



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 207

B E T W E E N:

KHOMEINI TAALIB-DIN

Plaintiff

- v -

THE PROVOST MARSHAL

Defendant

Before: Chief Justice Hargun

Appearances: John McSweeney, Cox Hallett & Wilkinson, for the Plaintiff
Dantae Williams, Marshall Diel & Myers Limited, for the
Mortgagee Bank

Date of Hearing:

8 October 2018

Date of Judgment:

18 October 2018

JUDGMENT

Establishing and extinguishing judgment liens on real property; issue of priority between judgment liens and mortgagee rights; appropriateness of declaratory relief

Introduction

1. These proceedings, commenced by Originating Summons dated 12 June 2018, seek a number of declarations designed to confirm the legal position of various parties with respect to execution of their respective claims against a residential property at 5 Railway Trail in Southampton Parish (“the Property”). The relevant claimants are Clarien Bank Limited (“the Mortgagee Bank”), Khomeini Taalib-Din (“the Plaintiff”) and Mr Paul Harshaw and Canterbury Law Limited (“the Judgment Creditors”). Declaratory relief in relation to these various claims is said to be justified on the basis that such relief is necessary to effect a sale of the Property or otherwise promote a settlement between the parties.

Background

2. I take these background facts from the affidavit of the Plaintiff dated 11 June 2018. The Property was the family homestead of the Plaintiff’s father, Mustafah Taalib-Din. Prior to his death in March 2006, the Plaintiff’s father executed a will (“the First Will”) which left the Property to the Plaintiff and his sister, Hanifah Rukan Smith (“the Judgment Debtor”) to be divided equally between them “*as tenants in common, per stirpes, absolutely but subject to a first option to purchase each other’s share in the estate*”.
3. The Plaintiff’s father allegedly made a new will (“the Second Will”) at the hospital two weeks before his death. This Second Will was handwritten by the Judgment Debtor and gave the property to herself. The Second Will was granted probate on 6 November 2007 and on the same date the Judgment Debtor executed a Vesting Deed vesting the Property in her name.

4. On 26 February 2008, the Judgment Debtor obtained a mortgage in her sole name (“the Mortgage”) from the Mortgagee Bank in the sum of \$205,000. The Mortgage deed expressly recited that the Judgment Debtor was the owner in fee simple of the Property. In this regard that the Mortgagee Bank expressly relied upon the Vesting Deed dated 6 November, 2007.
5. On 2 March 2010, the Plaintiff commenced proceedings against the Judgment Debtor contesting the validity of the Second Will.
6. On 4 May 2012 Kawaley CJ made an Order on Judgment whereby the Second Will was declared to be invalid and the validity of the First Will was affirmed with the result that the Property was to be shared by the Plaintiff and the Judgment Debtor in equal shares as tenants in common. The Order expressly provided that *“the said Probate granted to the (Judgment Debtor) on 6 November 2007 is hereby revoked”* and that *“the Vesting Deed dated 6 November 2007 vesting the property of 5 Riviera Estate, Southampton Parish SN03 in the (Judgment Debtor) is hereby set aside.”* The order also awarded costs to the Plaintiff from the date of the re-amendment of the Statement of Claim.
7. The amounts due under the Mortgage to the Mortgagee Bank by the Judgment Debtor remain outstanding. As of 1 March 2018 the amount outstanding and payable to the Mortgagee Bank was \$334,834.62 and interest continues to accrue at a rate of \$45 per day.
8. Mr Harshaw and Canterbury Law Limited, having represented the Judgment Debtor in proceedings which resulted in the Order of 4 May 2012, proceeded to obtain judgments against the Judgment Debtor on account of unpaid fees. They obtained judgments against their former client on 16 November 2012 in the sum of \$74,593.59 and on 21 November 2012 in the sum of \$79,028.99. On 11 September 2017, the Judgment Creditors advised the Plaintiff that the judgment debt, with interest, was approximately \$220,000.

9. Following the Judgment dated 4 May 2012, the Plaintiff obtained an Order from the Taxing Master, taxing his costs of the proceedings in the amount of \$22,815.00. This costs Order was signed on 17 January 2013.

10. On 25 April 2018 Rego Sotheby's International Realty conducted a valuation and the fair market value of the Property was assessed at \$585,000. It can be seen that if only the Judgment Debtor's 50% share of the Property is available to satisfy the claims of the Mortgagee Bank and the Judgment Creditors then it is not possible to meet these claims in their entirety. Indeed if the Mortgagee Bank has priority over the claims of the Judgment Creditors there are insufficient monies available even to satisfy the claims of the Mortgagee Bank. Despite that the Judgment Creditors informed the Provost Marshal on 8 November 2017 to execute Writs of Execution and proceed with the sale of the Property. On 30 May 2018 Hellman J ordered that all proceedings to execute the Judgment Creditors judgments against the Property be stayed in order to determine first the entitlement to any potential proceeds of sale of the interested parties. In accordance with that Order the Plaintiff has commenced these declaratory proceedings.

THE APPROPRIATENESS OF DECLARATORY RELIEF

11. The Plaintiff seeks declaratory relief in order to clarify a number of legal issues in circumstances where without such clarification it would be difficult to persuade a potential purchaser to purchase the property or to effect a commercial resolution between the parties. Legal clarification is sought as to (i) the extent of the security interest created by Mortgage dated 26 February 2008; (ii) the issue of priority between the rights of the Mortgagee Bank under the Mortgage and the claims of the Judgment Creditors; and (iii) whether the liens established on the signing of the judgments in favour of the Judgment Creditors are extinguished upon the sale of the Property by the Mortgagee

Bank exercising its power under the Mortgage and the Conveyancing Act 1993 (“the Act”).

12. The grant of declaratory relief is discretionary. In *Financial Services Authority v. Rourke* [200] Lexis Citation 2268, Neuberger J considered that:

“ the court can grant a declaration as to their rights, or as to the existence of facts, or as to principles of law, where those rights, facts, or principles have been established to the court’s satisfaction.

...

... When considering whether to grant a declaration or not, the court should take into account justice to the claimant, Justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration”.

13. In all the circumstances I am satisfied that this is an appropriate case where the Court should grant declaratory relief. The grant of declaratory relief is likely to serve a real practical purpose. It is said by counsel for the Plaintiff, which I accept, that without the grant of declaratory relief it is extremely difficult to assure good title to a prospective purchaser. I note that the Mortgagee Bank and the Judgment Creditors have been advised of the proceedings. The Mortgagee Bank was represented at the hearing of these proceedings. The Judgment Creditors were advised of the hearing but decided not to attend. However, their position was set out in correspondence which was exhibited to the affidavit evidence filed on behalf of the Plaintiff.

THE POSITION OF THE MORTGAGEE BANK

14. Under the Deed of Mortgage dated 26 February 2008, the Bank lent monies to Judgment Debtor on the basis that Judgment Debtor was the owner in fee

simple of the Property. The Bank clearly assumed that the Judgment Debtor was the sole owner of the Property and in support of that fact relied upon the Vesting Deed dated 6 November 2006 whereby the entire Property was vested in the Judgment Debtor in fee simple absolutely. Clearly the Mortgagee Bank, when lending the monies to the Judgment Debtor, was under the impression that the loan was secured by the entire Property.

15. However, the Judgment and Order of Kawaley CJ dated 4 May 2012 radically redefined the proprietary rights of the Plaintiff and the Judgment Debtor with respect to the Property. The Order pronounced against the validity of the Second Will and pronounced for the validity of the First Will. It revoked the Probate granted to the Judgment Debtor on 6 November 2007 and set aside the Vesting Deed dated 6 November 2007 vesting the entire Property in the Judgment Debtor. The Judgment and Order declared that the Property was owned in equal shares by the Plaintiff and the Judgment Debtor as tenants in common.
16. The end result is that the Mortgagee Bank's rights to security under the Deed of Mortgage are limited to the proprietary rights the Judgment Debtor has in the Property. This result necessarily follows from the terms of the Judgment and Order of 4 May 2012. Given that the Judgment Creditor's interest in the Property is limited to an equal share with the Plaintiff as tenants in common, the Mortgagee Bank is entitled to execute against the Property but only to the extent of the Judgment Creditor's interest in the Property. If the Property is sold the Mortgagee Bank will be entitled to retain the Judgment Debtor's 50% share of the sale proceeds (*Marshall v. Wakefield and Acardo* [2009] Bda LR 25, *Kawaley CJ at [11]*; *Oatham v. Dickens, Gibbons and Oatham* [1977] Bda LR 1, *Summerfield CJ at [23-30, 34-35]*)
17. The legal mortgage evidenced by the Deed of Mortgage dated 26 February 2008 preceded in time the two judgments obtained by the Judgment Creditors dated

16 and 21 November 2012. Given that the Mortgage was first in time, the rights created under it have priority over the liens established by the judgments in favour of the Judgment Creditors. It necessarily follows that if the Judgment Debtor's 50% interest in the Property is insufficient to satisfy the Mortgagee Bank's claims, the Judgment Creditors will not be able to execute on the Property to satisfy the judgments they have obtained against the Judgment Debtor. They must look to the other assets of the Judgment Debtor in order to satisfy their judgment debts.

THE POSITION OF THE JUDGMENT CREDITORS

18. The Judgment Creditors obtained judgments against the Judgment Debtor on 16 and 21 November 2012. These judgments were obtained after the Judgment and Order of Kawaley CJ of 12 May 2012 declaring that the Judgment Debtor's interest in the Property is limited to an equal share with the Plaintiff as tenants in common. Any rights created by these judgments with respect to the Property must be limited to the Judgment Debtor's interest in the Property. The effect of a judgment in Bermuda is that it constitutes, from the date of signing of the judgment, a lien over any real property owned by the judgment debtor. As explained by Smellie JA in *Davis v. The Minister of Finance* (Civil Appeal No. 21 of 2017):

“21. In Bermuda, by operation of section 1 of the Act [Real Estate Assets Act 1787] a judgment constitutes a lien on any real property owned by the judgment debtor. See Oatham v Dickens & Gibbons [1977] Bda LR 1 SC per Summerfield CJ at para 12, following and applying the judgment of Smith AJ in Cates and Panchaud v Dill [1956] Bda LR 1 SC. The lien runs with the land and will not be overreached even if the land is sold to a bona fide purchaser for value, as the judgment is deemed to constitute notice of the lien to any purchaser.

22. Accordingly and in order to moderate the effect of the Act, section 19 (a) of the Supreme Court Act 1905 was enacted and provides that judgment shall, as regards bone fide purchasers for valuable consideration, affect real property (i.e.: “lands, tenements and hereditaments”) only as from the date on which they are signed. This was also acknowledged in Cates and Panchaud (above) at para 65.”

22. In principle the judgments in favour of the Judgment Creditors dated 16 and 21 November 2012 would constitute a lien on the 50% interest of the Judgment Debtor in the Property from the date of the judgments. However, as noted above the security rights created by the Mortgage in favour of the Mortgagee Bank have priority over the lien established by the judgments in favour of the Judgment Creditors. If, as seems likely, the security, represented by 50% share in the Property, is insufficient to satisfy the claims of the Mortgagee Bank, then the judgment creditors will not be able to execute on the Property to satisfy their claims.

23. In this case the Judgment Debtor has, under the Deed of Mortgage dated 26 February 2008, conveyed her interest in the Property to the Mortgagee Bank and her interest in the real property is limited to an equity of redemption. The Mortgagee Bank has the power to sell the Property in the event the mortgage monies remain unpaid (section 30 (1)(i) of the Act). Furthermore, the Mortgagee Bank, when exercising its powers as the mortgagee has the power to convey the Property “*for such estate and interest as is the subject of the mortgage, free from all estates, interests and rights to which the mortgage has priority...*” (Section 32 (1) of the Act). Accordingly, if the Property is sold by the Mortgagee Bank, exercising its powers under the Mortgage and the Act, the Judgment Creditor’s lien over the Judgment Debtor’s interest in the Property would be extinguished when the Property is conveyed to the new purchaser.

THE POSITION OF THE PLAINTIFF

24. In the Judgment and Order dated 4 May 2012 the Plaintiff was awarded costs to be taxed if not agreed on a standard basis. The Plaintiff taxed his costs and by an Order dated 17 January 2013 he was awarded the sum of \$20,815. The Order dated 4 May 2012 gave the Plaintiff an entitlement to pursue an order for costs and such an order was made on 17 January 2013. In principle, the Order of 17 January 2013 established a lien over the Judgment Debtor's interest in the Property.

25. Given that the two judgments in favour of the Judgment Creditors are earlier in time than the costs Order in favour of the Plaintiff, the Judgment Creditors have priority over the Plaintiff in terms of execution on the Property. In practical terms, as noted above, given that the Judgment Debtor's interest in the Property is insufficient to satisfy the indebtedness of the Mortgagee Bank, neither the Judgment Creditors nor the Plaintiff will be able to effect execution on the Property in order to satisfy their judgment debts. The Plaintiff's lien over the Judgment Debtor's interest in the Property stands to be extinguished in the same way as the lien in favour of the Judgment Creditors.

RELIEF GRANTED

26. In the circumstances I grant the following declaratory relief:

(1) A declaration that the monies received for the sale of Judgment Debtor's (Mrs. Smith's) interest in the Property shall be applied in the following order of priority: (i) Clarien Bank Limited in its capacity as the mortgagee under the Mortgage dated 26 February 2008; (ii) the debts of the Judgment Creditors (Paul Harshaw and Canterbury Law Limited) under the judgments dated 16

and 21 November 2012; and (iii) any surplus to the Plaintiff to discharge the costs Order dated 17 January 2013.

(2) A declaration that, assuming the Property is sold at the appraised value of \$585,000 and Mrs. Smith's indebtedness to Clarien Bank Limited remains at \$334,834.82, all monies received for the sale of Mrs. Smith's interest in the Property shall be applied to satisfy the indebtedness of Clarien Bank Limited to the exclusion of any claims by the Judgment Creditors and the Plaintiff.

(3) A declaration that the liens established by judgments dated 16 and 21 November 2012 in favour of the Judgment Creditors and the costs Order dated 17 January 2013 in favour of the Plaintiff would be extinguished upon the sale of the Property by Clarien Bank Limited exercising its rights as the mortgagee under the Mortgage dated 26 February 2008.

27. As submitted by counsel for the Plaintiff I order that there shall be no order as to costs.

Dated this 18 October 2018

NARINDER K HARGUN, CJ