

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV949 of 2015

BETWEEN

THE BANK OF NOVA SCOTIA CLAIMANT

AND

RONALD BEST DEFENDANT
SHARON COSTELLA BEST INTENDED SECOND DEFENDANT

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2017: April 20
2018: August 31

Appearances:

Mrs. Avenel Hinkson-Forde, in association with Ms. Abigail Linton, Attorneys-at-law on behalf of the Claimant

Ms. Paula S. Jemmott, Attorney-at-Law on behalf of the Intended Second Defendant

DECISION

INTRODUCTION

[1] The Intended Second Defendant, Sharon Costella Best who is the wife of the Defendant, Ronald Best filed a Notice of Application on 2 April, 2017 under a Certificate of Extreme Urgency seeking the following orders:

- (1) That she be added as a Second Defendant to these proceedings and be granted leave to file a counterclaim in the form set out at Appendix A within 14 days of the hearing of this application or as ordered by the court;
- (2) An injunction restraining the Chief Marshal from executing the Writ of Possession granted herein on the 11th January, 2017, upon the mortgaged property being the subject matter of this suit until the hearing of the Intended Defendant's counterclaim and that the said Writ of Possession also be suspended until the hearing of the Intended Second Defendant's counterclaim;
- (3) That the Order of Possession granted herein on the 25th November, 2015 be suspended until the hearing of the Intended Second Defendant's counterclaim;
- (4) That the costs of this application be costs in the cause; and
- (5) Such further or other orders as this Honourable Court shall deem fit.

[2] The grounds of the application are set out below and are these:-

- (1) The Applicant has an interest in the mortgaged property in priority to the Claimant's.
- (2) The Applicant has an interest in the mortgaged property being the subject matter of this suit by virtue of the fact has she has been the wife of the Defendant for the last 10 years (that is, from the 21st day of January, 2007) and as such, indirectly contributed to the acquisition, conservation and improvement of the said property.
- (3) No order for possession has ever been served on the Applicant who has resided in the mortgaged property with the Defendant from on or about the year 2012 when the property was constructed.
- (4) The Applicant has not waived her interest in the mortgaged property or surrendered same to the Claimant, nor did she receive independent legal advice in respect of her interest in same until the 10th day of April, 2017, that is, after the grant of the aforesaid Order for Possession and Writ of Possession.

(5) That the Applicant's interest in the mortgaged property be assessed and paid to her in priority to the claim of the Claimant.

[3] In essence she contends that the Claimant threatens to evict her and her husband from the matrimonial home without notice to her and without establishing any claim whatsoever against her or her interest in the mortgaged property.

[4] The matter came on for hearing on the 20th April, 2017 and the parties were ordered to prepare written submissions which they have done and which have been reviewed by the court.

FACTUAL BACKGROUND

[5] On the 8th July, 2015, the Claimant, in exercise of its power of sale, instituted proceedings against the Defendant to recover possession of the mortgaged property situate at Ealing Grove, Boggs in the parish of Christ Church ("the mortgaged property"). This was as a result of the Defendant's non-payment of the principal owing under the said mortgage and further charge from as far back as September, 2013.

[6] On the 25th November, 2015, it was ordered by the court in the presence of the Defendant and his legal counsel Mr. Hilary Nelson, that unless the Defendant pays to the Claimant on or before the 1st February, 2016, all monies due and owing under the mortgage dated the 22nd May, 2009 with a further charge endorsed thereon by way of upstamping dated the 8th March,

2012 made between the Defendant as Mortgagor and the Claimant as Mortgagee, he shall deliver to the Claimant possession of the mortgaged property on or before the 31st March, 2016.

[7] The Defendant did not pay the monies due to the Claimant by the 1st February, 2016 as ordered and he failed and/or refused to comply with the terms of the said order in that he did not deliver possession of the mortgaged property to the Claimant.

[8] On the 18th August, 2016, the Claimant filed a Notice of Application seeking permission to issue a Writ of Possession of the mortgaged property and an order in those terms were obtained on the 11th January, 2017. The writ of Possession was duly filed on the 7th February, 2017.

[9] It is against this background that the Intended Second Defendant has filed the aforementioned Notice of Application.

ISSUE(S)

The issues for consideration are:

1. Whether the Intended Second Defendant should be added as a party to these proceedings; and
2. In the circumstances whether the Writ of Possession should be stayed or suspended.

THE LAW

[10] Part 19.2(3) of the Supreme Court (Civil Procedure) Rules, 2008 (the CPR) provides that the court may add a new party to proceedings where “(a) it is

desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceeding and it is desirable to add the new party so that the court can resolve that issue.” Accordingly, a critical element of the test set down in Part 19.2(3) is that there must be shown to be “matters in dispute “before a party can be joined under that Part and the expression “matters in dispute” was thought to mean “what could be considered to be issues in the proceedings” – see Re Grant Eastern Cleaning Services Pty (1978) 2 NSWLR 278 at 281.

[11] What therefore are the matters in dispute in these proceedings, if any? Both sides accept that a wife can acquire an interest in the property of her husband through her financial and non-financial contributions to the household. The Intended Second Defendant has stated at paragraph 2 through 4 of her affidavit filed on the 12th April, 2017 that the Defendant was responsible for the major purchases/finances while she was responsible for the purchasing of groceries, cooking, cleaning, ironing, purchasing small furnishings and paying some bills. Assuming the above to be correct, it is accepted that the Intended Second Defendant has acquired an interest in the mortgaged property. This therefore is not an issue in dispute.

[12] On the 14th February, 2012 the Intended Second Defendant signed an Occupier’s Release with respect of the mortgage property whereby she

- (i) consented to the Defendant creating a legal charge (“the charge”) in favour of the Claimant over the subject property;
- (ii) agreed that the charge and all money and liabilities secured by it shall have priority over all (if any) estate interest or rights in the property or the proceeds of its sale to which the Intended Second Defendant may now or at a later date be entitled;
- (iii) charged all (if any) of her estate interest and rights in the property or the proceeds of its sale to the Claimant as a continuing security for all money and liabilities now or hereafter secured by the charge;
- (iv) agreed not to assert or maintain any estate interest or right in the property adverse to that of the Claimant or which would obstruct delay or hinder the orderly realization by the Claimant of its security;
- (v) agreed that the Intended Second Defendant shall immediately vacate the property and give up possession to the Claimant upon the exercise by the Claimant of its rights under the charge.

[13] The Intended Second Defendant therefore consented in writing to the Defendant, her husband, utilizing the mortgaged property as security for a further loan from the Claimant. She also agreed in writing to postpone her interest in the mortgaged property to that of the Claimant for the duration of the loan agreement between the Claimant and the Defendant.

[14] The Intended Second Defendant having signed the Occupier’s Release, the effect of which was to postpone her interest in the mortgaged property to the interest of the Claimant until the loan obtained from the Claimant by the Defendant is paid in full, cannot now claim that her interest in the mortgaged

property rank in priority to that of the Claimant or that she is entitled to have her interest in the mortgaged property assessed and paid to her in priority to the claim of the Claimant.

[15] The Intended Second Defendant further contends that she did not received independent legal advice in respect of her interest in the mortgage property in that the same attorney-at-law acted for her and the Claimant. This however is disputed by the Claimant and it is their evidence that the legal counsel acting for the Claimant in the mortgage transaction presented the Intended Second Defendant with the opportunity to obtain independent legal advice concerning the Occupier's Release but that she declined, after which the Claimant's legal counsel became responsible for ensuring that the Intended Second Defendant understood the terms of the Occupier's Release prior to her signature.

[16] Numerous authorities were cited which dealt with this issue of independent legal advice with respect of a spouse and I do not propose to go into them here. I will mention however the case of Royal Bank of Scotland v. Etridge (No. 2) and other appeals [1998] 4 All E.R. 750 which noted the other cases and established a number of propositions. In short the case suggests that it is irrelevant who introduces the solicitor to the wife and asks him to advise her as well as who is responsible for his fees. The Claimant is entitled to expect the solicitor to regard himself as owing a duty to the wife alone when giving

her advice. Even if the solicitor accepted the Claimant's instructions to advise the wife, he stills acts as her solicitor and not the Claimant's solicitor when he interviews her.

[17] There is nothing to suggest that the Intended Second Defendant asked for independent legal advice and was denied this, there is no evidence of duress or intimidation or anything to suggest that the wife in this case did not sign the Occupier's Release with full knowledge and understanding of what she was signing and its consequences.

[18] It is the position of the Intended Second Defendant that as a resident of the mortgaged property, she was not served with a copy of the Order of Possession.

[19] Part 42.6 of the CPR states:

- “(1) unless the court otherwise directs, every judgment or order must be served on
 - (a) every party to the proceedings in which the judgment or order is made; and
 - (b) any other person on whom the court orders it to be served.
- (2) where a party is acting by an attorney-at-law, the court may direct that any judgment or order be served on the party in person as well as on the legal representative.”

[20] The Intended Second Defendant, not being a party to these proceedings, no order was made to have the order served on her. As there was no evidence of any conflict between the Defendant, that is, the husband and the Intended

Second Defendant, that is, the wife, there was no reason for the court to make any order in these circumstances that the wife be served with the Order of Possession.

[21] The Intended Second Defendant has indicated that she is interested in exercising her right of redemption of the mortgage property pursuant to section 101(2) of the Property Act. In her application and Affidavit in Support thereof she discloses an offer for sale of the mortgaged property by a third party, a Mr. Juan Watson, who has also filed an Affidavit in Support of her application. It is submitted that her application clearly discloses her interest in redemption of the mortgaged property by virtue of the fact that the property owned by her husband is matrimonial property which she is entitled to share in and moreover which she still occupies.

[22] It is the opinion of this court that the Intended Second Defendant, along with the Defendant have had more than sufficient time to work with the Claimant in trying to reach an amicable resolution to this matter. Whatever offer was proffered by Mr. Juan Watson was not accepted by the Claimant and no other offers have been forthcoming. Neither the Intended Second Defendant nor the Defendant has shown a real prospect of her or him redeeming the mortgage now or in the near future.

DISPOSAL

[23] It is for these reasons that the court exercises its discretion against adding the Intended Second Defendant as a party to these proceedings and her application is therefore dismissed. There shall be no stay or suspension of the Writ of Possession issued in this case.

PAMELA A. BECKLES
Judge of the High Court