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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02970

BETWEEN	ROY PAHARSINGH	CLAIMANT
AND	JAMAICA REDEVELOPMENT FOUNDATION INC.	DEFENDANT

Mr. Anthony Pearson instructed by Pearson & Company for the claimant.

Mrs. Alexis Robinson, instructed by Myers, Fletcher & Gordon for the defendant.

Heard the 16th and 22nd July and 23rd September 2010

G. Brown, J.

The claimant seeks an interlocutory injunction to restrain the defendant from exercising a power of sale contained in a mortgage.

He filed a fixed date claim form dated the 23rd June 2010 against the defendant for the following relief:-

1. An Order for the Discharge of Mortgages #416834, #653707, # 777876.
2. An Order for the return of the Claimant's Duplicate Certificate of Title.
3. An Injunction to prevent the defendant its servant and/or agents from selling or offering for sale by way of auction or otherwise premises known as Crodel Park, 49 Old Harbour Road, St. Catherine and being the premises comprised in Certificate of Title registered at Volume 1176 Folio 330.

On the 24th June 2010, Miss Justice Simmons (Ag.), granted an exparte injunction.

The claimant maintained that his debt of $6,006,030.28 was assumed by a third party, thereby discharging his obligations to the defendant.

Mr. Pearson relied on a proposal from the Sugar Company of Jamaica Ltd. to National Commercial Bank Ltd to remit the said sum. The letter dated the 11th May 1999 reads:

> We hereby confirm that the amount of J$6,006,030.28 is owed to Paharsingh Engineering Works by our Frome Division. Mr. Paharsingh has asked us to remit this amount to your bank on his behalf based on our payment schedule, which is as follows:
>
> Fourteen equal payments in crop-months
> 1999 - May and June 2
> 2000 - January - June 6
> 2001 - January- June 6
> Total 14
>
> We look forward to your acknowledgement in due course.
>
> Yours faithfully,
> The Sugar Company of Ja. Ltd.
>
> Ronald E Chin
> General Manager- Finance
>
> Cc Mr. Roy Paharsingh

The bank responded by letter dated the 2nd January 2000. It reads:

> We refer to our letter of 1999 May 26 and advise that we have FINSAC's approval to accept your proposal to pay us the amount of $6,006,030.28 in fourteen equal payments in crop.
>
> We confirm that we received two payments totalling $842,002.16 representing payments for May and June 1999.
>
> We look forward to the commencement of the next round of payment as outlined in your letter of 1999 May 11.
>
> Yours Truly,
>
> IAN K. WATSON
> ACTING ASSISTANT GENERAL MANAGER
> ASSET QUALITY CONTROL DIVISION

The defendant was opposed to the application for an interlocutory injunction and contended that the exparte injunction should be discharged for the following reasons:

(a) The claimant failed to disclose in the application for the exparte injunction that he has another action relating to same mortgage.

(b) He had also obtained an exparte injunction which was discharged at the inter parties hearing before King, J.

Mr Pearson, in his written submission, stated "that the failure to mention the first claim, the injunction granted, and discharged does not amount to a material non disclosure as it was innocent, ...it did not mislead or attempt to mislead the Judge."

The claimant did not appeal the decision by the court and had not discontinued the claim. Thus there are two actions before the Court for the same cause. This was brought to the court's attention by the defendant who claimed that in discharging the exparte injunction, the Court decided that there was no serious issue to be tried and also that damage was an adequate remedy.

Mrs. Robinson submitted that the claimant had a "duty to give full and frank disclosure of the material facts of the matter to the court on an exparte hearing for an injunction and thereby misled and/or attempted to mislead the judge" and the application should be dismissed. Interim injunctions belong to that exceptional category of remedies which are granted in the absence of the defendant. In exercise of the court's discretion to grant such a remedy an essential prerequisite must be that the matter is of such urgency that there is no time to serve the defendant. In exceptional cases, the certainty of success at the interlocutory stage may persuade the court to grant the remedy where urgency is not established, but this is rare. (Per Downer J.A. in **Inglis and McCabe v Granburg** (1990) 27 J.L.R. 107 at P. 109.

This principle was again emphasised in **NCB Ja. Ltd v Olint Corp. Ltd.,** Privy Council Appeal No 61 of 2008 at para 13. It reads:-

> "Audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships could expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

In that case, the claimant had failed to give notice to the bank who was seeking to close its accounts. The court allowed the appeal and dismissed the injunction.

It was evidently clear that the claimant fell asleep after the 20th day of April 2010 when the court dismissed his application for the injunction. He only reacted because of the advertisement for the auction sale. He made no mention of his previous application in his affidavit. This information would have alerted the Court not to hear the matter in the defendant's absence. He ought to have given the defendant notice of his application for an exparte injunction. He had not sought to explain his failure to do so or the reasons for the delay. Thus, the court should not entertain this application unless he has an overwhelming case on its merit.

In this instant case, the claimant was indebted to the National Commercial Bank. The debt was sold to the defendant who entered into two compromised agreement with him. Subsequently, the Sugar Company of Jamaica wrote to the bank and advised them that, "Mr. Paharsingh has asked us to remit this amount to your bank on his behalf based on our payment schedule." The bank sought the defendant's approval before accepting the proposal. It was the claimant's contention

that by virtue of an acceptance of a proposal that a third party would remit the sum owed by 14 payments and had made some payments to the defendant that he was released from his obligations and the Sugar Company was liable. He was replaced as the debtor by the latter and therefore the defendant should seek to recover any outstanding sum from that company.

It is settled law that payment of a lesser sum in satisfaction of a larger is not good discharge unless there is an accord and satisfaction. Thus, a creditor who accepts, in full satisfaction, part payment of a debt by a third party, cannot later recover the balance from the debtor. In **Cook v Lister** (1863) 13 C.B., N.S. 543, at pp.594, 595, Willes J. said:-

> "If a stranger pays a part of the debt due in discharge of the whole, the debt is gone, because it would be fraud on the stranger to proceed."

However, in this case, the defendant did not agree to accept a part of the compromised sum from a third party who had offered to remit that sum and have failed to do so. Thus, payment of a lesser sum without more does not discharge the greater.

The thrust of the claimant's case was based on the doctrine of novation which is defined as "a tripartite agreement whereby a contract between two parities is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party. A common instance is where a creditor at the request of the debtor agrees to take another person as his debtor in the place of the original debtor." (Osborn's Concise Law Dictionary 6th ed. by John Burke)

It was quite clear from the correspondence between the parties that the defendant remained the debtor and not the Sugar Company of Jamaica. The premises at Volume 1176 Folio 330 remained as the security for the loan.

The Sugar Company of Jamaica had failed to remit the amount to settle the debt as agreed in the compromised agreement. This was known to the claimant.

This was clearly not in the category of 'an exceptional case' for the Court exercise its discretion to grant the injunction. The claimant ought to have advised the defendant of his application for the exparte injunction.

The application for interlocutory injunction is refused.

Cost to the defendant to be agreed or taxed.