
LOUIS MAYZEL (*Plaintiff by Counter-*
claim)

APPELLANT;

1968
*Feb. 1
Apr. 29
—

AND

RUNNYMEDE INVESTMENT COR-
PORATION LIMITED and REX-
DALE INVESTMENTS LIMITED }
(*Defendants by Counterclaim*)

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Power of sale—Legislation with effective date September 1, 1964, respecting notice of exercising power—Sale on October 6, 1964—Whether proceedings under power of sale were commenced by notice given May 20, 1964, and were consequently outside legislation—The Mortgages Act, R.S.O. 1960, c. 245, s. 29 (rep. & sub. 1964, c. 64, ss. 4 and 5).

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Pigeon JJ.

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CORPORATION
LTD. *et al.*

An action brought by Runnymede Investment Corporation Ltd. for foreclosure of a mortgage against Louis Mayzel and City Parking Ltd. was discontinued by Runnymede, but prior to the discontinuance a counterclaim was commenced by Mayzel against Runnymede and Rexdale Investments Ltd. The aim of the counterclaim was to set aside the sale of an interest in certain lands, which interest had been sold to Rexdale by Runnymede on October 6, 1964, relying on a power of sale in a mortgage of that interest from Mayzel to Runnymede. The latter mortgage had been given to Runnymede to secure an extension of time on two other mortgages held by Runnymede on adjoining lands owned by Mayzel. All three mortgages were in default on May 20, 1964, when a notice of sale was given by Runnymede.

The Mortgages Act, R.S.O. 1960, c. 245, s. 29 (rep. & sub. 1964, c. 64, ss. 4 and 5) provides that a mortgagee shall not exercise a power of sale unless a notice of such exercise in the form prescribed has been given to certain persons enumerated by the Act. Mayzel would have been one of such persons. Section 8 of the same Act provides that the foregoing provision "applies where proceedings under a power of sale are commenced on or after the 1st day of September, 1964."

The exercise of the power was upheld by the trial judge and an appeal from his decision was dismissed by the Court of Appeal. Mayzel then appealed to this Court. Runnymede and Rexdale submitted that the proceedings under the power of sale were commenced by the notice given on May 20, 1964, and that they were consequently outside the legislation in question.

Held: The appeal should be dismissed.

The Court agreed with the conclusion of the Court of Appeal that the proceedings under the power of sale were commenced by the notice of May 20, 1964; that these proceedings were never abandoned and that the right subsisted and continued up to October 6, 1964; and that negotiations between Mayzel and Runnymede which were running concurrently with the sale proceedings did not constitute a withdrawal or an abandonment of the proceedings.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Haines J. Appeal dismissed.

Claude R. Thomson, for the appellant.

John J. Robinette, Q.C., for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—We are concerned in this appeal with the counterclaim of Louis Mayzel against Runnymede Investment Corporation Limited and Rexdale Investments Limited. In this counterclaim Mayzel asked for a declaration

that the exercise of the power of sale in a certain mortgage given by him to Runnymede Investment Corporation Limited was a nullity. Both the trial judge and the Court of Appeal have upheld the exercise of the power.

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Mayzel says that the exercise of the power is a nullity because it offends s. 29 of *The Mortgages Act*, which was enacted by 1964 Statutes of Ontario, c. 64, s. 5. This legislation came into force on September 1, 1964. The new s. 29(1) provides:

29. (1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale (Form 1) has been given by him to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and the persons subject to whose rights the mortgaged property is being sold:

There is a transitional provision in the 1964 legislation contained in s. 8, which reads as follows:

8. *The Mortgages Act*, as amended by this Act, applies where proceedings under a power of sale are commenced on or after the 1st day of September, 1964.

Mayzel's argument is that the proceedings under the power of sale were commenced on or after September 1, 1964. Runnymede and Rexdale submit that the proceedings were commenced by a notice given on May 20, 1964, and that they are consequently outside the new legislation. This is the only issue involved in this appeal.

Mayzel was the owner in fee of two parcels of land on University Avenue. These were subject to mortgages which were vested in Runnymede as mortgagee. There were encumbrances prior to these mortgages. Mayzel was also interested in land known as 137 Richmond Street West, which adjoined the two freehold parcels. His interest in 137 Richmond Street West was a right to acquire a leasehold interest from Principal Investments Limited. This leasehold enjoyed a right of perpetual renewal every twenty-one years at an agreed or arbitrated amount as ground rental. To secure an extension of time on the mortgages on the freehold lands on University Avenue, Mayzel gave a mortgage to Runnymede on his right to acquire the leasehold interest in 137 Richmond Street West. All three mortgages were in default on May 20, 1964, when Run-

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Runnymede Investment Corporation Limited gave the following notice of sale. It applied both to the freehold lands and the leasehold interest. It is in the following form:

May 20, 1964.

Mr. Norton Penturn,
John Penturn & Son Limited,
25 Adelaide Street West,
Toronto 1,
Ontario.

Mortgagee's sale of freehold and
leasehold land

We wish to inform you that written Offers to Purchase will be considered by us at the offices of Messrs. McDonald, Davies & Ward, 4 King Street West, Toronto 1, on Friday May 29, 1964 at 12:00 o'clock noon, in respect of the lands described in the enclosed sketch. The lands are vacant except for a service station building located at the northeast corner of the property.

The portion of the property outlined in red is leasehold land subject to a perpetually renewable lease which provides for a current rental of \$7,200 per annum. Such rental to be re-negotiated and if necessary settled by arbitration in 1970 for the ensuing twenty-one year term and so on from term to term. The balance of the property is freehold land which will be sold subject only to an existing first mortgage for \$800,000 due as to the principal amount on October 1, 1971 with interest only payable during the term at the rate of \$4,600.03 per month.

The area of the property is approximately 60,000 square feet; the 1963 real estate taxes were approximately \$74,000 and we understand (without warranty thereof) that the net rental income derived from the property is approximately \$55,000 per annum.

A deposit equal to 10% of the purchase price, in cash or by certified cheque, will be required upon the submission of any Offer to Purchase. The balance of the purchase price shall be payable in cash or by certified cheque on June 12, 1964. The freehold portion of this property is being sold by us as third mortgage under and by virtue of the power of sale without notice contained in a first mortgage upon the said leasehold interest.

In connection with this sale we refer you to our letter of October 24, 1963, which was mailed to you. The sale contemplated by that letter was abandoned because of the furnishing by the mortgagor of the adjoining leasehold property as additional security for us. As this additional mortgage is now in default and the original mortgage has continued in default we are now entitled to sell the two properties together.

Yours very truly,

RUNNYMEDE INVESTMENT CORP. LTD.

Louis Charles

LC/ej

Enc.

This notice was sent to forty of the leading real estate agents in Toronto and a copy was also sent to Mr. Mayzel and his solicitor.

Mayzel's right to acquire an assignment of the leasehold interest from Principal Investments was in serious jeopardy. The purchase price was \$250,000 with a \$10,000 deposit. The purchase should have been completed on December 17, 1962, but because of litigation concerning the validity of the right of perpetual renewal, there were extensions from time to time. The closing date was finally extended to October 6, 1964. On that date Mayzel required almost \$250,000 to save the property.

There were continuous negotiations between Runnymede and Mayzel from the date of the notice, May 20, 1964, to the date of closing of the purchase of the leasehold interest, October 6, 1964. Mayzel's object in these negotiations was to come to some kind of agreement with Runnymede about the ultimate disposition of the property. It is admitted that no such agreement was made but on October 6, 1964, Mayzel consented to the sale from Runnymede to Rexdale of his right to acquire the leasehold interest in the hope that he would be able to come to a subsequent arrangement with the person who controlled both Runnymede and Rexdale. He signed a direction, dated October 5, 1964, to Principal Investments to assign the lease to Rexdale Investments Limited in the following terms:

TO: National Trust Company,
Receiver-Manager of
Principal Investments Limited.

RE: Principal Investments Limited sale to
Mayzel. Principal Investments Leaseholds

Please make the Assignment of the Lease between John Elias Gibson and Principal Investments Limited, dated December 15th, 1949, and registered in the Registry Office for the City of Toronto on December 4th, 1950, as Instrument Number 31971E.S. to REXDALE INVESTMENTS LIMITED, a Company incorporated under the laws of the Province of Ontario.

This shall be your good and sufficient authority for so doing.

DATED at Toronto this 5th day of October, 1964.

WITNESS:

(sgd)

Vera Christoff

(sgd)

Louis Mayzel
LOUIS MAYZEL

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On October 6, 1964, Runnymede, for a consideration of \$65,000, assigned to Rexdale all the right, title and interest of Mayzel to purchase the leasehold interest in 137 Richmond Street West under the agreement of October 19, 1962, made between Mayzel and Principal Investments.

I have mentioned that both Runnymede and Rexdale were under the same control but Mayzel, as appellant, declined to attack the transaction on this ground. He could not very well do so. He had released his interest in the property in favour of Runnymede and Rexdale in the hope that he would be able to make a subsequent agreement with them. This is more than acquiescence. He confines his attack on the transaction to the legislation amending *The Mortgages Act* in 1964. This legislation came into force, as I have said, on September 1, 1964, over a month before the exercise of the power of sale on October 6, 1964.

The Court of Appeal has held that the proceedings under the power of sale were commenced by the notice of May 20, 1964; that these proceedings were never abandoned and that the right subsisted and continued up to October 6, 1964; and that the negotiations which were running concurrently with the sale proceedings did not constitute a withdrawal or an abandonment of the proceedings. With this conclusion I agree.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Claude R. Thomson, Toronto.

Solicitors for the respondents: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.