IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. B 014 OF 1989.

BETWEEN	TAVARES ELLIS BANCROFT	PLAINTIFF
AND	FRANKLYN GRIER	FIRST DEFENDANT
AND	B.K. MONTEITH	SECOND DEFENDANT

Dennis Morrison, Q.C., and Miss Paula Blake, instructed by Dunn, Cox, Orrett and Ashenheim for the plaintiff.

Ms. Carol Davis, instructed by Mrs. Crislyn Beecher-Bravo for the first defendant.

Gayle Nelson for the estate of the second defendant.

Heard: April 18; May 21, 22 and 24; June 12, 13, 25 and 26; and December 20, 1996.

PANTON, J.

The plaintiff was, up to February 2, 1984, the registered proprietor of an estate in fee simple in a parcel of land at Forest Hills, Saint Andrew, registered at Vol. 1155 Folio 537 of the Register Book of Titles. On that date, the first defendant was registered as proprietor of an estate in fee simple in the said parcel of land.

The plaintiff was in 1977 minded to travel to England. As a result, the plaintiff and the defendants had discussions in relation to the execution of a lease with an option to sell. The plaintiff signed two documents - one has been identified as a lease with an option, the other as an instrument of transfer. The latter document dated December 17, 1979, was registered in the Register Book of Titles on February 2, 1984.

The plaintiff has challenged the registration of this transfer, pleading that he gave no instructions to effect the transfer. He, in paragraph 12 of his statement of claim, alleged that the registration of the transfer in the name of the first defendant was effected by the fraudulent conduct of either the first or the second defendant, or both of them acting together. It is to be noted that at the trial before me, the action was discontinued against the second defendant who had earlier given evidence under a Court Order while lying on his deathbed.

The fraud alleged against the first defendant has been particularised thus:

1. Acquiescing in engrossing or causing to be engrossed an instrument of transfer over the signature of the plaintiff while well knowing that that was contrary to the plaintiff's express instructions.
2. Presenting or causing to be presented for registration a fraudulent document.
3. Procuring discharges of mortgages without the plaintiff's knowledge or consent.
4. Conspiring to deprive the plaintiff of his interest in the said land.

The plaintiff claims, as a result:

1. a declaration that the instrument of transfer and the subsequent registration thereof were procured by fraud and are null, void and of no effect whatever;
2. an Order directing the Register of Titles to cancel the entry in the Register Book the second day of February, 1984 transferring the premises registered at Volume 1155 Folio 537 to the first named defendant;
3. an Order for the first defendant to account to the plaintiff;
4. an Order for payment of any monies found due by the first defendant to the plaintiff; and
5. damages against the first defendant.

In his defence, the first defendant has pleaded that the premises were offered for sale to him as the plaintiff was in arrears with his mortgage payments. The offer was accepted, and the lease agreement with an option to purchase was executed. An undated instrument of transfer was also signed by the plaintiff. So far as the exercise of the option in writing was concerned, the first

defendant says that the plaintiff waived the requirement. According to the first defendant, he has satisfied his responsibilities under the lease agreement and with the option having been waived by the plaintiff, he is entitled to an estate in fee simple in the land.

The first defendant has counter-claimed for a declaration that he is the owner of the land originally registered at Volume 1155 Folio 537 of the Register Book of Titles and now registered at Volume 1227 Folio 84. He is also seeking Orders directing the Registrar of Titles to cancel the registration in the name of the plaintiff and directing the registration of himself as the proprietor instead. Alternatively, he seeks damages.

THE EVIDENCE

The evidence presented to the Court discloses that the plaintiff and the first defendant were friends. The plaintiff's wife was ill in 1977, as a result of which she and the plaintiff decided to return to England where they had lived for many years. The evidence also discloses that the mortgage on the property in question was in arrears.

So far as the outcome of this case is concerned, the lease and the transfer documents are critical matters.

In his evidence, the plaintiff has denied signing the transfer. This denial contradicts his pleading. In relation to the lease, he testified that he signed it in blank. This also contradicts his pleading.

On the basis of my assessment of the witnesses and of the evidence recorded as having been given by the second defendant, I am satisfied that both documents were signed by the plaintiff. In the case of the lease, I find that the contents were indeed recorded on the document prior to signing. The transfer, on the other hand, was signed in blank and left with the second defendant. It appears that the plaintiff was under great mental stress at the time he left Jamaica due to the state of his wife's health. This may well account for his evidence that he did not sign the transfer.

There is no doubt that the plaintiff left these shores and remained away therefrom for ten years. When he returned in 1987, he discovered that his interest in the property had been erased, and that the new owner was his friend and lessee, the first defendant.

During the plaintiff's absence from the country, he was not in touch with either defendant. He left no address, no contact number, nothing.

The lease makes reference to a period of five years. However, the plaintiff said that he had been asked by the first defendant for a ten-year lease and he had agreed. The second defendant said that he had notes to change the period of the lease from five to ten years, but there had been no agreement thereafter on the matter. The fact is that the lease as written was for five years.

In my view, the lease has to be examined so that the Court may see the obligations that the parties undertook, and the rights accruing to them thereunder.

Under the instrument of lease, the plaintiff agreed to grant and the first defendant to take a lease of the land "subject to the mortgage and upon the terms, covenants, provisions and conditions hereinafter contained as of May 2, 1977. The instrument acknowledged arrears of $1,122.00 in respect of mortgage payments and the parties agreed as follows ---

1. the first defendant was to discharge and pay out of the premium of $10,000.00 all arrears due and owing by the plaintiff for principal and interest and other monies under the mortgage up to April 30, 1977, as well as arrears for telephone charges.
2. the first defendant was to pay all monthly mortgage instalments of $374.00 out of the monies payable for rent.
3. the tenancy was for a period of five years at a yearly rental of $5400.00 clear of all deductions to be paid by equal monthly instalments in advance on the first day of each month.
4. the first defendant was to pay all charges incurred for gas and electric current and power supplied to the premises.
5. the first defendant was to pay all rates, taxes, assessments etc.
6. the first defendant was not to assign or underlet or part with possession of the premises or any part thereof without the plaintiff's written consent.

The lease permitted the plaintiff where any rent or part thereof remained unpaid for fourteen days after it became due to re-enter the premises and determine the lease. Crucially, in paragraph 6 thereof, an option was given to the first defendant in the following terms ---

"If the tenant shall desire to purchase the reversion in fee simple.. and shall not less than three months before the expiration of any year of the term hereby granted give to the landlord notice in writing of such desire then the landlord hereby covenants that he will upon the expiration of such notice and upon payment of the sum of $55,000.00 together with all arrears of rent up to the expiration of the notice and interest on the said sum... at the rate of .. per centum per annum from the expiration of the notice until actual payment thereof assure the demised premises to the tenant in fee simple for all the estate and interest of the landlord therein but until the said sum of $55,000.00 together with interest as aforesaid and the said arrears of rent shall have actually been paid this lease shall continue in full force and the tenant shall not be released from any of his obligations hereunder".

The question that arises is this: did the first defendant exercise the option? If so, did he do so in keeping with the terms of the lease?

In arriving at the answer, it cannot be overlooked that Mr. Raymond Anderson, the Chief Group Internal Auditor of Victoria Mutual Building Society, the mortgagee, has said that the most striking feature of the account in this case was that it was constantly running in arrears and the property was regularly put up for sale at public auction. From 1972, the property was constantly under the threat of sale.

The plaintiff's evidence was to the effect that he was not notified of the first defendant's intention - whether in writing or otherwise. He also said that he gave no instructions to the second defendant for any transfer of his property to be effected.

The evidence of the defendant Grier is that he wrote to the second defendant Monteith telling him that he was in a position to carry out the purchase of the property. To use his own words, he was "eager to complete the purchase, not hearing from the plaintiff knowing I had a five year agreement. For option really. I had the right to carry out the purchase agreement when the purchase price was paid off."

He said further he did not have a copy of the letter that was written to Mr. Monteith. "Workers Bank wrote it on my behalf. I signed it. It was sent off. I think that I sent this letter sometime in 1981. I can't recall what happened after I sent this letter; but I know I went to Victoria Mutual Building Society (VMBS). I went to Mr. Anderson. He asked me to get the transfer from Monteith. I went to Monteith. I told him that VMBS required the transfer as I was ready to exercise the purchase. He gave me a sealed letter. He never gave me a copy of the letter he wrote to VMBS. I took the letter to VMBS. After I had signed the transfer, I never saw it again. I wrote nothing else on it at all."

I should mention at this stage that I reject the first defendant's evidence that he did not receive a copy of the letter to VMBS. I prefer the evidence contained in the letter itself (the last line) indicating that he had been given a copy.

The first defendant continued that at no time did he see the discharge of mortgage. He personally had nothing to do with the Titles Office and the transfer. He never received the title, and he does not know where it was sent. He was, it should be reminded, registered as proprietor on the 2nd February, 1984.

In his evidence, Mr. Raymond Anderson of VMBS said that it was not possible that someone from VMBS had inserted the date on the transfer. He was of the view that the document on page 39 of the agreed bundle of documents suggests that the transfer had been lodged by Workers Bank. That document is the backing of a registration of transfer addressed to Workers Bank and indicating that the transfer had emanated from the plaintiff. Perhaps, the plaintiff may well feel that the high point of Mr. Anderson's evidence was reached during re-examination when he said this: "The circumstances of this transaction were most unusual. It is the only one we have had like this in our 117 years of existence, to the best of my knowledge".

The evidence of the second defendant in this regard needs to be recounted also. It will be recalled that this evidence was given at a time when he was virtually on his deathbed. This is what he had to say:

"Sometime in 1977 - about May 1977 - the first defendant drove into my yard here and told me that Victoria Mutual desired to see his transfer. I wondered why but decided to send it to them as they were mortgagees having an interest. I handed a typed letter signed by me and unsealed to the first defendant for delivery to Victoria Mutual."

The year 1977 aforementioned appears to have been an error considering the date of the letter from the second defendant to VMBS was 21st September, 1982.

He further said:

"I deny completely that transfer and mortgage discharge was lodged by me with the Registrar of Titles. I lodged no transfer. I was never put in funds for any such purpose and I prepared no discharge. The practice is that only the lawyers of the mortgage people can prepare discharge. I would have had to have funds to pay stamp duty, transfer tax, registration fee, attorney's costs plus the debt owed to the English attorney. I collected never a penny and presented no such documents to the Titles Office."

He also said:

"The lease gave an option by notice given within three months before the expiration of any year. To my knowledge, I am not aware of any such notice being given. I am not aware of the plaintiff receiving from the first defendant the consideration of $55,000.00. I have no personal knowledge of the tenant having discharged and paid out of the premium of $10,000.00 all arrears due and owing by the landlord under the said mortgage."

Miss Davis, for the first defendant, submitted that when the second defendant handed over the transfer what was intended was completion. According to her, VMBS would only need the transfer if they were going to use it. Of course, VMBS maintains that they did not use it.

It may be appropriate at this point to quote in parts the letter written by the second defendant to VMBS for the attention of Mr. Anderson:

"Mr. Franklyn Grier now of.....has consulted me and informed me that you desire the production of the original instrument of transfer relating to the above to enable certain transactions to go through.
2. I had taken the precaution of preparing a transfer and obtained thereto the signatures of Mr. Tavares Ellis Bancroft as vendor, and Mr. Farnklyn Grier as purchaser and which signatures made in my presence were witnessed by me.
3.....
4. At the time of the execution of the above transfer and at other times the vendor Mr. Bancroft informed me that he was returning to England. I fruitlessly inquired his likely place of abode and postal address in that country, but he was unable or unwilling to supply the same. Since his return to England I have not heard from him.
5. I accordingly enclose the above transfer and at the further request of Mr. Grier, set out below the following fees to be paid....."

Then follows a statement as to the amount of the stamp duty, registration fees, transfer tax and attorney's costs. There is also a statement that Mr. Grier had been provided with a copy of this letter.

It seems clear from this letter that:

(a) the first defendant informed the second defendant that VMBS required the production of the transfer;
(b) the first defendant requested the sending of the transfer to VMBS; and
(c) the second defendant had not received any communication from the plaintiff since he left for England.

FINDINGS

Having considered the evidence of the witnesses given at the trial, and the evidence of the second defendant given on his deathbed, I am satisfied that the relationship between the plaintiff and the first defendant so far as this property is concerned is embodied in the document headed "Instrument of Lease under the Registration of Titles Act". I find that this document was executed by the parties prior to the plaintiff's departure to England. I find also that the

plaintiff did execute and leave with the second defendant the document headed Transfer of Land. This latter document was undated and was intended for use later if the occasion arose.

I find that there was no agreement for sale, as advanced by the first defendant. Rather, the agreement that existed was a lease agreement which contained an option to purchase. The first defendant who was constantly in consultation with various attorneys-at-law could not have failed to understand that it was a lease and not an agreement for sale.

The first defendant did not faithfully comply with the various terms of the lease. He was often delinquent in the payment of the monthly mortgage amounts to the mortgagee. This caused the mortgagee to be constantly threatening a sale by public auction.

The first defendant did not comply with paragraph 6 of the lease agreement. He claims that he gave written notice to the second defendant. I reject that. It is not without some significance that the first defendant has been unable to produce a copy of that notice. He cannot produce a copy as there was no original. It does not exist. It is also not without some significance that the first defendant who was always in consultation with an attorney-at-law found it convenient to avoid the use of the services of an attorney-at-law to do this most important task. After all, the first defendant would have known that the exercise of the option would have had very important consequences, legal and otherwise, for him and the property.

I find that the plaintiff was not in contact with anyone in relation to the land. He communicated no desire to sell to anyone - not to the first defendant, not to the second defendant. He clearly did not wish to sell. This conduct on the part of the plaintiff cannot be regarded as a waiver. An owner of land who does not wish to sell is not required in the circumstances that obtained in this case to do anything.

The activation of the blank transfer form was done by the first defendant in circumstances where he clearly knew he had no authority or basis so to do. The activation of this transfer form was unauthorized, and calculated to deceive. The second defendant's letter to VMBS makes it clear that he had not heard from the plaintiff. It is also clear that the first defendant had not heard from the plaintiff.

So far as the insertion of the date on the transfer form is concerned, I find that that was done as a result of either the first defendant's conduct or instructions. Workers Bank in its letter dated September 15, 1987, is saying that the transfer was not registered by them or anyone acting on their behalf. So, there is this very strange situation: the first defendant goes to the second defendant and secures possession of the transfer which he takes to VMBS; the latter does nothing with the transfer but points a finger at Workers Bank; the mortgage held by VMBS is paid up by Workers Bank; the transfer is registered, and the first defendant's name ends up on the title; all three parties (VMBS, Workers and the first defendant) claim innocence so far as the activities at the Titles Office are concerned. However, the first defendant claims the benefit from all of this. He has asserted that he has a lawful title.

All the circumstances, in my judgment, point unequivocally to the first defendant being involved in fraudulent activity in relation to the registration of the transfer. There is no allegation of a mistake having been made. If there has been no error, then clearly that which has been done was done deliberately.

In my view, the counterclaim is wholly devoid of merit. Judgment is hereby entered in favour of the plaintiff against the first defendant. The declarations sought at paragraphs 13 (a), (c), and (d) of the statement of claim are granted. Costs are awarded to the plaintiff; such costs are to be agreed or taxed.