IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. R-047 OF 1991

BETWEEN	GEORGE RATTRAY		PLAINTIFF
A N D	SONIA SMITH	FIRST	DEFENDANT
A N D	MARGARET SMITH	SECOND	DEFENDANT

Clarke Cousins and Andre Earle for Plaintiff.

Miss Carol Davis for Defendants/Applicants.

HEARD: 12th, 18th December, 1995 and 20th December, 1995

SMITH J:

Before me is a Notice of Motion dated 26th July, 1995 for leave to set aside a default Judgment entered on the 29th May, 1995 and to extend time for application so to do.

The plaintiff is the registered proprietor of land situate at 9 Bolam Avenue, Kingston 20 in the parish of St. Andrew and comprised in Certificate of Title registered at Volume 1223 Folio 227 of the Registered Book of Titles. This land was previously registered at Volume 1120 Folio 543 of the Register Book of Titles. It is necessary to set out the background of this case.

Documents filed indicate that on the 14th January, 1976 Lloyd George Rattray transferred the land to one John Thompson of 1A Carter Avenue, Kingston 10 for $8,500.00.

On the same day John Thompson purportedly transferred the land to one Ena Walker of 16 Woodlawn Avenue, Kingston 8 for $12,000.00.

A document headed "Agreement for Sale and Purchase" and dated 6th May, 1976 purports to contain an agreement between one Ralphston Walker of 16 Woodlawn Avenue and one Cover Lloyd Campbell of 18 Benbow Crescent, Patrick City to sell and purchase respectively the property. The sale price was $46.000.00.

The law firm of Judah, Desnoes and Company now renamed Nunes, Scholefield, DeLeon and Company had the carriage of sale.

Sometime in 1980 Mr. Campbell rented 9 Bolam Avenue to the defendants. The second defendant in an affidavit dated 27th July, 1995 swore that since February, 1980 the first defendant and herself have been renting premises located at 9 Bolam Avenue

from Mr. Lloyd Campbell who to their knowledge is the landlord and owner of the said premises and who has been in possession since 1976.

The Plaintiff/Respondent in an affidavit stated that the Lloyd Campbell referred to above has not or ever been legally entitled to possession of my said premises nor did I ever authorise him to sign same."

He further stated that the signature on the document dated 6th May, 1976 is not his. The document "does not bear my signature at all" he asserts. "I have never executed any transfer of land to anyone in relation to the premises at 9 Bolam Avenue, Kingston 20," he swore. He also denies knowing any person by the name of John Thompson who is purported to be the original Transferee.

In short Mr. George Rattray is saying that his signature on the document which purports to transfer the land in question to one John Thompson was forged.

On the 30th August, 1990 Lloyd Campbell filed a Writ of Summons, Suit No. C.L.1990/C310 naming Ralphston Walker, the firm of Nunes, Scholefield, DeLeon and Company and George Rattray as first, second and third defendants respectively. By this Writ of Summons Lloyd Campbell claims inter alia specific performance of agreement for sale dated 6th May, 1976 against the first and second defendants and an injunction against the third defendant restraining him from entereing the premises at 9 Bolam Avenue.

It would seem that this action was discontinued as indicated in the affidavit of Mr. Ballentine dated 11th October, 1995. In its place a new suit was filed, Suit No. C.L.1991/C126 dated 18th March, 1991. In this suit the plaintiff Lloyd Campbell claimed damages for fraud against both Nunes, Scholefield, DeLeon and Company (first defendant) and Beryl Murray (second defendant).

On the 3rd day of April, 1991 George Rattray filed a Writ of Summons against defendants Sonia Smith and Margaret Smith claiming possession of the premises at 9 Bolam Avenue and damages or mesne profits. A defence to the claim was filed by the Smiths, the defendants.

On the date set for hearing (29th May, 1995) neither the defendants nor their attorneys were present. Judgment in default was given on the basis of the defendants' failure to appear and was entered in favour of the plaintiff on the 29th May, 1995. The defendants now seek to have this defaulf judgment set aside.

Miss Davis for the defendants who are the applicants in this matter submitted that the real issue here is whether or not the absence of the defendants was excusable.

She contended that whether or not there is merit in the defence is not relevant at this stage. Only in exceptional circumstances she contended would such question be relevant at this stage. In support of this contention she relied on Bracken v. Ailpin (The Weekly NOtes August 6, 1921, 274). However in my view that case did not address the question of whether the merits of the matter should be considered in an application to set aside default judgment. The Court of Appeal there was concerned with whether or not the order for retrial ought to have been made without an affidavit of merits. The court held that where judgment was entered in default of appearance or of defence the common practive was to require an affidavit of merits before the judgment could be set aside. It is otherwise where the case for the plaintiff has been heard in court and the defendant is absent, for in such circumstances the judge would have known something of the merits since the defence would have been filed.

Counsel for the defendants also referred to Grimshaw v. Dunbar (1953) 1 Q.B. 408 and Hayman v. Rowlands (1957) 1 W.L.R. 317. In the former case Jenkins L.J. at pp. 414-416 mentioned some of the main considerations which he conceived should influence the judge in the exercise of his discretion:

> (1) The reason why the party failed to appear when the case was heard;
>
> (2) Whether there has been any undue delay by the absent party in launching his proceedings for a new trial; delay in itself would not be important, but delay prejudicing the other party or delay enabling rights of third parties to intervene would be material;
>
> (3) Whether the other party would be prejudiced by a new trial in any respect which could not be adequately compensated by a suitable award of costs.

Having set out these three considerations Jenkins L.J. went on to say at page 416:

> "Then there is a more debatable point, as I regard it, as to how far the judge should consider the prospects of success of the party applying for a new trial. No doubt the judge is entitled to satisfy himself that the party applying has a bona fide intention of defending the action and that there is some possibility of his doing so with success. For example, I apprehend that if an admitted and self confessed trespasser allowed judgment for possession to go in default in his absence the judge would be entitled, on an application for a new trial, to refuse on the ground that he was palpably a trespasser and could not whatever evidence he gave, possibly justify his presence in the house. But, short of cases of that kind, I think that

> a new trial should seldon if ever, be refused merely on the ground that the applicant's case appears to be a weak one ....."

Grimshaw v. Dunbar was applied in Hayman v. Rowlands (supra).

I agree with Mr. Clark Cousins Counsel for the plaintiff (the respondent in this motion) that from the above it is clear that in the exercise of his discretion as to whether he should order a new trial the judge should satisfy himself that the party making the application has an arguable case. In other words there should be some possibility of his succeeding at trial.

I therefore cannot accept Miss Davis' submission that the only issue here is whether or not the absence of the defendants was excusable.

Miss Davis further submitted that the reason given by Mr. Ballentine, the then attorney for the defendants, for his absence, viz that he was unaware that the matter was fixed for the 29th March, 1995, was not refuted. Mr. Ballentine in his affidavit had said that this was due to the fact that his clerk was unable to collect the weekly court list from the Supreme Court Registry.

Mr. Cousins did not in his submissions deal with the reason given for the absence of the defendants and their attorney or their delay in making the application for a new trial. He however is opposing this motion on the ground that the defence files does not raise any triable or arguable issue so as to justify the court in setting aside what is a regularly obtained judgment at trial.

Mr. Clark Cousins for the plaintiff submitted that Mr. Lloyd Campbell did not have the requisite intention which is critical to satisfy the doctrine of adverse possession. He contended that the Writ dated March, 1991 is clear evidence that Lloyd Campbell thought he was a purchaser in possession and was entitled to possession as of right. Thus, he argued, Lloyd Campbell did not have the intention which is necessary to establish adverse possession. Counsel referred to S.70 of the Registration of Titles Act and contended that whatever the evidence in the circumstances of this case the defendants cannot defeat the title of the plaintiff to the land at 9 Bolam Avenue.

Miss Davis on the other hand referred to the proviso of S.70 of the Act and submitted that a registered title could be defeated by possessory title. She contended that there is an issue as to whether or not Mr. Lloyd Campbell who has been in possession of the said premises since 1976 has established all the requirements for a possessory title which could defeat the registered title of the plaintiff. The she said could only be determined by evidence at a trial. She argued that even though Mr. Campbell thought he

was taking possession as a purchaser such possession may be found by a trial judge to be 'adverse.' For this she relied on a passage in Elements of Land Law 2nd Edition by Kevin Gray LLD at p. 297:

> "(d) Adverse possession need not be hostile. Adverse possession operates as an essentially objective process of law. The mere fact that possession must be 'adverse' does not mean that it must necessarily be hostile. Possession may be objectively adverse to the interests of the paper owner without the relevant parties necessarily becoming in any subjective sense, adversaries in respect of the possessory acts which are subsequently a matter of dispute.
>
> Thus it is quite possible that adverse possession may occur without either the paper owner or the adverse possessor having any knowledge of it at all.
>
> A title may be acquired through adverse possession even though the claimant, through ignorance or mistake, was unaware of the true ownership of the property. 1 Indeed the animus required of the adverse possessor relates not to ownership of the land at all but rather to the assertion of a factual degree of 'complete and exclusive physical control' over the land 2 - an assertion which is wholly consistent with an erroneous assumption of entitlement. A plea of adverse possession can therefore succeed even though both parties mistakenly but genuinely believed that the claimant was the true owner of the land and that his entry on that land was therefore 'as of right.'3

It is interesting to note that foornote No. 3 indicates that in Blodder v. Phillips (1991) EGCS 109 Muskill L.J. deliberately left open the question whether adverse possession may be claimed by one who believed he already owns the land.

Both attorneys-at-law cited many authorities in support of thier contentions - Bridges v. Mees (1957) 2 ALL E.R. 57 , Archer et ux. v. Georgiana Holdings Ltd. 1972 21 W. IR 43; Buckinhamshire County Council v. Moran (1989) 2 ALL E.R. 225; Aneita Grant v. Crystal Coast Development Co. Ltd. and Others S.C.C.A. No. 17/89 and Stanley McKenzie v. Anthony Campbell et al SCCA 16/91.

Bearing in mind the purpose of this exercise I do not think that it is necessary for me to analyse these cases. However I am constrained to make a brief reference to Bridges v. Mees which I think is instructive.

In that case the plaintiff contracted with a company to purchase from it a strip of land at the back of both the plaintiff's and defendant's properties. The plaintiff paid a deposit of £2, obtained a written memorandum of receipt for the deposit and his

purchase, entered into occupation of the strip of land and thereafter retained possession without any interference by the company. The plaintiff completed payment of the purchase price in 1937, but the land was never transferred to him nor was any entry made on the register to protect his rights.

In 1955 the company went into liquidation and in that year the liquidator sold the strip of land to the defendant. The company through its liquidator conveyed the strip of land to the defendant and in April 1956 the defendant was entered on the register as proprietor with absolute title. The plaintiff claimed that he was entitled to the strip of land on several grounds.

In answer to the plaintiff's claim that he had acquired by possession a right to the property under the Limitation Act 1939, the defendant argued that "the plaintiff's possession did not ripen into ownership, because it was not 'adverse' on the ground that possession can only be adverse if it be not referable to a lawful right."

This submission did not find favour with Harman J. I might add here that in my view this decision is not in conflict with Aneita Grant's case (supra).

As I understand it to hold that a person who erroneously thought he was in possession 'as of right' could not under <u>any circumstance</u> claim a possessory title would have the effect of penalising such a person and placing him in a worse position than a squatter.

I would venture to think that the purpose of the "adverse possession" principle is not to reward the squatter but rather extinguish the right of the absentee owner who has effectively abandoned his property but not seeking to recover possession during the statutorily prescribed period of time running from the date when the <u>right of action first accrued.</u>

Mr. Cousins contended that the defendants and Mr. Lloyd Campbell are in no better position than trespassers. To use the words of S.11 of the Limitation of Actions Act, Mr. Campbell may be described as a "person wrongfully claiming to be entitled to the land." "Wrongfully Claiming" includes a claim made by mistake - <u>Williams v. Pott (1871) L.R. 12 Eq. 1499</u>.

It seems to me that if it were established that Mr. Lloyd Campbell was wrongfully claiming to be entitled to the land it could be argued that he was in "adverse possession" in the sense that the land would be in possession of some person in whose favour the period of limitation could run. This is so because the moment he takes possession

"wrongfully claiming to be entitled" aright of action would acrrue to the plaintiff.

Bridges v. Mees and the passage extracted from the Elements of Land Law (Supra) seem to support the view that the defendants have an arguable defence.

It is not for me at this stage to shut out the defendants on the ground that, whatever the evidence they may adduce, they cannot in the circumstances of this case establish a possessory title in Lloyd Campbell.

Conclusion

1. Time for application to set aside Judgment extended.

2. Final judgment entered in the absence of defendants set aside.

3. Costs thrown away to be the plaintiff's and to be taxed if not agreed.