the effect of the caveat would be to prevent the registration of the Memorandum of Transfer by the Mortgagee to the Purchasers. It is to be noted that the removal of the caveat would result in the registration of the Memorandum of Transfer. A sale under a power of sale destroys the equity of redemption in the mortgaged property. The sale constitutes the mortgagee exercising the power of sale a trustee of the surplus proceeds, if any, after satisfying his own charge, first for the subsequent encumbrancers, and ultimately for the mortgagor: Halsbury’s 4th Edn. Vol. 32 Mortgage para. 738.

In the instant case the Applicant exercising the power of sale would be a trustee of the surplus proceeds, if any, for the Respondent.

I would therefore order:

1. That the caveat lodged with the Registrar General on 15th April, 1998 be removed.
2. That the costs of the application be paid by the Respondent to the Applicant to be taxed in default of agreement.

Dated this 17th Day of December, 1998.

PRAKASH MOOSAI

JUDGE