2016-HC-DEM-CIV-APL-50

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

In the matter of the Rules of the High Court CAP 3:02

-and-

In the matter of Order 46 Rule 18 of the Rules of the High Court, CAP 3:02

-and-

In the matter of Orders 20 and 21 of the Rules of the High Court, CAP 3:02

BETWEEN:

CITIZENS BANK GUYANA INC. a company incorporated under the provisions of the Companies Act, Chapter 89:01, Laws of Guyana, and continued user the provisions of the Companies Act No. 29 of 1991, Laws of Guyana, whose registered office is situate at Lot 201 Camp and Charlotte Streets, Lacytown, Georgetown, Guyana LIMITED, a company incorporated in Guyana and continued under the 1991 Companies Act, with its Registered Office situated at Lot 69-72 Eccles Industrial Site, East Bank Demerara.

Plaintiff/ Respondent

-and-

1. DUNSTAN BARROW
2. CHERYLL BARROW

Defendants/ Applicants

The Honourable Justices Roxane George and Navindra A. Singh, Puisne Judges.

Mr. Stephen Fraser and Ms. Shantel Scott representing the Applicants.

Mr. Neil Boston representing the Respondent.

Heard June 30th, July 8th and September 30th 2016.

DECISION

BACKGROUND

The Respondent instituted Civil High Court Action No. 1046-CD of 2015 on September 29th, 2015 against the Applicants claiming monies owed on several loans totaling in excess of two hundred and twenty three million dollars made to the Applicants by the Respondent at the Applicants request.

The loans were secured by five mortgages in favor of the Respondent on two properties owned by the Applicants and so the Respondent further claimed ***foreclosure*** of the said mortgages in HCA 1046-CD of 2015.

On November 24th, 2015 the Applicants filed a Summons praying that the claim be struck out and the action dismissed on the ground that the claim did not disclose a cause of action since a claim for ***foreclosure*** did not exist in the Roman Dutch mortgage.

On March 4th, 2016, having heard the parties, Justice Insanally dismissed the Summons and the Applicants filed an appeal challenging the correctness of Justice Insanally's decision on March 17th, 2016.

On March 22nd, 2016 the Applicants filed a Summons requesting that the proceedings in HCA 1046-CD of 2015 be stayed until the hearing and determination of the appeal filed on March 17th, 2016.

That Summons was dismissed on May 25th, 2016 after arguments.

The Applicants by this Motion now apply to this Court for a stay of proceedings in HCA 1046-CD of 2015 be stayed until the hearing and determination of the appeal filed on March 17th, 2016.

The Honourable Madam Justice Louis E. Blenman JA in the case of **C-Mobile Services Limited *v* Huawei Technologies Co. Limited** BVIHCMAP 2014/ 0017 (Unreported from the Eastern Caribbean Court of Appeal) cited with approval the dicta of the Chief Judge of the High Court of Hong Kong, Ma J, in **Wenden Engineering Services Co. Ltd. *v* Lee Shing UEY Construction Co. Ltd.** HCCT No. 90 of 1999, identifying the five principles that ought to be considered when considering the grant of an order staying proceedings pending the hearing of an appeal.

The five principles advanced by Ma J are as follows;

1. The court should take into account all the circumstances of the case.

2. A stay is the exception rather than the general rule.

3. The party seeking the stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.

4. In exercising its discretion, the court applies a balance of harm test, in which the likely prejudice to the successful party must be carefully considered.

5. The court should take into account the prospect of the appeal succeeding, but only where strong grounds of appeal or a strong likelihood that the appeal will succeed is shown.

The Applicants sole resistance and defense to the claims in HCA 1046-CD of 2015 is that the concept of foreclosure does not exist in the Roman Dutch mortgage and therefore that Writ ought to be dismissed.

But, what is meant by the use of the term "***foreclose***" with respect to mortgages in the Republic of Guyana?

More than 100 years ago Sir Charles Major CJ in **The Demerara Turf Club Ltd. (In liquidation) British Guiana Mutual Fire Insurance Co. Ltd. *v* The**

Demerara Turf Club Ltd. [1915] L.R.B.G. 191 clarified the use of the word foreclosure in this country.

At page 193 he explained the right of the mortgagee as follows;

"*By the law of this colony a mortgagee has a right, upon failure of his debtor to observe and perform any of the covenants, stipulations and conditions contained in the instrument of mortgage, to take proceedings to enforce the security given for his so doing. The proceedings take the form of an action for ascertainment (where that is necessary) of the amount of the debt and for a decree that the mortgaged property be declared liable to be taken in execution and sold to satisfy same*".

The learned Chief Justice then opined at page 194 that the use of the term "***foreclose***" in this jurisdiction is "*inaccurate and misleading*". I do believe that the learned Chief Justice use of the words "*inaccurate and misleading*" was based solely on his perception that the word "***foreclose***" should only be used when referring to the rights of a mortgagee under an English mortgage or a mortgage taken in England under English law.

On this point I tend to disagree with the Learned Chief Justice since there really is no such fixed allocation for the word. In fact thefreedictionary.com defines "***foreclose***" as follows;

"*To enforce (a lien, deed of trust, or mortgage) in whatever manner is provided for by law*".

Nevertheless, despite not being pleased with the use of the word "***foreclose***", the Learned Chief Justice goes on at page 195 to explain the **foreclosing of a mortgage** as follows;

"*The mortgagees hold an instrument thereunder the mortgagors specifically bind and oblige their property Bel Air and furthermore, agree that the mortgagees shall in case of default, have the right of* ***foreclosing the said mortgage*** *- [that is of enforcing the security for the performance of the terms in respect of which*

default has been made] and of bringing the property thereunder mortgaged to sale at execution"

In this regard it is clear that the use of the word "***foreclose***" has a distinct meaning in this jurisdiction, a meaning that has been understood and upheld by the Courts in this jurisdiction for over a century. Indeed, it would make nonsense of the law should we dwell on semantics.

The Applicants have not raised any other challenge or defense to the Respondent's claim in HCA 1046-CD of 2015, particularly, the Applicants have not denied the advancement of the loans to them by the Respondent at their request nor have they contended that they are not in default of their repayment agreement.

I find that the Applicants have no prospects of success in their appeal of Justice Insanally's decision to dismiss their Summons dated November 24th, 2015. I further find that greater harm would be done to the Respondent with the further delay of its ability to pursue its claim against the Applicants.

In the circumstances, the application for a stay of proceedings pending appeal is refused.

Costs to the Respondent in the sum of $200,000.00

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Justice N. A. Singh