

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 2010 OF 2002

BETWEEN

BARBADOS MUTUAL LIFE ASSURANCE SOCIETY

PLAINTIFF

AND

**HERMAN PERSAD
SHIRLEY SHARIFFA PERSAD**

DEFENDANTS

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Mr. A. des Vignes for the Plaintiff

Mrs. J. Koorn for the Defendants

JUDGMENT

The Plaintiff is mortgagee of a property at Saltmine Road, Thick Village, Siparia, under a deed of mortgage dated 18th March 1986 registered as No. 4988 of 1986 created in its favour by the Defendants. Its summons of 6th October 2004 seeks leave to enter judgment in default of defence pursuant to the provisions of Order 85 of Rule 4.

The proceedings were started by originating summons filed 12th June 2002. When this came on for hearing before Bereaux J. on 15th October 2003, the Plaintiff conceded that triable issues had been raised in the affidavit of the First

Defendant filed on 18th June 2003 in opposition to the originating summons. A consent order was entered that the originating summons be treated as a writ and a timetable for pleadings was set out. The statement of claim was delivered one day late, but was accepted by the Defendant's attorneys. The defence and counterclaim, however, was not forthcoming after 10 months and several extensions of time and remainders from the Plaintiff, hence the summons before me. The summons is supported by the affidavits of Michelle Abraham of 6th October and 14th October 2004, as well as the affidavit of Marcelle Ferdinand filed 6th October 2004.

The filing of this summons resulted in a defence and counterclaim being filed on 5th November 2004, as well as several affidavits in opposition. The Defendants also sought leave to use the affidavit of the First Defendant filed 18th June 2003 in opposition to the initial originating summons.

At the hearing of the summons the Defendant raised two preliminary objections:

1. That the summons should be heard by Bereaux J., he having "heard" the originating summons, on the basis of either or both the proceedings being effectively part-heard by him, or because of the provisions of Section 16 of the Supreme Court of Judicature Act Chap. 4:01. This requires all proceedings in an action subsequent to the hearing down to and including final judgment or order to be heard by the same Court.

I consider this objection to be misconceived. It would be tantamount to saying that a judge hearing a chamber application is to preside at the trial. That is clearly not the case, given that Section 16 refers to "all proceedings in an action subsequent to the hearing or trial".

I overruled this objection.

2. That the summons was not served personally on the Defendants as is required by Order 85 Rule 4 (ii).

I also overruled this objection.

I did so because first, this Rule does not require personal service; second, I had regard to the provisions of Order 65 Rules 1 and 9, in contrast to, say, Order 10 Rule 1; third, the Defendants entered an appearance to the originating summons (and which is now a Writ ab initio); fourth, the Defendants took steps to defend the proceedings down to the filing of the defence and counterclaim; and finally, Order 85 Rule 2 applies only where no appearance has been entered to the originating summons.

Further, I was satisfied that the requirements of Order 85 Rule 4 had otherwise been complied with.

I approached the determination of this summons by analogy to proceedings under Order 19 where an application is made for judgment in default of defence, rather than by analogy to proceedings under Order 14. I did so after hearing Mr. des Vignes and him agreeing that this would be more appropriate, although it placed a perhaps lesser burden on the Defendants. He also agreed that regard should be had to the defence and counterclaim as filed, expressing the view that little if any weight should be placed on the First Defendant's affidavit filed 18th June 2003. Mrs. Koorn made no submission as to this. In the event, I have exercised my discretion and also have had regard to the affidavit evidence before me, including the First Defendant's affidavit, although this might not be the usual approach in hearing an application under Order 19.

The Defendants seek to raise two principal issues in defending the claim.

The first is that they paid certain premia due on life and building insurance policies, which the Plaintiff also claims to have paid after the Defendants defaulted in doing so. They claim that these amounts have not been taken into account in calculating the balance due on the mortgage loan.

Second, the Defendants claim that there was an agreement with the Plaintiff in 1996 that an amount of \$42,417.00 would be credited to their mortgage (i.e. loan) account. Details of how this agreement arose are sadly lacking, what little there is appearing in the counterclaim rather than the defence. It appears that the First Defendant, quite apart from being a mortgagor, was the Plaintiff's tenant of another property, and when leaving was asked to either leave or reinstall certain items he had installed while a tenant. These items had either been removed or he intended to remove them on his departure. It was agreed that he would leave or reinstall these items, as the case might be, and that he would be paid for those items on an "installed cost" basis. There is, however, no pleading as to the amount of \$42,417.00 being agreed upon, and the reading of the exhibits to the First Defendant's affidavit indicates a dispute as to quantum. I venture no view as to the counterclaim's chances of success at trial.

While the defence as pleaded leaves much to be desired, and while there is in particular a distressing lack of particularity as to both of these issues, the defence does raise them. It does not condescend, for example, any attempt to answer the further and better particulars delivered by the Plaintiff on 29th March 2004 in answer to the request of the Defendants' Attorneys by letter of 4th January 2004. In addition to raising these issues, however, I do not think that I can disregard the contents of the First Defendant's affidavit which clearly sets out the Defendants' position in greater detail than the defence and counterclaim. The latter, I might add, was filed some 7 months after the Defendant received the further and better particulars of the Plaintiff's claim.

There is, however, another aspect of the matter. While there is no doubt that the affidavit in support of the summons before me complied with the requirements of Order 85 Rule 4 by setting out the matters required to be deposed to under Order 85 Rule 3, it must be kept in mind that the affidavit to be filed under Rule 3 is in support of an originating summons. Proceedings commenced by an originating summons do not contemplate issues, or serious issues, of fact being thrown up which require viva voce evidence at a trial for deciding those issues. The matters deposed to in the affidavit supporting the summons are therefore more formal, and it is filed in order to demonstrate how the amount now claimed arose under the mortgage in accordance with its original terms, not as to how it may have been varied.

It is not in issue that the mortgage was varied at least once, if not more than once, by way of a change in the interest rate being charged on the balance of the loan outstanding. Nor is it in issue that no revised amortisation schedule was made available to the Defendants. Further, I am told nothing about the form in which any variation may have taken, if indeed there was one.

The variation(s) are not, however, pleaded in the statement of claim, nor are there any particulars of a variation in the further and better particulars delivered by the Plaintiff. It is to be admitted, however, that no particulars of any variation were requested by the Defendants.

I have also considered the fact that the statement of claim and the supporting affidavit (the latter being cast in the same format as Order 85 Rule 3 requires for an affidavit supporting the originating summons) both appear to contain an unexplained error, at least on an initial reading. They both set out an amount acknowledged as paid on account of the principal amount originally lent (\$175,000.00), as well as the amount now said to be outstanding. In neither the statement of claim nor the affidavit, however, do these amounts clearly aggregate \$175,000.00. While I accept Mr. des Vignes' explanation as to how the amount

claimed comes to be correct, it must be recalled that Order 85 provides a summary procedure for obtaining judgment. There should be no need to explain any calculations. A statement of claim must set out fully the material facts of a plaintiff's case, and do so clearly, but I do not think that it does so in this instance. More important, however, is that the statement of claim does not set out the variation(s) in the interest rates and the consequences following therefrom. It also in my view does not allow me - even if taken together with the further and better particulars - to arrive at what I would consider to be an accurate computation of the Defendant's liability under the mortgage, and I say this even if there were no disputes as to premium payments and the like.

I am therefore reluctant to give leave to enter final judgment, and decline to do so.

Nor do I think it appropriate to order leave to enter judgment with an account to be taken by the Registrar, which Mr. des Vignes submitted was an order I might make. The taking of any such account will inevitably depend ultimately on a determination of the issues raised by the Defendants, and those issues will in my view need to be decided at a trial after viva voce evidence, and not in the course of the Registrar taking an account.

There remains, however, the fact that the defence and counterclaim in its present form is deficient, and manifestly so despite the Defendants' Attorneys having the further and better particulars which would enable a properly drafted and settled pleading to be filed and served. There is also the fact that the Defendants are sadly - and badly - late in getting this pleading filed and served, and therefore move this matter forward in readiness for trial. They have delayed. I therefore propose to do what I can to have the matter progress with a greater degree of expedition.

In the circumstances I make the following orders:

1. the time for filing and serving the defence and counterclaim is extended to 13th May 2005.

In default, there is to be judgment for the Plaintiff in terms of paragraphs (1), (2) and (3) of the Plaintiff's summons of 6th October 2004, together with the costs of the action certified fit for Advocate.

2. In the event that the defence and counterclaim is filed and served as ordered:
 - (i) the time for the Plaintiff to file and serve a reply and defence to counterclaim is extended to 27th May 2005;
 - (ii) each party is to file and serve its list of documents verified on affidavit on or before 10th June 2005, and inspection is to be completed on or before 24th June 2005;
 - (iii) the Plaintiff is to file bundles of pleadings for the Judge and Registrar on or before 17th June 2005;
 - (iv) the matter is set down for trial by a judge without a jury in Port of Spain and is to be placed on the Cause List to be published in July 2005.
3. As to costs all I need say is that there was a long and unexplained delay in filing a defence and counterclaim. This effectively forced the Plaintiff to file its summons, and leads me to conclude that it would be inappropriate to condemn the Plaintiff in costs on its application brought as a consequence of the Defendants' default, and award the Defendants the costs of this summons. The Defendants brought this application upon themselves. The costs of this application are therefore to be paid by the

Defendants to the Plaintiff, certified fit for Advocate.

9th May 2005

C.V.H. Stollmeyer

Judge