



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 179

BETWEEN:

**LINDA FAY SOUSA
(AS EXECUTRIX FOR THE ESTATE OF BENJAMIN SOUSA)**

Plaintiff

- and -

BARRY CAPUANO

Defendant

JUDGMENT

Date of Hearing: 25 January 2022

Date of Ruling: 30 March 2022

Appearances: Jai Pachai, Wakefield Quin Limited, for Plaintiff

Defendant in Person

RULING of Mussenden J

Introduction

1. This matter comes before me on two Plaintiff's summonses:

- a. A summons dated 15 October 2021 seeking possession of the property at Sousa Building, Burnaby Street, Hamilton (the “**Property**”) and payment of the sum of \$1,556,333.57 together with interest and costs on an indemnity basis.
 - b. A summons filed 23 December 2021 for leave to amend the Specially Endorsed Writ of Summons issued 16 June 2021 (the “**Writ**”) in respect of the claim for arrears owing from \$1,556,333.57 to \$1,974,116.25 as at 15 December 2021 and daily interest thereafter until payment at the rate of 7% per annum in the amount of \$188.11. This summons, if granted, would amend the figure in the summons dated 15 October 2021.
2. The Plaintiff’s applications are supported by her First Affidavit sworn 8 October 2021 along with exhibits and her Second Affidavit sworn 22 December 2021 along with exhibits.
 3. The Defendant opposes the applications and has filed submissions, his First Affidavit sworn 9 December 2021 with exhibits and his Second Affidavit sworn 14 January 2022 with exhibits.

Background

4. The Plaintiff caused the Writ to be issued in respect of a mortgage dated 27 September 2004 (the “**First Mortgage (Sousa)**”) between the Defendant as borrower on the one part and Benjamin Sousa as the lender of the other part.
5. The Writ sets out that Mr. Sousa mortgaged the property to the Defendant with the repayment of the principal sum of \$1,662,000 with interest at 7% per annum. The repayment was to be made by monthly installments of \$14,938.53 commencing on 27 September 2004 and monthly thereafter until the total of 180 installment payments over 15 years had been made.
6. The Writ also sets out that the Defendant has failed to pay principal, interest and charges and is in arrears at the date of the Writ in the sum of \$1,556,333.57 in respect of the First

Mortgage (Sousa). This sum is calculated by adding the principal sum of \$1,662,000 and interest for the 15 year term of \$1,027,029.19 less the amount paid by the Defendant of \$1,132,695.62.

7. The Writ also sets out that a Power of Sale has arisen under Clause 3 of the First Mortgage (Sousa) and under section 31 of the Conveyancing Act 1983 (the “Act”). Thus, the Plaintiff claims possession of the Property and the sum of \$1,556,333.57, and if amended, the sum of \$1,974,116.25.
8. The Defendant in his written submissions response to the Writ dated 23 July 2021 explained that he had entered into a Second Mortgage on 21 August 2008 with Capital G Bank, now Clarien Bank (the “**Second Mortgage (Clarien)**”). He stated that he had found a private lender to take over the First Mortgage (Sousa), but after taking some time to consider his request of an assignment of it, Clarien Bank did not approve it.

Summons for Leave to Amend

The Plaintiff’s Submissions

9. Mr. Pachai submitted that in respect of the summons for leave to amend, the Plaintiff had a right to amend pursuant to the Rules of the Supreme Court (the “RSC”) Order 20, rule 8. He referred to the White Book at 20/8/6 and the case of *Cropper v Smith* wherein Bowen LJ spoke of the well-established principle of the object of the Court to decide the rights of the parties and the right to amend the pleadings if it can be done without injustice.
10. The reason for the amendment as evidenced by the Plaintiff’s Second Affidavit and a Schedule prepared by Mrs. Anne Walsh, a chartered accountant and the accountant of Wakefield Quin (“**Mrs. Walsh**”), is that in respect of the First Mortgage (Sousa) the Defendant only made regular payments for a period of four years until December 2008 and thereafter only sporadic payments resulting in arrears in the amount of \$1,974,116.25 as of 15 December 2021. In response to that application to amend, the Defendant filed an affidavit in which he lists various payments that he claims are missing from the Plaintiff’s

list of payments (the “**Missing Payments**”). In turn, the Plaintiff provided further explanations to reject the list of Missing Payments except for one small amount.

The Defendant’s Submissions

11. Mr. Capuano submitted that the application to amend should be declined as there were various errors and omission in the schedule prepared by Mrs. Walsh. He detailed them as follows:

- a. There were the Missing Payments made by him but which were not accounted for in the sum of \$106,164.96 per his partial review to the date of the hearing. He stated that there may be more Missing Payments upon closer inspection of the records;
- b. There were incorrect dates in respect of accrued interest; and
- c. There was an issue with the Plaintiff in respect of reduced payments of \$5,000 per month from February 2021 which were agreed with her. This was so that the \$5,000 would cover the interest portion and prevent the amounts owing from increasing. However, in 2016 he was told that the actual amount required to prevent an increase in funds owing was \$5,705.72. Thereafter he made payments in that amount for one year but that was still incorrect as his total balance owing was still increasing. Thus from 2012 to 2017, whilst he understood his total balance owing was fixed, it had actually grown by \$166,599.64.

12. The Defendant asserts that sometime after the passing of Mr. Sousa in early 2016, he was told by the Plaintiff to cease making payments altogether so an outstanding balance could be determined for Mr. Sousa’s probate proceedings. He submits that it is unreasonable now to have interest accruing at \$188.11 per day to be back dated to a time when he was told to stop making payments. In any event, he was hopeful that he and the Plaintiff could together determine the true figure that is outstanding.

Analysis

13. In my view, the Plaintiff has the right to amend the SOC pursuant to the RSC Order 20, rule 8. The Defendant objects because he does not agree with the increased amount claimed for the total of the arrears. However, his disagreement does not mean that the amendment

should not be allowed. Any dispute over the amount of arrears will be a matter for trial. Therefore, I grant leave to the Plaintiff to amend the SOC as set out in the application to amend.

Summons for Possession

The Plaintiff's Submissions

14. The Plaintiff's claim is essentially a breach of contract arising out of the First Mortgage (Sousa) as the Defendant is in substantial arrears of \$1,973,906.97 per the application to amend. Consequently, the Plaintiff claims a Power of Sale arises under Clause 3 of the First Mortgage (Sousa) and under Section 31 of the Act. Thus, the Plaintiff now seeks summary judgment pursuant to Order 14, rule 1 and Order 88, rule 6.

15. Clause 3 of the First Mortgage (Sousa) states :

“3. IT IS HEREBY AGREED AND DECLARED as follows

*(a) It shall be lawful for the Mortgagee at any time or times hereafter and without any further consent on the part of the Mortgagor or of any other person or persons TO SELL the mortgaged lands or any part or parts thereof in the event that the Mortgagor fails to comply with all or any of the terms and conditions contained in this Deed;
...”*

16. Section 31 of the Act provides as follows:

“Regulation of exercise of power of sale

31(1) A mortgagee shall not exercise a power of sale unless and until-

- (i) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or*
- (ii) some interest under the mortgage is in arrears and unpaid for one month after becoming due; or*
- (iii) there has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making*

the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

(1A) For the purposes of subsection (1)(i) notice may be served-

(a) by delivering it to the mortgagor;

...

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.”

17. In relation to the Missing Payments, Mr. Pachai explained that there was a slight difference between the date of the Defendant’s cheques/receipts when mortgage payments were submitted to Limestone Services (an entity that received payments from the Defendant) and the dates such payments were deposited into the Plaintiff’s account. However, the payments were properly recorded according to the schedule prepared by Mrs. Walsh. Mr. Pachai gave various explanations about the Missing Payments to make the point that they were not “missing” and he conceded that there had been a mistake about the 6 December 2011 payment in a very small amount, for which credit would be given. Also, he explained that the Defendant’s own list of payments contained various mistakes. Further, he submitted that Mrs. Walsh had submitted a revised list confirming that the outstanding amount as at 15 December 2021 was \$1,973,906.97 with daily interest accruing after that date at the rate of 7% per annum in the sum of \$188.08.

18. Mr. Pachai submitted that in respect of the Defendant’s argument that the sum owing should be fixed at \$1,100,000, the Plaintiff had explained that that amount was agreed on condition that the Defendant would make full payment by 18 October 2021, which was evidenced by the Consent Order which Wakefield Quin prepared at the Plaintiff’s request as exhibited. However, the Defendant did not sign the Consent Order and he did not make that payment. Therefore, the Plaintiff was entitled to an order for possession of the Property and judgment in the amended sum of \$1,973,906.97.

The Defendant's Submissions

19. The Defendant, through his affidavit evidence and submissions before the Court, takes no issue with the validity of the First Mortgage (Sousa).
20. The Defendant admits that the Mortgage is in arrears. However, he submitted that in any event the balance owing on the First Mortgage (Sousa) should not be the \$1,556,333.57 as set out in the Writ or the \$1,973,906.97 as set out in the application to amend. He submitted that the outstanding balance should be \$1,110,000 as the Plaintiff had agreed with him in October 2021 for a full and final payoff figure of that amount, subject to agreeing an appropriate timeframe for payment. Further, he submitted that refinancing the Property at a figure higher than \$1,110,000 would be extremely difficult in the current circumstances. This was because the office/commercial real estate market in Bermuda has been decimated by the Covid-19 pandemic and there is now an influx of discounted commercial space in Hamilton. Thus, it is unlikely that a sale will happen in a timely manner and certainly not for a value exceeding \$1,500,000. Also, once fees associated with a sale are factored in, then it is unlikely that the Plaintiff would realize a sum greater than \$1,110,000.
21. The Defendant submitted that as there was a settlement agreement in principle for a \$1,100,000 payoff amount, that the Court and the Plaintiff would now agree this amount and he would give his best efforts to have that amount paid off. In his submission dated 23 July 2021, the Defendant requested a stay of the action for 30 days which would allow the parties to finalize an agreement for the settlement of the First Mortgage (Sousa).

The Law

Summary Judgment

22. Order 14/1(1) of the Rules of the Supreme Court 1985 states:

“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ,

or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.”

23. RSC Order 14/3(1) reads as follows:

“Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”

24. Hellman J in Pearman v Fray [2015] Bda LR 48 held as follows: *“A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit”*.

25. Summary judgment is reserved for cases where it is clear that there is no real substantial question to be tried (*Codd v Delap* (1905) 92 LT 519 HL) and there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (*Jones v Stone* [1894] AC 122).

Analysis

Application for Possession of the Property and Power of Sale

26. The Defendant accepts that the mortgage is in arrears. In my view, it follows that a Power of Sale has arisen contractually and under the Act. Although, the Defendant has made a passionate plea about any potential sale price in a forced sale of the Property in a downturn

economy he has not raised a triable issue or defence to the claim for possession. Issues about the proper sale price can properly be addressed at later stages. Therefore, I grant the Plaintiff's application for summary judgment for possession effective 60 days from the date of this Judgment, subject to any submissions whether the 60 days should be varied, unless the Defendant voluntarily delivers possession before then.

The Claim for \$1,973,906.97

27. The Defendant has accepted that he is in arrears although he disputes the amount of \$1,973,906.97. In my view, there are issues in dispute which ought to be tried. First, there are the issues of the Missing Payments raised and maintained by the Defendant but which the Plaintiff feels certain has been clarified down to a minimal amount. Second, there are the issues of what arrangements or agreements, if any, were made between the Plaintiff and the Defendant in respect of the payment or non-payment of the principal and the full interest amount or part interest amount, all which have the effect of determining some parts of the difference between \$1,556,333.57 and \$1,973,906.97. I note that the Defendant submits that the total amount due increased by \$166,599.64 over the period when he thought the total amount due would remain fixed. Third, the Defendant claims that the total amount due should actually be \$1,110,000 as a result of some settlement discussions which for several reasons did not result in an executed Consent Order. In light of these issues, I am of the view that these are issues which ought to be tried to determine the actual amount of the arrears for judgment.

28. The issue of the mortgage arrears should be tried expeditiously.

Conclusion

29. In summary:

- a. The application for leave to amend is granted;
- b. The application for possession is granted effective 60 days from the date of this Judgment, subject to any submissions whether the 60 days should be varied, unless the Defendant voluntarily delivers possession before then; and

- c. The application for a judgment in any amount is declined and the issue should be set down for trial.
30. The parties are to arrange a hearing in a Thursday Chambers to settle directions for trial.
31. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct as follows:
- a. In respect of the costs of the application to amend, the Defendant shall have its costs arising out of the amendment on a standard basis, to be taxed by the Registrar if not agreed; and
 - b. In respect of the application for possession and judgment, I reserve costs until the determination of the issues at trial.

Dated 30 March 2022

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**