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22-12-2011

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 174 OF 2011

IN THE MATTER OF THE REGISTERED LAND LAW (2004 REVISION)

BETWEEN: CAYMAN ISLANDS DEVELOPMENT BANK PLAINTIFF

AND: JAMES COLEMAN EBANKS FIRST DEFENDANT

AND: KAREN TERESA MCKEE SECOND DEFENDANT

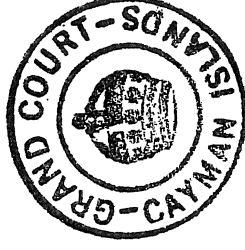
Appearances: Mr. James Austin-Smith of Campbells for the Plaintiff

Mr. James Coleman Ebanks, the First Defendant, In Person

Ms. Karen Teresa McKee, the Second Defendant,
did not appear

Before: Hon. Justice Henderson

Heard: December 22, 2011



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RULING

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11 1. The Plaintiff Cayman Islands Development Bank (“CIDB”) has applied for an
12 order sanctioning the sale by private treaty of certain property owned by the
13 defendants James Ebanks and Karen McKee (“the mortgagors”).
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- 15 2. By letter dated August 12, 2009 CIDB offered to grant a mortgage loan to the
16 mortgagors. The formal written offer dated September 15, 2009 imposes (on
17 page 2) a condition that “no additional debt without the approval of CIDB for
18 at least one year” may be incurred. On September 24, 2009 the mortgagors
19 indicated their acceptance by signing the last page of the formal offer.
20
- 21 3. A first charge in the amount of \$272,000 in favour of CIDB was executed by
22 the mortgagors on September 29, 2009 and registered in the Land Registry. A
23 schedule to the charge agreement incorporates by reference the terms and
24 conditions of the offer letter including the term prohibiting additional debt for
25 at least one year. The monthly payment was to be \$2,151.
26
- 27 4. The mortgagors made only 2 monthly payments on the mortgage, the last such
28 payment having being received by CIDB on January 14, 2010.
29

1 5. Under the terms of the mortgage, the principal amount left unpaid is now due
2 and owing, together with interest on it. As at July 6, 2011 the amount owing
3 was \$296,135.63.
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5 **Procedural history**
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7 6. The letters before action required by the provisions of the *Registered Land*
8 *Law* (2004 Revision) were received by each of the 2 mortgagors on May 3,
9 2011. CIDB issued an originating summons seeking to enforce its charge on
10 May 10, 2011. By August 18, 2011 the summons had been served on both of
11 the mortgagors.
12

13 7. The originating summons was returnable on September 21, 2011.
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15 8. Essentially, the mortgagors say that CIDB is estopped from enforcing its
16 charge because it has failed to fulfill a promise it made to the mortgagors to
17 grant a second mortgage. The mortgagors say that they made it clear to the
18 bank at the time they applied for the mortgage that they would be unable to
19 service the loan unless they were granted a second mortgage in the amount of
20 \$25,000. In her affidavit evidence Ms. McKee has said that the mortgagors'
21 inability to make monthly mortgage payments was caused by their inability to
22 extract cash from their business, which was in turn caused by the failure of
23 CIDB to grant the second mortgage. While the second mortgage was to be
24 granted for the stated purpose of "injecting" money into their business, it was

1 clear from the evidence that the money would be used indirectly to service the
2 first mortgage.

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4 9. On September 21st I adjourned the proceeding in order to give the mortgagors
5 additional time to try to come to some agreement with the CIDB.

6

7 10. On October 28, 2011 all three parties appeared before Williams, J. who gave
8 some directions and then adjourned the matter again. Although his note does
9 not say so, I infer from the circumstances that this adjournment was at the
10 request of the mortgagors.

11

12 11. On December 16, 2011 all three parties appeared before me. The mortgagors
13 explained that a Mr. Lewis who had formerly been employed by CIDB but
14 was no longer there could give material evidence on their behalf. They had
15 not made any arrangements for him to be present. I adjourned the hearing to
16 December 22, 2011, ordered that a witness summons issue for Mr. Lewis, and
17 asked Mr. Austin-Smith (as an officer of the Court) to assist the mortgagors by
18 attempting to locate Mr. Lewis and have the summons served upon him. My
19 minute of order says “witness summons to issue for Mr. Lewis on behalf of
20 the bank” but, in the context of the case, Mr. Lewis’ evidence would be given
21 on behalf of the mortgagors.

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23 12. On December 22, 2011 CIDB and Mr. Ebanks appeared at the resumed
24 hearing. Ms. McKee was absent, apparently due to illness. Neither mortgagor

1 was represented by counsel. Counsel to the CIDB explained that Mr. Lewis
2 had not been served as he could not be located.

3

4 13. After considering the evidence, I granted to CIDB an order permitting it to list
5 the property for sale on the multiple listing service at a price of \$296,500. I
6 granted legal aid to Mr. Ebanks and later to Ms. McKee as well. I also
7 directed that my order permitting the listing be stayed for a period of 30 days.

8

9 **CIDB's Position**

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11 14. CIDB denies that it promised to permit a second charge on the property at any
12 time. By November 3, 2009 Mr. Lewis had retired from CIDB. CIDB says
13 that the account documentation does not include any indication from Mr.
14 Lewis that he made such a promise.

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16 **Mortgagors' Position**

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18 15. Ms. McKee says the subject of a second charge was "discussed at length".
19 She says (in her affidavit of November 22, 2011, paragraph 3(b)) that the
20 second mortgage was a "suggestion" from Mr. Lewis on August 6, 2009 and
21 that both mortgagors understood that the second charge "was not a problem"
22 (paragraph 3(f)). She also says that on September 15, 2009 Mr. Lewis advised
23 "that a second offer letter can be collected" (affidavit of Karen McKee dated
24 September 15, 2011 at paragraph 7 (xii)). No such letter was collected and
25 CIDB says it has no record of one.

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2 16. In an email from Ms. McKee to CIDB on November 25, 2009 Ms. McKee
3 said that she would “look forward to a positive response concerning the
4 second charge.” Whatever CIDB may have said to the mortgagors later on, it
5 is clear that it made no promise to the mortgagors to permit a second charge
6 prior to their execution of the charge.

7

8 17. Much of the evidence before me concerned communications between CIDB
9 and Ms. McKee (who spoke for both mortgagors) subsequent to the execution
10 and registration of the charge. According to Ms. McKee, on November 27,
11 2009 a Mr. Thomas of CIDB advised her that Mrs. Tracy Ebanks (a bank
12 officer) had approved a second charge in the amount of \$25,000. No
13 documentary evidence of that has been produced. Mr. Thomas has denied it.

14

15 18. Ms. McKee has produced an email message from the CIDB dated July 2, 2010
16 which says that the request for a second charge “will be discussed by our
17 Senior Management Team”. Ms. McKee asserts that a CIDB official, Mr.
18 Eustace Jeffers, advised her orally that the request was approved. Mr. Jeffers
19 has challenged Ms. McKee’s credibility and in effect (although not explicitly)
20 denied the allegation. There is however an internal CIDB email message from
21 Mr. Jeffers (of September 9, 2010) which says: “... at times I heard that we
22 were going to issue the [consent] letter and other times we were not going to”.

23

24 19. Just two monthly mortgage payments were made. Ms. McKee asserts that no
25 further payments were made

1 “from November 2009 (sic) as it was clear in our mind that
2 the injection of the loan would include the arrears that had
3 accumulated as a result of non-payment which was
4 apparently a matter of little concern to the plaintiff bank as
5 they were going to permit us to obtain the money by
6 allowing us to register a second charge. This money
7 obtained from the second charge would have included
8 monies to pay off the arrears on the first mortgage.”
9 (paragraph 3(i)).
10

11 **Analysis**

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13 20. I have not heard oral evidence and cannot resolve the contradictions in the
14 evidence. Instead, I have approached the application on the footing that all of
15 the assertions of fact by the mortgagors are true.

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17 21. On this basis, and making all assumptions of law and fact in favour of the
18 mortgagors, the CIDB should have permitted them to borrow an additional
19 \$25,000 to service the mortgage. That money would have enabled them to
20 make their monthly payments up to and including September 30, 2010 and (I
21 will assume) the CIDB is estopped from treating any failure to pay in those
22 months as an act of default. However, only two payments have ever been
23 made. Assuming those two payments extinguish the liability for October and
24 November, 2010, the mortgagors were, by January, 2011, undeniably in
25 default and have been in default for over one year. By this reasoning, I
26 conclude that the defence of estoppel has no hope of success and a resolution
27 of the factual issues which depend upon the credibility of the witnesses is

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1 unnecessary. In consequence, I granted to CIDB an order permitting it to list
2 the property for sale on the multiple listing service at a price of \$296,500.
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4 Dated this 22nd day of December, 2011
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6 *Henderson, J.*

7 Henderson, J.
8 Judge of the Grand Court
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