FORECLOSURE - CAMA & CHATTEL

SC CIV 74 006

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Plaintiff

- and -

LINDEN CONSTRUCTION LTD.,
and LINDEN BUILDING
SUPPLIES LTD.

Defendants

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

The present application came on before me, as a joint motion, one for an Order declaring the amount owing under a land mortgage, setting the period of redemption, and providing for sale in default of redemption; and another seeking an Order for removal and sale by private sale of a trailer unit held under a chattel mortgage. The defendants, although served to the satisfaction of the Court, made no appearance.

It appears clear from the material before me that a Small Business Loan in the sum of $15,000.00 was advanced to the defendant Linden Construction Ltd. in the name of the plaintiff. This loan, repayable at the monthly rate of $125.00 with interest at 9½% per annum was secured by:

(1) Promissory note

(2) Personal guarantee of George von Rootselaar

(3) Assignment of fire insurance

(4) Second mortgage on von Rootselaar's house at Spirit River, Alberta

(5) First mortgage on Lots 7, 8 and 9, Block 76, Plan 72, Yellowknife

(6) Chattel mortgage on a campmobile house trailer situate on the land described in (5) above.

At the present time the total balance owing is $19,208.64 being made up of $14,000.00 principal, $2,195.23 taxes, and the difference interest and insurance premiums. Because of the apparent bankrupt position in which von Rootselaar finds himself (he and his wife were the officers of the mortgaging Corporation) the note and guarantee are not considered of any value as securities. The Alberta security has been lost through foreclosure proceedings instituted in that province under the first mortgage. The fact that the plaintiff took no part in these proceedings does not impair his position here as the evidence shows clearly the value of the Alberta security was inadequate to cover the prior encumbrances: *Worthington & Co. Ltd. v. Abbot,* 1 Ch. 588 at 595; *Beatty v. Bailey,* (1912) 3 D.L.R. 831.

As a consequence the only securities remaining are the land mortgage registered against the Yellowknife property and the chattel mortgage filed against the housetrailer situate on the same land.

By Statement of Claim issued in this Court on September

21, 1973 foreclosure of the above land was sought. Paragraph 10 of this claim is to the effect:

> " The plaintiff holds securities collateral to the said memorandum and reserves its rights under said collateral security, the plaintiffs right under the collateral land mortgage of lands situated in Alberta apparently having been foreclosed by prior encumbrancers and the plaintiff intending to separately seize the 20 man sleeper trailer unit presently located on the mortgaged premises and mortgaged to the plaintiff separately in the chattel mortgage registered as number 1109408 in the Document Registry of the Northwest Territories."

The second defendant, Linden Building Supplies Ltd. became registered owner of this land by registration of transfer at the Land Titles Office on 9th May 1972 and in consequence became subject to the same liabilities under the land mortgage as the original mortgagor: S. 106 *Land Titles Act*, 1970 R.S.C. c. L-4.

Similarly, by Bill of Sale dated the 1st day of February 1972, the interest of Linden Construction Ltd. in the housetrailer was transfered to Linden Building Supplies Ltd. for a consideration of $1.00.

Under Warrant of Distress dated October 4, 1973, the Sheriff effected a seizure of the housetrailer under the above chattel mortgage. The seizure was made October 30, 1973 and a

Notice of Objection was returned by Linden Construction Ltd. on November 11, 1973, objecting to same. The housetrailer appears to have been occupied at the time of the seizure by the Rootselaar's but they have since vacated it. Mr. Rootselaar signed a bailee's undertaking.

While the municipal authorities have taxed the land and trailer as realty I think counsel for the plaintiff, herein, was wise to follow the precaution of foreclosure of the land and seizure of the trailer unit as the material before me shows that the trailer unit while hooked up to the electric power is nonetheless only sitting on blocks. Historically also it is to be noted that both assets have been treated separately as land and personalty even in the transfers to Linden Building Supplies Ltd. which have taken place subsequent to the effecting of the security.

In the present applications, partly because of zoning difficulties, the plaintiff seeks to have the Court dovetail the orders to permit the best possible realization on the assets: viz. to permit possible sale of trailer unit and land as one or sales separately, dependent on how the bids come in. The Commissioner has through his counsel indicated he had no desire to acquire the assets themselves.

The plaintiff in seeking to realize on his securities in the manner outlined above is in my opinion entitled to. He

comes clearly within the principle enunciated in *Fletcher v. Rodden* (1882), 1 O.R. 155 where Boyd, C. set forth the rule:

> " The ordinary rule of equity is, that when a plaintiff properly comes into the Court to enforce presently part of his claim he may and should seek the assistance of the Court to work out in the one suit his full rights which are accruing due in respect of the same claim ..."

While the practice followed in *Krook v. Yewchuk* 1962 S.C.R. 535 might have been the safer one, I cannot see that the present procedures have materially added to the costs. See also *Edmonton Airport Hotel Co. Ltd. et al v. Credit Foncier Franco-Canadien*, 1965 S.C.R. 441.

The further question of whether the mortgagee when he follows separate actions or methods of enforcing his securities may run the risk of having elected to rely on one or other and to have perhaps lost the other must now be considered: *Dyson v. Morris* 1842 1 Hare 413, 66 E.R. 1094.

Sir James Wigram, V.C. at page 1098 of the *Dyson* case, above, in discussing a mortgage where the security is both land and chattels sets forth the recommended practice as being to first realize the collateral chattels and then after crediting the proceeds, proceeding by foreclosure of the realty.

The practice in land foreclosure in the Northwest Territories is to apply for an order for sale of the realty before

foreclosure. This follows the Alberta practice, the Rules of the Supreme Court of Alberta, governing in both jurisdictions: *Judicature Ordinance*, 1970 O.N.W.T. (3rd) c. 5, s. 25(1). Alberta Rule 694 provides for an Order for Sale following the expiration of the redemption period fixed in the Order Nisi.

In the present case the mortgagee, while bringing the land foreclosure action ahead of the distress proceedings was careful to include in his Statement of Claim paragraph 10, as quoted above, reserving his right to seize.

It is my opinion that the above precaution had the effect of preserving the mortgagee's right to enforce his collateral securities, and constituted a clear declaration against any suggestion that he might be electing to enforce the land security only. I say this without in any way deciding here that otherwise he may have been taken to have so elected.

With the above declaration, and coming before the Court, as he does, today, seeking to enforce both securities it seems to me that the mortgagee has succeeded in keeping all of his options open and has satisfied the principles enunciated in the cases discussed.

In this respect I have read such cases as *Sayre v. Security Trust Co.*, 1920 3 W.W.R. 469; and *Canada Life Insurance Co. v. McHardy*, 1922 3 W.W.R. 855, and do not see that they have application here. Rather, I think the mortgagee in the present case satisfies all the tests required of him and by

seeking sale, as he does, not only satisfies the practice laid down for this jurisdiction but satisfies the practice as laid down by Lord Phillimore in *Gordon Grant Co. v. F. L. Boos*, 1926 A.C. 781, pages 784 - 787.

I am not unmindful, also, of the fact that election has not been pled by the defendants: *Alce v. Higgins* (1962) 41 W.W.R. 321.

I have not had to consider the *Consumer Protection Ordinance*, 1970 (2nd) O.N.W.T. c. 5 as Section 5 excludes its application to the Commissioner.

In the result therefore the plaintiff will be entitled to:

A - With respect to the chattel security:

(a) An order providing for sale by tender subject to approval of the Court;

(b) In the event of no bids, the chattel security to be re-offered for sale with the land security when and if same is offered for sale after the redemption period has lapsed and subject to the same terms.

B - With respect to the realty security:

(a) The usual decree nisi but with the period of redemption reduced to two months;

(b) The usual order for sale following the lapsing of the redemption period providing for sale of the realty and chattels at the same time.

The plaintiff is entitled to costs to be taxed on a solicitor and client basis.

W. G. Morrow

Yellowknife, N.W.T.
20 November 1974.

Counsel:

D. Brand, Esq.,
for the plaintiff

No one contra.