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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B213 of 1981

BETWEEN MARJORIE BROWN-YOUNG PLAINTIFF

A N D LADDY VERNON ANDERSON DEFENDANT

N.E. Wright for the Plaintiff.

C.M. Daley and A. Lee Hing instructed by Daley, Walker & Lee Hing for Defendant.

Heard on: 23rd, 24th, 25th July, 1984

Delivered: 5th October, 1984

JUDGMENT

ELLIS J:

The plaintiff says that by an agreement dated 15th April, 1981 and signed by her and the defendant as purchaser and vendor respectively, she agreed to purchase premises 4 Orchard Road registered at Volume 277 Folio 46 in the office of the Registry of Titles.

She says that in keeping with a term of the agreement she paid the deposit of \$10,000 and engaged the services of a Land Surveyor to have the boundaries of the premises identified.

The surveyor's report disclosed a discrepancy in acreage between what was on the title and what was measured. The area measured was some 400 sq. ft. less than what was shown on the Registered Title. She communicated the fact of the discrepancy to the vendor with a request that it be remedied. Her request was not granted and after a series of correspondence her deposit of \$10,000 was returned.

She has therefore sued claiming:

- (a) Specific Performance of the Agreement

- (b) All necessary and consequential accounts, directions, and inquiries.
- (c) Damages for breach of contract in lieu of or in addition to
Specific Performance
- (d) Further or other relief
- (e) Costs

The defendant, in answer to the claim, has filed a Defence and Counter-claim. At the trial he sought and obtained leave to amend the Defence to say inter alia, that the plaintiff not having complied with the condition as to obtaining a mortgage which was a condition precedent, the agreement was thereby rendered void and unenforceable.

In the Defence as amended, the defendant admitted the agreement between himself and the plaintiff. He also, particularly at paragraph 9 of the Defence admitted a defect in title which he could not remedy. He contends that the fact that the defendant refused to accept a defective title left him no option but to return the plaintiff's deposit of \$10,000.

He counter-claimed damages for interest lost on \$100,000 which was the agreed purchase price of the property and other consequential reliefs as shown in paragraph 12 of the Defence and Counter-claim.

The plaintiff gave evidence and called in support two Commissioned Land Surveyors to say that there were discrepancies between the boundaries surveyed and those reflected on the Registered Title. In addition to viva voce evidence a number of documents were put in evidence as Ex. 1 - 12.

The plaintiff was strenuously cross-examined and objections were taken to the reception of each bit of correspondence. The plaintiff's case was not shaken in cross-examination and I admitted the exhibits as

everyone confirmed what the defendant by his pleadings admitted.

The defendant through Mr. Daley submitted that the plaintiff had not made out a case and elected to stand on his submission and to call no evidence.

Mr. Daley argued in his submission that the plaintiff failed to establish by any evidence that there was a discrepancy between the boundaries of the land as measured and the boundaries as shown on the Certificate of Title. He said that there was no evidence of a refusal by the defendant to execute a transfer of the land described in the Certificate of Title. He argued that there was no binding agreement and therefore there can be no order for Specific Performance. He contended that it was a special condition that the purchaser secured a mortgage of \$75,000 within six weeks of signing the agreement. He said that the agreement was void for uncertainty and even if it were certain it was inchoate and not of full force until conditions (b) and (c) thereof were fulfilled. In support of this contention, he cited the cases of Lee-Parker et al vs Izzett et al (no. 2) /1972/ 2 All E.R. 800 and Aberfoyle Plantations vs Cheng /1960/ A.C. 115 at pp. 125 - 128.

Mr. Daley also cited and relied on Voumard - The Sale of Land 2nd Edition at page 72 and concluded that the plaintiff's case must fail since:

- (a) the agreement is void for uncertainty,
- (b) the special conditions being conditions precedent were not performed,
- (c) the plaintiff has not given any evidence of what she was buying,
- (d) the remedy of Specific Performance is not available to the plaintiff since she admitted that the defendant acted reasonably

in seeking a meeting with the surveyors to discuss the discrepancies in the dimensions of the boundaries,

(e) the agreement is unenforceable since it is not stamped.

Mr. Wright based his reply to Mr. Daley's submission on four limbs:

- (i) The Pleadings
- (ii) The evidence led by the plaintiff
- (iii) The Law as it applies the Pleadings and the evidence
- (iv) General reply to points raised by the Defence.

On the point of the Pleadings he referred to the Statement of Claim and the Defence and Counter-claim and as I understand his argument, he submits that the defendant in his Defence has admitted the contention of the plaintiff contained in the Statement of Claim. He said that the admissions by the defendant remove any doubt as to whether there was a discrepancy in the defendant's title. He submitted that on the state of the Pleadings the plaintiff is entitled to succeed and supported this by referring to Section 307 of the Civil Procedure Code.

In relation to the evidence of the plaintiff the court's attention was drawn to Exhibit 6 dated the 6th of July, 1981. He said that letter being over one month from the period of six weeks limited for getting the letter of commitment still treats the agreement as subsisting although there is the argument that the condition have not been fulfilled. The plaintiff has placed before the court the evidence of the surveyors on whose measurement of the boundaries she relies. There has been no evidence from Mr. Betty who did the defendant's survey of the boundaries. On the evidence before the court there is clearly a discrepancy in the measurements of the boundaries and that discrepancy has been conceded

by the defendant and has been put forward as the main reason for returning the plaintiff's deposit.

He said the law applicable to this case is as stated in:

- (a) Williams on Title 3rd Edition at pages 526 - 7 and 705.
- (b) Stonham's Vendor and Purchaser, 1964 at pages 167, 233 and 750.
- (c) Vounards - The Sale of Land 2nd Edition at page 377.

On the point raised by the defendant as to non compliance with the condition the plaintiff contends that they were complied with and that compliance was communicated to the defendant by letter of June 8, 1981. It was submitted that the terms of the mortgage are not vague and in the circumstances the case of Lee-Parker et al vs. Izzett (no. 2) /1972/ 2 All E.R. 800 is easily distinguishable. He invited the court to say that the plaintiff has made out a case.

In this case several documents including an unstamped agreement were admitted as exhibits. Their admission was objected to by the Defence. The court admitted them because they were found to be relevant to and probative of the issues raised in the case. Also they were merely confirmatory of what the defendant admitted in his Pleadings. In admitting the unstamped agreement the court was mindful of Section 36 of the Stamp Act which excludes the admission of unstamped documents as evidence in civil proceedings. Equally however, the court was mindful of the law that parties are bound by their pleadings. The whole tenor of the Defence in this case, was an admission of the agreement as alleged by the plaintiff to have been made by the parties. To have excluded that document would have been contrary to law and would not have conduced to justice.

On a consideration of the evidence and the arguments advanced I make the following findings:

1. There was an agreement between the parties to sell and to purchase the parcel of land described in the Schedule thereto.
2. The measurements of the boundaries as shown on the Registered Title differ from those identified by two Commissioned Land Surveyors.
3. This difference in boundary measurements would result in the plaintiff getting some 400 sq. ft. of land less than what she agreed to purchase.
4. The condition as to the plaintiff obtaining a mortgage has been fulfilled because:
 - (a) the case of Lee-Parker vs. Izzett /1972/ 2 All E.R. 800 is distinguishable from the instant case.
 - (b) the defendant by exhibit 6 dated 6th July, 1981 treated the agreement as still in force in spite of the allegation that there was no compliance with the condition as to the mortgage.

On the above findings I hold that the defendant's contention that the plaintiff has not made out a case is untenable.

What is the remedy available to the plaintiff?

When it is a question of a purchaser insisting upon the purchase being carried through, as in this case, the proposition is that it would be inequitable for an innocent purchaser to accept something different from what he contracted to buy. Equally, it would be equitable to insist that the vendor conveys what he has, with an abatement of the contracted purchase price.

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The right of a purchaser to a decree of Specific Performance of a contract with an abatement of purchase price applies only where there is a deficiency in the subject matter described in the contract. The case of Rutherford v Acton-Adams (1915) A.C. 866 is a binding authority for that proposition and I adopt the reasoning and apply it to this case and hold that the plaintiff is entitled to the remedy of Specific Performance with an abatement of purchase price. The deficiency in the amount of land has been ascertainable to be 400 sq. ft. and therefore the abatement in purchase price can be easily calculated.

The plaintiff did make claims for remedies other than for Specific Performance. In the circumstances those claims with the exception of that for costs are rejected.

The plaintiff will have judgment on the claim and on the counter-claim and the court makes a decree for Specific Performance with an abatement of purchase price, such abatement to be the value of the difference in the area of land which was ^{contracted} ~~contained~~ for and that which was shown by survey.

Costs to the plaintiff to be agreed or taxed.

not agree with these findings. Any citizen of unblemished character must, in a similar situation, suffer indignity and humiliation. He was in danger of being convicted, if not losing his liberty. As said in McGregor on Damages, "it therefore seems that the plaintiff can recover in respect of the risk of conviction; this is basically injury to his feelings."

Accordingly, despite the arguments of Mr. Langrin to the contrary, we granted the application of Mr. Millingen for an amendment to the respondent's Notice of Intention so as to allow this Court to assess damages for malicious prosecution. We therefore assessed those damages at \$2,000.00, which marks the aggravated element in the defendant's bad conduct. The judgment was in the event further varied by the setting aside of the award of \$2,000.00 for exemplary damages. Added also is the sum of \$1,000.00 for loss of earnings for 10 days at the rate of \$100.00 per day, which was claimed and proven in evidence, but not awarded by the trial judge.

The final award of damages was therefore assessed at \$5,550.00 with costs of the trial to be taxed or agreed. The appeal was dismissed without costs.

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