

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

30/7

C.P. NO. 1347/92

1110

BETWEEN SOUTHERN CROSS
BUILDING SOCIETY

Plaintiff

A N D G. BHANA and
R.M. POULSON

Defendants

Hearing: April 6, 1993
Further Submissions: April 20, 1993

Counsel: Mr. C.J. Tomaszuk for Plaintiff
Mr. G.D.S. Taylor for Firstnamed Defendant

Judgment: 14 May 1993

JUDGMENT OF MASTER ANNE GAMBRILL

The Plaintiff seeks to recover on Summary Judgment the sum of \$91,114.81 together with interest and costs being the short-fall on the sale of a property sold by private treaty on 12th December 1991. The Plaintiff pleads it has never released the Defendants from their personal covenants and are entitled to recover the short-fall. There is no argument the Defendants are still contractually bound.

The Defendants oppose on the basis of four grounds:

- (i) The Plaintiff has not accounted for all sums received in respect of the mortgage sued upon;
- (ii) The Plaintiff is in breach of its duty as mortgagee receiving rents in respect of the property and by failing to obtain a better price on its sale;
- (iii) The Plaintiff itself caused the loss in respect of which it sues the firstnamed Defendant by failing to include in the mortgage sued upon a covenant that the planned alterations to the property were carried through to conclusion;
- (iv) It is unjust to enter Summary Judgment in the absence of the Housing Corporation which is a necessary party to determine whether the firstnamed Defendant is liable to the Plaintiff since the Plaintiff has called upon the Housing Corporation of New Zealand to honour its guarantee and the Housing Corporation has disclaimed liability.

The first two grounds relate to the period after the Plaintiff entered into possession and the third and fourth grounds relate to the earlier period when the Defendants bought the property and the mortgage was advanced.

It became apparent at the hearing the amended notice had not been served on the Plaintiff's Counsel through a genuine mistake and the Plaintiff's Counsel thereafter filed further submissions but elected to proceed with the hearing time allocated.

The Plaintiff took me carefully through the evidence relating to the accounting for the sums received as rental. I am satisfied that the Plaintiff's steps were adequate and satisfied any standard that could be required. The property was vacated by the tenant on 25th February 1991, it was advertised eight times and re-let on 3rd May 1991. The Plaintiff attempted

to have a mortgagee's sale on 6th September 1991 and the "new" tenant vacated before the end of August. The Plaintiff did not achieve a sale at a mortgagee's sale and finally through multiple listing managed to sell the property in December 1991. The Plaintiff says there has been no evidence of wilful default or gross negligence and it has no liability to account for rental over and above the sums it actually received. It relies on Hinde McMorland & Sim, Land Law Vol. 2, para. 8110.

The Defendant attempts to persuade me that the failure to keep the property tenanted was the responsibility of the Plaintiff and suggests the property had deteriorated because of the manner in which it was tenanted. He suggests it is implausible that such a low offer should have led to the result of not tenanting the property. He says that the material is inadequate and the whole of the issue should be covered at trial..

On reading the affidavit evidence, it is clear to me that the Defendant is looking to a Rolls Royce standard for a property that is in relatively poor condition, in a neighbourhood with low values and the Plaintiff's efforts to let, show the difficulties of obtaining tenants and their unwillingness to pay rental for the property. I accept that the Plaintiff has taken the steps necessary to market the property both for a mortgagee's sale and to obtain a tenant.

The other major issue the Defendant sought to succeed on was that the Defendants had stated, when applying for a mortgage, that a conversion of the property would be completed, the failure to complete the conversion affected the rental, the Defendants say at the time of the loan application they did not own the property and the conversion could or should have

been made by the previous owners of whom one Defendant, Mr. Bhana, was of the same name, prior to the settlement with the mortgage funds..

There is an argument that it behoved the Plaintiff to obtain a certificate of compliance and completion of the alterations before it advanced the money. I know of no duty of a mortgagee to undertake an obligation to obtain such a certificate. The Defendant's case rested only on the factual evidence and not on any legal authority to support such a proposition. Finally, the Defendant said that it was important for the Housing Corporation to be a party to these proceedings. It is said the Plaintiff misinformed the Housing Corporation as to the value of the property because its figure for guarantee purposes was based on the fact the alterations would have been completed. Having misinformed the Housing Corporation, because the alterations were not completed, there was no guarantee. The Defendant traversed in depth the Housing Corporation Rules for a guarantee. The Defendant says that as the Plaintiff misrepresented the value of the property at \$180,000 this is the reason now the Housing Corporation refuses to pay out on the guarantee. The Defendants say the guarantee was essential for the loan to be made, it would have protected the Defendants if there had been recourse and it is as a result of the Plaintiff's misrepresentation the Defendants are here in Court today.

The Plaintiff says nevertheless, the evidence clearly establishes that the mortgage broker, Kendall Waller acting on behalf of the Defendant, represented that the conversion work would be undertaken and completed in August 1989. The property was previously owned by a Mr. and Mrs. Bhana. The Plaintiff relied on the Defendants' representations that they would complete the conversion work prior to settlement and on that basis made an application to the Housing Corporation. The Plaintiff says the

Defendants defaulted on their contractual obligations and the Defendants are not entitled to rely on their own default. The Plaintiff says further there is no evidence that could be given by the Housing Corporation that would be relevant to the issues between the parties and who cannot adduce evidence that would assist the Court. With that view I concur. The issue pertaining to the alleged duty to obtain a completion certificate is capable of being determined directly between the Plaintiff and the Defendants and there seems to be no real reason for the Housing Corporation to be involved. The Plaintiff says further there is no evidence to suggest the loan advance or the Defendants' obligations had arisen ex turpi causa. The Plaintiff says the case is based on the straight forward issue of liability by the Defendants under their contract to the Plaintiff for a short-fall pursuant to the mortgagee's sale. The denial by the Housing Corporation of liability is an issue to be determined separately between the Plaintiff and the Housing Corporation. There is no evidence of impropriety. The only evidence is the failure of the Defendants to complete the conversion work as represented thereby adding to the value of the property.

I am satisfied that there is no evidence before the Court that would justify the refusal of Summary Judgment. The Plaintiff has put before the Court the details of its actions when granting the loan, the necessary documentary evidence of the mortgage, the necessary evidence of the leasing of the property, the necessary steps of proceeding to auction the property and details of the subsequent private sale. I am satisfied the Plaintiff is entitled to recover under the covenants of the mortgage. The evidence before the Court is sufficient to satisfy me it is a proper case for Summary Judgment and accordingly there will be Summary Judgment in accordance with the Statement of Claim against both Defendants. Mr. Bhana was not formally

represented at the hearing although on previous calls he had been represented.

There was some doubt as to the position of the Defendant Mrs. Poulson and a grant of legal aid. If an order can be made against the Defendant I would order the sum of \$2000 costs plus disbursements as fixed by the Registrar. (This award includes the costs on the transfer application by the Defendants which was subsequently withdrawn). If there is any difficulty herein, if the file is referred to me I will make the appropriate orders.


MASTER ANNE GAMBRILL

Solicitors:

Tetley-Jones Thom Sexton, Auckland, for Plaintiff
Robert Logan, Wellington, for Firstnamed Defendant

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