

*Boubaris v Bluestone Group Pty Ltd* [2007] NTSC 48

PARTIES: BOUBARIS, Smaragda  
  
v  
  
BLUESTONE GROUP PTY LTD  
(ABN 20 091 201 357)

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: No 101 of 2007 (20725375)

DELIVERED: 26 September 2007

HEARING DATES: 21 September 2007

JUDGMENT OF: MILDREN J

**CATCHWORDS:**

INJUNCTION – mortgage – sale by mortgagee – late application for interlocutory injunction to restrain mortgagee from selling the property – whether arguable case – whether balance of conscience favoured the plaintiff or the defendant – prejudice to mortgagee if injunction granted – application dismissed

**References:**

Meagher, Gummow & Lehane's, *Equity, Doctrine and Remedies*, 4<sup>th</sup> edn, Butterworths, Sydney, 2002

**Citations:**

***Referred to:***

*Harvey v McWatters* (1949) 49 SR(NSW) 173

**REPRESENTATION:**

*Counsel:*

Plaintiff: A Young  
Defendant: C Ford

*Solicitors:*

Plaintiff: David C Story  
Defendant: Cridlands Lawyers

Judgment category classification: B  
Judgment ID Number: mil07410  
Number of pages: 6

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Boubaris v Bluestone Group Pty Ltd* [2007] NTSC 48  
No. 101 of 2007 (20725375)

BETWEEN:

**SMARAGDA BOUBARIS**  
Plaintiff

AND:

**BLUESTONE GROUP PTY LTD**  
**(ABN 20 091 201 357)**  
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 26 September 2007)

- [1] This is an application for an interlocutory injunction to prevent the defendant from exercising its power of sale pursuant to a registered mortgage over two parcels of land situated at 5 Nutwood Crescent, Farrar and 24 Fitzmaurice Drive, Leanyer in the Territory.
- [2] The plaintiff is the registered proprietor of both parcels of land. On 27 March 2007 the defendant served a notice of exercise of power of sale on the plaintiff. At that time the defendant alleged that the plaintiff was in arrears under the mortgage in that interest in an amount of \$7,073.64 then due and owing was not paid on 31 May 2006 and principle and interest in an amount of \$7,099.92 being due and owing was not paid on 30 June 2006.

- [3] The plaintiff claims that at the time of the service of the notice of exercise of power of sale, she was not in arrears because she had made a payment in or about October 2006 in the sum of \$35,000 which the defendant has not taken into account. The plaintiff in her affidavit says that she paid the money in cash but has not been able to locate a receipt for it.
- [4] It is not disputed that, but for the \$35,000, the notice of power of sale is valid and that the plaintiff was at the time of service and still is in arrears.
- [5] Since service of the notice, the plaintiff says that she has been seeking substitute finance with another mortgagee. The plaintiff has produced a formal letter of approval for a loan of \$742,000 to refinance the mortgages. It is not in dispute that subject to the said \$35,000 payment the amount outstanding under the mortgages is now \$805,803.32. The plaintiff has deposed that her father has applied for a loan with Majestic Mortgages Pty Ltd to be secured over a property which is registered in his name for sufficient funds to pay out the balance of the mortgage. This loan application was also annexed to the plaintiff's affidavit, but it appears to be incomplete in that it is not signed, it is not dated and it is not accompanied by referees as required by the document itself. There is no information as to when the plaintiff's father applied for those funds and there is no information enabling me to make a finding that the plaintiff's father is likely to be successful in his application.

- [6] Counsel for the plaintiff sought an interlocutory injunction only for 14 days. The mortgagee has scheduled the two properties to be auctioned on Saturday 22 September 2007 and on Wednesday 26 September 2007.
- [7] The application was brought before me on Friday 21 September 2007 urgently. It appears that the question of the payment of the sum of \$35,000 has not previously been raised with the defendant until these proceedings. The defendant denies ever having received the sum of \$35,000 in cash from the plaintiff. Further the defendant's telephone records with the plaintiff do not indicate that the subject of this payment was ever previously raised with them despite numerous calls made by the defendant to the plaintiff concerning making the mortgage payments on time and on refinancing the loans. There is no explanation for the delay in seeking the assistance of the Court.
- [8] After hearing submissions, I dismissed the application and said that I would provide reasons at a later time. These are those reasons.
- [9] I am not satisfied that there is a serious question to be tried as to the alleged payment of the \$35,000 in cash. The material in the plaintiff's affidavit is extremely vague. There is no indication of exactly when the payment was made, how it was paid, to whom it was paid or the circumstances under which it was paid. It almost defies belief that the plaintiff is not able to produce any documentary evidence in support of the payment either in the

form of showing such an amount being paid out of her own bank account or in the form of a receipt.

[10] In my opinion there is no serious issue to be tried on this question. The plaintiff, at best, has a very tenuous claim that she made a payment to the defendant of \$35,000 in October last year.

[11] Furthermore I am satisfied that the balance of convenience favours the defendant. The plaintiff submits that she will be in a position to refinance the loan within two weeks. I am far from satisfied that this is so. The material before me does not give me any confidence that the plaintiff would be in position to speedily refinance those loans with any degree of certainty. It is clear that the plaintiff has only been able to raise \$742,000 from MKM Capital Pty Ltd, leaving a balance of \$63,800 plus costs yet to be raised.

[12] The defendant tendered some evidence concerning the market value of the two properties which appear to be at best between \$775,000 and \$850,000. There is therefore a risk that the properties when sold will not bring sufficient funds to discharge the mortgage entirely. If an injunction were to be granted the defendant would suffer prejudice. First, costs and interest would accumulate; secondly, interest in the properties could be adversely affected by the cancellation of auctions so close to the auction dates; and thirdly, the longer the properties remain unoccupied the bigger the risk that the defendant may not recover its entire loan.

- [13] I take into account that the properties are investment properties and are not actually occupied by the plaintiff as her home. The defendant is in actual possession of the properties.
- [14] On the other hand, if in fact it turns out that the defendant has wrongly exercised its power of sale, the plaintiff will have an action for damages. There is no evidence to suggest that the defendant is not in a position to pay any damages.
- [15] Furthermore, as to the undertaking as to damages which would cover the costs thrown away in relation to the aborted auctions, these will only go to increase the debt where there is already a significant risk of non-recovery.
- [16] In terms of balance of convenience, it seems to me that when someone comes to court at such a late hour, an applicant needs a much stronger case to stop an auction than has been made by the plaintiff in this case.
- [17] Finally, even if I were to have granted the application, I would have at least required the plaintiff to make a payment into Court of so much as would suffice to give adequate protection to the mortgagee in accordance with the judgment of Sugarman J in *Harvey v McWatters* (1949) 49 SR(NSW) 173 at 178; see also the discussion in Meagher, Gummow & Lehane's, *Equity, Doctrine and Remedies*, 4<sup>th</sup> edn, Butterworths, Sydney, 2002 at 93-95. As it appears that the plaintiff has no ability to make any payment into Court at this time, that is also a reason for refusing the application.

[18] I therefore made an order refusing the application and ordered the plaintiff to pay the defendants costs to be taxed.

-----