[2012] JMSC Civ168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV4220 OF 2008

BETWEEN	**ROBERT EVAN DUNCAN**	**1ST CLAIMANT**
A N D	**JENNIE RICKETTS-DUNCAN**	**2ND CLAIMANT**
A N D	**RALPH SMITH**	**DEFENDANT**

Canute Brown, instructed by Brown, Godfrey & Morgan for the Claimants.

Franz Jobson and Philpotts Brown, instructed by Clough, Long & Co. for the Defendants.

Contract for sale of property – Whether there was breach of contract by claimants or defendant – Failure by claimants to comply with terms of contract for sale of property – Termination of contract for sale of property – Effect of termination of contract for sale of property.

HEARD: 16TH November 2011 & 8th November, 2012

CORAM: ANDERSON, K., J.

[1] This mater concerns the proposed sale by the Defendant to the Claimants of an apartment on land which is described in the Certificate of Title pertaining to same as being all that parcel of land part of Fort Lands of Prospect Hill Pen and part of Clanside situated at Montego Bay in the parish of St. James, being the strata lot numbered 6 on the strata plan numbered 282 and shares in the common property comprised in Certificate of Title registered at Volume 1182 Folio 813. The address for that premises is known as: 419 Upper Deck, Montego Bay, St. James. Prior to the agreement between themselves, for the sale of that land parcel by the Defendant to the Claimants, it had been agreed between themselves, on August 1, 2003, that the Defendant would lease said apartment premises to the Claimants for the sum of $20,000 per month.

[2] There initially was dispute between the parties as to what was the date of the sale agreement and that issue is one which, for reasons which will later become obvious from this Judgment, is of some importance as regards this particular Claim. The Claimants are contending through the 1st Claimant's evidence, that there were two agreements for sale, one dated February 18, 2005 and the other on June 15, 2005 and the Claimants contend that the operative agreement for sale between the parties was the latter. The 1st Claimant has testified that the only difference between these two agreements for sale is the date inserted therein, as the respective dates of each and also the signature. On the other hand, the Defendant contended in his pleadings in terms of his Defence, that there was only one agreement for sale, that being dated February 18, 2005. Interestingly enough, in the Claimants' Particulars of Claim, the Claimants had suggested that there was one agreement for sale, that being dated June 15, 2005. As things turned out from the evidence, both of the 1st Claimant and from the Defendant, through his Attorney-at-Law who had carriage of sale at the material time, namely, Mr. Clayton Morgan, it became apparent, as both of these witnesses expressly so testified, there were in fact two agreements for sale between the said parties in respect of the said land parcel and that the first of these was in fact dated February 18, 2005 and the second of these was dated June 15, 2005.

[3] The Defendant has agreed, through the evidence of his witness, Mr. Clayton Morgan, that the only difference between the two agreements were the dates and the signatures. The difference in terms of the signatures on the respective agreements, was that when the first agreement for sale was signed by the parties on February 18, 2005, the Claimants were not then married. Thus, the 2nd Claimant signed that agreement in the name – "Jenni Ricketts" as distinct from what became her married name when she, not long thereafter, married the first Claimant, this being – "Jenni Ricketts – Duncan."

[4] Mr. Morgan testified also, that this change in marital status of the Claimants and the unmarried status of the Second Claimant when she signed the first agreement, was one of the reasons why he prepared a new agreement for sale between the parties

which was executed by them and dated June 15, 2005. He went on to testify that the second reason for his having prepared and had the parties execute a second agreement for sale was that the statutory period for stamping the first agreement, being 30 days from as of February 18, 2005, had expired and as such, if thereafter stamped, the purchasers would have incurred severe penalties when the time came for stamping of that first agreement. It was in an effort, he told the Court, to prevent that from occurring, coupled with the other reason, that being the change in marital status of the purchasers, which caused him to prepare and have the parties executed a second agreement for sale. Interestingly enough, the second agreement for sale made no reference to the first agreement. When he was cross-examined about the failure to make reference to the first agreement for sale in the second agreement for sale, Mr. Morgan testified that he should have made reference in the second agreement to the first agreement and that the 2nd agreement supersedes the first, but he had omitted to do so.

[5] It is very clear to this Court though, that notwithstanding his failure to do so, the latter agreement for sale must, of necessity, have superseded the first, this especially since the first agreement had provided that the sale was to be a cash sale and thus, was not contingent upon the purchasers obtaining any financing to purchase the property and further and even more importantly in that particular context, had provided that the date for completion was to have been 90 days from the date of its execution. From this, it follows that since that 90 days period past February 18, 2005, would have required completion on a date when the second agreement was executed, that being June 15, 2005, then if the parties had intended, as of June 15, 2005, to treat the earlier agreement as still then being extant, then a new agreement should not have been executed by them upon that latter date, setting out therein the same terms and conditions as the earlier agreement, these including that a deposit of 10% was to have been paid on execution of the agreement, as well as the vendor's relocation expenses in the sum of $168,000 and also, the purchaser's 50% share of some of the closing costs as well as the cost plus G.C.T. for the preparation of the agreement for sale by the vendor's Attorney.

[6] There also had existed, surprisingly to this Court, in view of the evidence of the defence witness, Mr. Morgan, on the respective pleadings, dispute as to whether the Claimants had paid over to the Defendant's Attorney, a sum of $300,000 upon execution of the agreement for sale on February 18, 2005 – this being 10% of the purchase price, which was set at $1.6 million and a further $140,000.00 which would have been the portion of the closing costs due to have been paid by the intended purchasers; this being a sum which is referred to in the Defendant's Amended Defence and not disputed by the Claimants, as being $77,125.00. As already mentioned herein, the intended purchasers, being the Claimants, were also to have paid the sum of $168,000.00 on execution of that second agreement, just as indeed, on execution of the first. By my mathematical calculation, since the closing costs would have amounted to $77125.00 and the Claimants contend and above the 10% purchase price deposit, this would therefore mean that a sum of $62,875 ($14,000 less $77,125) would have from as of February 18, 2005, been paid towards the vendor's relocation expenses of $168,000 – as stipulated in both of the agreements for sale.

[7] During the trial itself, it actually emanated from the evidence given, both by the 1st Claimant as well as by the Defendant's witness – Mr. Morgan, that there is in fact no dispute that the sum of $300,000 was paid to the office of Mr. Morgan, as his office had carriage of sale and that, as Mr. Morgan himself testified, he would be surprised if a receipt had not been issued arising from the payment of same. The 1st Claimant testified that he did indeed get a receipt, but that same cannot now be located as personal items of his were removed from the apartment which is the focus of this Claim. What is also equally clear from the evidence of the respective parties, is that that cheque for $300,000 was never at any time negotiated, either by the Defendant or by his Attorney – Mr. Morgan. In fact, three other cheques amounting to a total of $2,026.000 were, over a period of time, paid in to the office of Mr. Morgan, in relation to the sale transaction, but none of those cheques were ever negotiated. In fact, all of those cheques, except for the $300,000.00 cheque payment to Mr. Morgan's office, were later returned by Mr. Morgan, to the Claimants' Attorney.

[8] There is no dispute that the Claimants paid the sum of $1.3 million by cheque to the Defendant's Attorney having carriage of sale (Mr. Morgan), on December 30,' 2005. By then though, the Defendant had delivered to the Claimants a Notice to complete. That Notice required the Claimants to pay the balance of the purchase price within 30 days thereof. That notice is dated December 1, 2005 and further provided that …"the vendor will hold you liable for any loss or damage that may be incurred by them by reason of any delay in default on your part in completing the said purchase or otherwise in relation to the said Agreement and will forfeit the amount paid under the said Agreement as a deposit and treat the aforesaid Agreement as at an end or take such steps as they may be advised to enforce the said Agreement or cancel same and institute Court proceedings in the event of the said Agreement not being completed within the time specified herein."

[9] That Notice to complete was addressed to the purchasers, being the Claimants, at : Apartment 419 Upper Deck, Sewell Avenue, Montego Bay. One of the "Special Conditions" of the Agreement for sale which was executed on June 15, 2005, is that – "Any notice or demand to be served or made on either party hereto shall be deemed to be sufficiently served or made as the case may be if sent by pre-paid registered post addressed, to the party's Attorneys-at-Law stated in this Agreement for sale and shall be deemed to have been received five (5) days after the date of posting in any post office in Jamaica (except where the address for service of either party or both parties in (sic.) outside Jamaica fourteen (14) days shall be substituted for the said period of five (5) days. This method is not exclusive and shall be in addition to any other available procedure."

[10] Insofar as the Notice is concerned, there is no dispute that the Claimants/purchasers received that Notice to complete prior to the expiration of the period, that being up until December 30, 2005, by which the purchase price was to have been paid, failing which the agreement was to be treated as being at an end and the vendor/purchaser would have had available to him, full recourse to his legal rights, in

the event of the intended purchasers' non-compliance therewith. Since the Notice to complete allows for such Notice to be given, not only by the specified method, but also by means of "any other available procedure," this Court is satisfied that such Notice to complete was in fact of such a nature that, insofar as it was addressed to the Claimants as the same apartment which is the subject – matter of this Claim and which the Claimants were then occupying as the lessees, it was duly served from as of whatever date the Claimants received the same. Clearly, that date must have been on or before December 30, 2005, since that is the date of the cheque for $1.3 million and that cheque was, prior to its payment at the office of Mr. Morgan, preceded by an electronic mail correspondence sent by the 1st Claimant to the Defendant's Attorney Mr. Morgan. That correspondence is dated December 21, 2005 states that Mr. Duncan had just received information, "last night" from his sister regarding his letter re transaction between, "Mr. Smith and us" Mr. Duncan then went on to state in that correspondence that he had some difficulties completing the transaction within the time promised and that he is seeking "patience to extend the period until the end of January 2006 to have the full amount paid without any loan." No such further extension was at any time forthcoming from the Defendant. It seems clear in this context, that the Claimants became aware of the Defendant's Notice to complete from as of December 20, 2005, this in any event, having been well outside of the 90 days period commencing as of June 15, 2005, for completion of the sale/purchase. It must be recalled also, that nowhere in the second agreement for sale, just as also nowhere in the first, was it provided that the agreement was contingent upon the Claimants obtaining loan financing. Thus, the sale was to be, in common Jamaican parlance, "a cash sale." Also, the second agreement for sale, just as the first, had expressly provided that it was a, "special condition" of that agreement, that, "Time is of the essence of this contract." Thus, in terms of the payment of all sums required to have been paid by the purchasers arising from the agreement, up until December 31, 2005, the intended purchasers had only paid the actual purchase price for the property, that being $1.6 million. According to the wording of the Notice to Complete however, there exists an issue for this Court to now resolve, as to whether that was what was then, pursuant, to that Notice, specifically being required by the vendor/Defendant, to have been paid within 30 days of the date of

that Notice. This is because, that Notice did not require the payment within 30 days of the date thereof, of all sums required to be paid under and pursuant to the agreement. Instead, it required the purchasers to pay,"the balance of purchase money within 30 days of the date hereof."

[11] Is the wording as used in that Notice to complete "balance of the purchase money," to be equated with the balance of the purchase price for the said property? If it is, then by December 31, 2005, the intended purchasers would have fully complied therewith, since by then, the sum of $1.6 million had already been paid into the office of the Defendant/vendor's Attorneys-at-Law, by the intended purchasers/Claimants. If it is not to be so equated however, the legal result would, of necessity, be vastly different, insofar as that would mean that not only would there have been non-compliance by the intended purchasers with the agreement itself, but also with the Notice to Complete and that Notice made it clear that if there was a failure to comply therewith, the agreement would be treated as, "at an end."

[12] In my view, although it was not perhaps as carefully worded as it either would or should have been, the Notice requiring the Claimants/intended purchasers to pay the balance of, "the purchase money", could only properly be interpreted as being a reference to all monies due and payable by the purchaser under and pursuant to the second agreement for sale, in order for the sale of the relevant property to be effected. This is no doubt how the intended vendor would have understood such wording and I have no doubt that this is equally so for the intended purchasers. That is therefore the interpretation which should be applied to that wording, by this Court now. See: **Investors Compensation Scheme v West Bromwich Building Society – (1998) 1 W.L.R. 896 .**

[13] There can be absolutely no doubt in the circumstances that overall, not only was there a fundamental breach of the agreement by the Claimants but also, they further failed to comply with the Notice to Complete. In that context, the Defendant was perfectly entitled to have, as he did, treated the agreement as being at an end. The Defendant in having done so, exercised his option to treat the agreement as though it

was at an end. There was thus no obligation on the Defendant, as at the end of December, 2005 to treat the sale agreement as then still subsisting. By then, the Claimants had breached a condition of the agreement that time was to habve been "of the essence." The Claimants breach of the agreement for sale, was never, at any time, waived by the Defendant.

[14] In view of that conclusion by this Court, the Claimants' Claim for an Order of specific performance and further or alternatively, for damages for breach of contract, must be denied. In addition, all Declaratory reliefs being sought by the Claimants must be denied. The Claimants have sought no relief whatsoever in respect of the termination by the Defendant of the lease agreement as between himself and the Claimants, nor as to the seizure by the Defendant of the Claimants' personal property in that said home which was leased to them and which was also the subject of the subsequent agreement for sale. Insofar as no such relief was sought, none can or will be granted by this Court. In fact, this Court has not given any consideration whatsoever to any of the legal issues that would have pertained to the termination of the lease agreement.

[15] Only one other issue remains to be determined by this Court, and it is as regards whether the $300,000 deposit which it was, on the evidence as presented at trial, agreed between the parties, as having been paid by the Claimants to the Defendant's Attorney who had carriage of sale, is now to be Ordered by this Court to be paid to the Claimants by the Defendant.

[16] That $300,000 deposit would not, even though, the contract between the parties was, as of December 31, 2005 treated by the innocent party as being at an end, have been refundable to the Claimants by the Defendant. That sum, if it had already been paid by then, would have been a sum that the Defendant would have been entitled to retain. In addition, the Defendant could sue for damages, so as to recover any additional sums which would have been due to him arising from the Claimants' non-performance of their contractual obligations. The Defendant has filed no Counter-Claim and thus, no relief whatsoever can or will be awarded to him by this Court. If the

$300,000 was paid by the Claimants and there existed proof of such payment received by the Defendant or by his Attorney, acting on his behalf and if such payment was made before the Defendant treated the agreement for sale as at an end, the Defendant would have been entitled to retain that $300,000. As things have emerged before this Court at trial however, no proof was ever provided to this Court by the Claimant, that the $300,000 cheque which was admittedly paid in to the Defendant's Attorney's office by the Claimants was ever negotiated by the Defendant or by the Defendant's Attorney. The copy cheque provided to this Court by the First Claimant, in respect of that $300,000 sum, shows no markings on it from any financial institution, as would suffice to show that that cheque was ever negotiated by the named recipient of same – that being the Defendant's Attorney. In addition, no evidence has been provided to this Court by anyone that such cheque was ever negotiated by anyone. There is evidence of payment of the cheque to an Attorney's office. This is not and cannot be equated with receipt of the sum specified on that cheque by either the Defendant or the Defendant's Attorney. Such receipt could only arise if the cheque had been negotiated. In the absence of proof by the Claimants of there having been such negotiation, the Claimants' Claim for refund of the $300,000 paid, must also fail.

[17] This Court grants Judgment in favour of the Defendant. The costs of the Claim are awarded to the Defendant, with such costs to be taxed if not sooner agreed. An Order in that regard, should be filed and served by the Defendant .

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Honourable Kirk Anderson, J.