

IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO. 132 of 2012

SELVIN JONES

CLAIMANT

AND

THE SCOTIA BANK (BELIZE) LIMITED

DEFENDANT

Hearings

2012

3rd December

2013

17th January

20th February

22nd March

Mr. Hubert Elrington SC for the claimant.

Mrs. Deshawn Arzu-Torres for the defendant.

LEGALL J.

JUDGMENT

1. This is a claim by the claimant for declarations that a sale by the defendant of property in the name of the claimant, which was the subject of a mortgage granted by the defendant, was unlawful and

void because the property, situate at 3803 Iguana Street, Belize City, (the property) was not sold by public auction, and that the defendant, in exercising the power of sale under the mortgage, acted negligently, recklessly, in bad faith and fraudulently, in failing to ensure that the property was sold for a fair market value. The claimant also claims, alternatively, damages of \$151,000 being the alleged difference between the market value of the property, alleged to be \$211,000, and the price for which the property was eventually sold – \$60,400.

2. By Deed of Mortgage dated 5th March, 1986, the claimant and his wife Evadne Jones, borrowed from the defendant, the sum of \$89,000 which was increased to \$106,000. The claimant was owner of the property by Minister's Fiat, lease No. 326 of 1976, which property was charged and used as security for the loan. In January 1996, the claimant obtained a Minister's Fiat Grant, that replaced the lease, giving him title to the property in his name alone. The claimant defaulted in making agreed payments under the mortgage deed. Notice of default was served on the claimant by the defendant around September 2007 demanding payment of the amount owing at that date, – \$132,017.72 – which included the principal and interest; and informing the claimant that failure to pay the amount owing within thirty days from the date of the notice, would result in the defendant exercising its power of sale under the mortgage deed. After several attempts to sell the property failed, it was eventually sold to Sharimah Gennity for \$60,400 who paid to the defendant the full purchase price shortly after the sale. The claimant attended the sale and knew that the property was sold to Gennity who has not been able to obtain

possession of the property as the claimant was in occupation and possession of it. The claimant is still in occupation and possession of the property. As shown above, the claimant has in this claim, claimed declarations that the sale was unlawful because the sale was not held by public auction and that the price obtained was not the true market value.

Public Auction

3. In the claim, it is stated that the defendant breached its duty to sell the property by public auction. The claimant says that the defendant sold the property by private treaty. The claimant in his sworn testimony said that he saw in the newspapers several advertisements for the sale of the property, and that public auctions were held for the property. He said that the property was sold in late November or early December 2011, and that four persons were present at the sale. The claimant denied the evidence of the defendant that the property was sold on 29th August, 2011 by public auction. In his witness statement, the defendant swore that the “property was auctioned in December 2011 by auctioneer Kevin Castillo.” Kevin Castillo, a licensed auctioneer, swore that he held three public auctions to sell the property – one in March 2008, one December 2010 and another one on 29th August, 2011 at which public auction the property was sold to the highest bidder Genitty for \$60,400. Miguel Ellis, a licenced auctioneer, swore that he held an auction on 21st July 2008 and no one attended. There is evidence that auctioneer Robert Lopez held an auction on 30th September, 2009 in relation to the property where

three persons attended, one of whom made a bid, but later withdrew it. The property was not sold on that occasion.

4. The claimant called two witnesses – Eric Brakeman and Thomas Morrison. Both gave witness statements supporting the claimant that the property was sold in December 2011. Brakeman in his sworn evidence in court said he could not remember what month the sale was held; and Morrison did not in his oral evidence in court give the date of the sale. Both of them agreed that an auction was conducted by Kevin Castillo, and that a young lady bought it. According to Morrison the young lady was Sharimah Gennity.

5. There were several advertisements in the local newspapers advertising the sale of the property by public auction. I have also seen the witnesses testified and observed their demeanour. I consider also the claimant's testimony that four persons attended the auction and also the oral evidence in court by the witness Brakeman for the claimant that he could not remember the month of the sale of the property. Bearing also in mind that the burden is on the claimant to prove on the balance of probabilities his allegation that the property was not sold by public auction and that it was sold in November or December 2011, I am not satisfied, on the evidence, that the claimant has discharged this burden in proving that the property was sold in November 2011, and that it was not sold by public auction.

Fair Market Price

6. It is the case for the claimant that the defendant did not sell the property at a fair market price, and therefore acted negligently and not in good faith. Let us examine the evidence to see if this allegation is proved. The property is situated in Belize City in an area known as the South Side; an area known for gun violence. It is also well known that there is gang related violence in that area. These matters may cause difficulty to sell the property. The claimant gave conflicting evidence in this regard. On the one hand, he swore that he accepted that the property was in an area “difficult to get off;” but on the other hand, he testified that he did not accept that the property “was in an area difficult to sell.” Moreover, we also know that there were attempts to sell the property, first in March 2008; and then in 2009 and 2010 which were unsuccessful.

7. At the first public auction held on 27th March, 2008 the reserve price was fixed at \$210,000. There were two bids at that the auction, one by Thomas Morrison for \$50,000, and the other by Rayford Gordon for \$55,000. As the bids were way below the reserve price, the auctioneer Castillo did not complete the sale. Another auction was held by Miguel Ellis on 21st July, 2008, but no one attended. The auctioneer in his report to the defendant wrote that “the property can certainly do with a facelift,” and that he saw opposite the property a sign marked “No more shooting in our area.” The auctioneer in his report suggested “a low reserve price.” At a third auction held on 30th September, 2009, the reserve price was lowered to \$160,000. There was one bid for \$70,000 which, as we saw above, was subsequently

withdrawn. The auctioneer in his report wrote that he did not think that “the property will sell in its present condition.” Kevin Castillo held a public auction on 23rd November, 2010, but no bidder attended the sale. At this auction, the reserve price was set at \$85,000. The property was, as we saw above, sold at a public auction held on 29th August, 2011 for the price of \$60,400. The reserve price at that sale remained at \$85,000.00, which seemed to have been fixed by the defendant, for Mr. Castillo wrote in his report to the defendant in relation to the sale of the property that as the “\$60,400 was below the reserve price it was referred to you who instructed me to accept it and I did.”

8. The physical features of the property have also to be considered. The property consists of a split level 1 ½ storey concrete building measuring 1585 square feet on land measuring four thousand square feet. The building has three bedrooms, two full bathrooms, a kitchen, dining and living rooms. Photographs of the external and internal features of the building were disclosed.
9. A witness for the defendant, Shaneen Myvette, swore that the property was valued by a property valuer Antonio Cawich dated 15th April, 2011. Cawich prepared an Appraisal Report which was tendered by the witness Myvette, in which report the property was valued at \$200,000 as at April 2011. Mr. Cawich was not called to testify in this matter as to the considerations that led him to value the property at \$200,000. There is no evidence of Mr. Cawich’s training, qualification, experience in the valuation of properties so as to lay a

basis for his opinion of the value of the property. A witness called by the claimant, Thomas Morrison, swore that he attended the auction and made a bid on behalf of one Troy Flowers who limited him to a bid of \$60,000; but he said that he would have been prepared to pay \$180,000 or \$200,000 for the property. The reason or basis for that position was not given in evidence. The legal basis for the acceptance of the opinions of Cawich and Morrison as to the value of the property has not been satisfied.

10. The claimant also submitted that the defendant acted unlawfully and negligently and in bad faith by “failing to set the best price reasonably obtainable at the date of the sale.” Mrs. Arzu-Torres for the defendant submitted that the “Defendant took all precautions to secure a proper price” and that “no document was supplied or relied on by the claimant evidencing bad faith or that the property was not sold for the proper price.” Mrs. Arzu-Torres says that the defendant acted correctly and in accordance with its rights under the mortgage deed. In support of her submission of the right of the defendant or mortgagee to exercise the power of sale of the property, Mrs. Arzu-Torres relied on, and quoted extensively from the decision of *Norma Coy v. Small Farmers and Business Bank Limited Supreme Court Claim No. 446 of 2006* in which several authorities were quoted including *Cuckmere Brick Co. Ltd. and Another v. Mutual Finance Limited 1971 Ch 949*.
11. I think the power of a mortgagee to exercise the power of sale of property under a mortgagee deed, where there has been default in

paying the installments under the mortgage, has been brilliantly expounded by Lord Moulton in the Privy Council decision of *McHugh v. Union Bank of Canada 1913 AC 311*, that: “It is well settled law that is the duty of a mortgagee when realizing the mortgaged property for sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.” In *Cuckmere Brick Co. Ltd.* above Salmon CJ at page 643 says that: “Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of sale.” The mortgagee in exercising a power of sale under a mortgage deed is not in the position of an absolute owner selling his own property. The mortgagee has a duty to pay some regard to the interests of the mortgagor when he comes to exercise the power of sale. In exercising that power of sale, the mortgagee has a legal obligation, considering the facts and circumstances of the case, to act reasonably, and to take reasonable care to obtain the true market value or price for the property at the date of sale.

12. Did the defendant, considering the facts and circumstances of this case, acted reasonably and took reasonable care to obtain the true market value of the property? It is a notorious fact that the property is located in an area where gangs operate and an area where there is violence in relation to gangs. Several public auctions were held to sell

the property between March 2008 to August 2011 at which auctions, there were reserved prices which have had to be reduced, as we saw above, in an attempt to sell the property. At the time of the sale, the reserve price was \$85,000; but the defendant accepted \$60,400 the highest bid. There is also the evidence of the witness for the claimant, Thomas Morrison, that he would have been prepared to pay \$180,000 or \$200,000 for the property. But it is unknown on what basis he was prepared to pay that amount for the property. There is also an Appraisal Report on the value of the property as at April 2011, by Antonio Cawich, giving the value at that date of \$200,000 for the property. But Mr. Cawich did not testify in this matter; and it is unknown to the court the reason or basis for his arrival at that figure for the property. No reason was given for not calling Mr. Cawich to testify.

13. Taking all those matters above into consideration, I am not satisfied, on a balance of probabilities, that the claimant has proven that the defendant acted negligently, in bad faith or unreasonably when it sold the property at public auction for \$60,400. In my judgment, on the facts of this case, the defendant took reasonable care to obtain a true market value of the property at the date of the sale.
14. The claimant acknowledged the rising crime rate in southern side of Belize City where the property is located, but submitted that in such circumstances, the defendant had a duty to offer a good payment plan to prospective purchasers of the property in order to obtain “a fair market price.” It was also submitted that the defendant in exercising

reasonable care to sell the property had to advertise the property displaying colour pictures and displaying attractive features of the property. The evidence is that the property was advertised in the local newspapers on several occasions showing photographs of the property and giving a description of the property. One advertisement gave the name, address, telephone number of the auctioneer, whom interested parties could have contacted to see the actual property and to inspect it. Moreover, the address of the property was given in the advertisements, so that prospective purchasers had the opportunity to see the actual property. I do not see merit in this submission. In relation to the payment plan, no authority was cited to me showing that the defendant had a legal duty to provide such a plan. Moreover, there is no evidence that such a payment plan would have caused a prospective purchaser to pay more for the property.

Registration Area

15. The claimant further submitted that the property was located in a compulsory registration area declared by the Minister under section 4 of the Registered Land Act, Chapter 194. The evidence of the claimant is that the property is situated in a registered area; but he could not remember taking any step to have the property registered. A witness for the defendant, Shaneen Myvette, swore that at the time of the sale, the property was in a registered area and the defendant held the unregistered title for the property. It seems that no one applied for a land certificate for the property under the Registered Land Act so that the property remained under the General Registry Act Chapter 327 and was not replaced by a land certificate under the

Registered Land Act. The claimant therefore has submitted that since the evidence is that the property is situated in a compulsory registration area, under section 11 of the Registered Land Act the sale is invalid and of no effect. The bank, according to the claimant, was ‘selling registered land without first bringing the property onto the Register of Land contrary to section 11 of the Act and therefore the sale is null and void.’ Section 11 states:

“From the date of any Order made by the Minister under section 4, all dealings relating to any land in the compulsory registration area named in that Order shall be made in accordance with this Act, and no dealing made otherwise than in accordance with this Act shall have any validity or effect.”

The word “dealing” is defined to “include disposition and transmission.” Disposition is defined as meaning “any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected; but does not include an agreement to transfer, lease of charge.” Proprietor means “the person registered under this Act as the owner of the land or a lease or charge.” The evidence is that neither the claimant nor the defendant was registered as the owner of the land under the Registered Land Act. The word “transmission” is defined as follows:

“transmission” means the passing of land, a lease or a charge from one person to another by operation of law or death or insolvency or otherwise however, and includes the

compulsory acquisition of land under any written law.”

16. The question is whether the word “dealings” in section 11 of the Act includes, considering the definition of transmission, the public auction sale of the property in August 2011. Does the public auction sale amount to a “passing of land” under the definition of the word “transmission?” At public auction sales each bid constitutes an offer which can be accepted on behalf of the seller by the auctioneer: *British Car Auctions Limited v. Wright 1972 3 A.E.R. 462*. On acceptance there is a contract between the seller or vendor, acting by auctioneers, and the purchaser. With respect to auctions of land an oral contract is created on acceptance of the bid, or as it is said, when the property is knocked down to the purchaser. But that oral contract, is not enforceable unless and until a memorandum is subsequently signed: see section 55 of the Law of Property Act Chapter 190; and *Pollway Limited v. Abdullah 1974 2 A.E.R. 381, at p.384*. It seems to me therefore that the public auction sale to Gennity did not amount to “passing of land” to her, but gave her a contractual right to the land, which would pass to her on signing of the memorandum. Therefore, in my view, the public auction sale is not a “dealing” as defined under section 11 of the Act; but is an oral contract for the sale of land. Learned senior counsel for the claimant quoted Halsbury Laws of England where it is said at paragraph 950 that: “Contracts for the sale of or other disposition of an interest in land made at public auction are now both valid and enforceable on the fall of the hammer.” I agree

that Gennity the successful bidder at the public auction made a valid contract. Moreover section 40(2) of the Act states:

“Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person lawfully authorized by him.”

I therefore agree that “section 11 of the Act does not at all prevent the mortgagee from entering into a contract for the sale of the land that falls within a declared area.”

The Counterclaim

17. The defendant filed a counterclaim requesting a single claim namely a mandatory injunction for the claimant to deliver vacant possession but it does not state to whom. The claim in the counterclaim does not show a cause of action against the claimant by the defendant. There is no merit in the counterclaim. Costs follow the event. The court also has a discretion in awarding costs.

18. **Conclusion**

For all the above reasons I make the following orders:

- (1) The claims in the matter are dismissed.
- (2) The counterclaim is dismissed.

(3) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
22nd March, 2013