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

CAUSE NO: 374 OF 2005

BETWEEN JOY EBANKS PLAINTIFF  
AND PHASE III DEFENDANT

CORAM: Madam Justice Ramsay-Hale

Appearances:

Mr Stephen Barrie for the Plaintiff  
Mr Clyde Allen for the Defendant

Dates of hearing: 6<sup>th</sup>, 9<sup>th</sup> and 16<sup>th</sup> October 2006



JUDGMENT

1. This is the Plaintiff's application for Summary Judgment pursuant to Order 14 of the GCR.

BACKGROUND

2. The admitted facts are that the Plaintiff, Ms Joy Ebanks entered into an agreement for the sale and purchase of land with the Defendant, Phase III Limited. The Defendant gave the Plaintiff a Vendors' Mortgage for the whole of the purchase price and a further loan to cover the purchase of the furniture in the premises.
3. A mortgage document and a Bill of Sale were executed by the parties in order to secure the Vendor's interest in the property transferred to the Plaintiff pursuant to the agreement for sale. In addition, the Plaintiff executed a general Power of Attorney appointing the Vendor her Attorney.

4. The Plaintiff defaulted on the payments under the divers agreements and the Vendor, exercising powers granted it under the Power of Attorney, executed a transfer of the property to itself and entered into possession of the property.

#### THE CLAIM

5. The Plaintiff's claim for which she now seeks summary judgment is
  - a) A declaration that the Defendant's purported exercise of a right of foreclosure against the Plaintiff's property was unlawful and contrary to the law and the terms of the Charge.
  - b) An Order setting aside the Defendant's execution of the Transfer as common law and an order rectifying the register and cancelling the Registration of the transfer pursuant to section 140 of the Law.
  - c) Alternatively, an Order setting aside the Defendant's execution of the Transfer of Land in respect of the Property in favour of itself dated 11<sup>th</sup> of April 2005 pursuant to the Fraudulent Disposition law (1996 Revision):
6. The other heads of claim were not advanced in the hearing before me.

#### RIGHT OF FORECLOSURE

7. The question of whether the Defendant foreclosed in fact and whether he was entitled to do so was the determining issue.
8. In support of the application for Summary Judgment, Counsel for the Plaintiff submitted:
  1. That all transactions regarding the sale of land are governed by the Registration of Land Law.
  2. That the Law expressly forbids foreclosure on property by reason only of the non-payment of money.
  3. That the Defendant, using the Power of Attorney granted to him by the Plaintiff, transferred the property to itself and entered into possession the property of the by reason only by default in payment of the monies owed; in effect, the Defendant foreclosed on the property.

4. That this use of the Power went beyond what was contemplated by the parties.
  5. That the use of the Power was in any event in contravention of the statutory prohibition against foreclosure and illegal, and in the circumstances, the defendant had no defence to the action.
9. Counsel for the defendant in his submissions before the Court said that at trial he would be calling evidence to show that the plaintiff knew that the Power was wide enough to permit the defendant to enter into possession of the premises and transfer property to himself and that it was agreed that the Power could be so used in the event of default by her.
10. At para 10 of his defence the defendant avers that:
- “The Plaintiff took no action to stop the Defendant exercising the power under the Power of Attorney to transfer the title of the property to itself as it was previously agreed and understood by the parties that he was permitted to do under the Power of Attorney”
11. At trial, he said, he would rely on her acquiescence when clearly told that the land was being transferred as evidence that supports the assertion that she was fully aware of the purpose for which the power was to be used and for which it was in fact used.
12. He submitted further, that this matter fell outside the provisions of the Registered Land Law as the Vendor did not foreclose ‘by reason only of the non-payment of money’ but because it was agreed by the parties that it should so be as security to secure the performance of all obligations owed to the Lender by me...in the event of any default: (excerpts relied on in the Defence at para 5).
13. Counsel submitted that as there was an issue of fact between the parties as to the purpose for which the Power was executed and what the terms of the agreement between the parties were at the time of its execution, summary judgment was not available to the Plaintiff and the matter had to proceed to trial.

DECISION:

14. The only issue of fact between the parties is what was the true agreement between the parties when the Plaintiff appointed the defendant her Attorney. That the exercise of the power amounted to a foreclosure in fact is not denied. All that is advanced is that the property was foreclosed on by agreement with the Plaintiff.
15. I am of the view that no amount of evidence going to show that the parties agreed that the Vendor was entitled to foreclose on the property if the Plaintiff defaulted could give the Defendant a real prospect of successfully defending the claim, as any such agreement would be illegal.
16. The Registered Land Law at section expressly states that all land transactions are to be done in conformity with the Law.
17. S 78 stipulates:
- “For the avoidance of doubt, it is hereby declared that the chargee shall not be entitled to foreclose, nor to enter into possession of the charged land...by reason only that default has been made in the payment of the principal sum...”
18. But may by S 72(b)
- “...sell the charged property”
19. On a proper construction of the Law any agreement use a Power of Attorney to achieve what the Statute says is expressly forbidden, is illegal and void. It would be an agreement to avoid a statutory provision made for the benefit of a section of the public and would therefore be a statutory a provision out of which the Plaintiff could not, as the provision is designed to protect purchasers as a class.<sup>[1]</sup>

20. While it unobjectionable, as Mr Allen suggests, to create a Power of Attorney to protect a Vendor's rights, it is objectionable to exercise that Power to avoid a statutory prohibition against foreclosure. I reject the submission that the Vendor entered into possession of the premises for some other reason than the Plaintiff's default in payment. No other reason is advanced in the Defence and the submission he made in his argument has no merit.
21. Even if I proceed on the basis that the assertions the Defendant makes are true, adopting the dicta of the Court in Rescetnyk v Waslyk<sup>[2]</sup> as Mr Allen has urged me to do, my conclusion would still be the same: that the defendant has no hope of success at trial. The only conclusion a Court could reach at a trial is that that the agreement alleged by the defendant was illegal and that the transfer of land to the defendant was void and of no effect.
22. Mr Allen complained that the Plaintiff did not plead illegality, and ought not to be allowed to rely on it, but where an agreement is illegal a Court will not enforce it, whether the illegality is pleaded or not.
23. I grant the Plaintiff's application for Summary Judgment and declare
1. That the Defendant's exercise of foreclosure was unlawful,
  2. That the Transfer of Land was registered by mistake as to the defendant's power to exercise foreclosure

And Order

3. That the Registrar of Lands be directed to cancel the Registration of the Transfer in favour of the Defendant
4. Costs to the Plaintiff.



Hon. Magistrate Ramsay-Hale  
Judge of the Grand Court (Acting)

