[2012] JMSC Civil 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 00290 OF 2009

BETWEEN	**CYNTHIA DELORES STEPHENS**	**CLAIMANT**
A N D	**CLEMENSTON GEORGE STEPHENS**	**DEFENDANT**

Appearances

D. Gentles-Silvera instructed by Livingston Alexander and Levy for the Claimant.

M. Frankson instructed by Gaynair & Frazer for the Defendant.

Heard: November 22, 2011, February 13 and October 4, 2012.

In Chambers

Joint Tenants – Application for sale of property – Partition Act

P.A. Williams, J.

[1] The parties in this matter are brother and sister. They have many siblings but they were sufficiently close that in 1973 property was bought and registered to them as joint tenants.

Unfortunately with the passage of years, the relationship broke down and they have now not spoken to each other since 1988. Such is the lack of communication between them that no decision could be arrived at regarding the property. Hence Cynthia Delores Stephens (the claimant) has turned to the courts in this application for the property to be sold with the proceeds of the sale divided equally between herself and her brother Clemenston George Stephens (the defendant)

[2] Such is the acrimony between the two, that not much is agreed between them. They dispute how the property came to be purchased, how the property was paid for and how the property was maintained.

What is not in dispute is that this property in now a vacant lot in Beverly Hills, Kingston 8. It is registered at Volume 966 Folio 116 of the Registrar Book of Titles where it is described as all that parcel of land part of Beverly Hill formerly part of Mona and Papine Estates in the parish of Saint Andrew being the lot numbered one hundred and seventy-nine on the plan of Beverley Hills aforesaid.

The address for the property more clearly defining its location is Number 58 Shenstone Drive.

[3] Over the years, in pursuing efforts to have the defendant purchase her interest/share in the property the claimant has had it valued and obtained valuation reports on three (3) occasions. The last such was in 2006.

This report described the property as "a lovely building site which is presently covered in low to medium indigeneous growth of shrubs".

The valuator was then of the opinion that a negotiated open market price for the estate in fee simple in this property should settle in the region of nine ($9,000,000.00) to ten ($10,000,000.00) million dollars in current market conditions.

[4] The defendant is maintaining that the claimant is not entitled to any interest at all in the property.

In his affidavit in response to the claimant's, he ask that she be ordered to execute a transfer to him without any consideration or alternatively that her name be removed from the title by the Registrar of Titles.

These orders, among others, are not being sought by the defendant by way of his defence or counterclaim and were left as inclusions of his affidavit.

The Law

[5] In a matter such as this, it is perhaps useful to start by appreciating the law applicable and thereafter consider the evidence and submissions most relevant.

The claimant as joint tenant is holding an identical interest in the whole land as the defendant with the interest of each being the same in extant, nature and duration.

Section 4 of the Partition Act is therefore the section on which she must rely as her interest is to the extent of one moiety upwards.

It states-

> "In a suit for partition, where, if this act had not been passed, a decree of partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions."

[6] This section is regarded as making it imperative on the Court, to order a sale unless it sees good reason to the contrary. The party interested in sale is entitled to such sale as of right unless there is some good reason to the contrary shown the onus then is on the party opposing to show what the Court will consider good reason.

It cannot be disputed therefore that a concurrent owner in the position of the claimant had the right to demand a sale of property.

[7] In her submissions on behalf of the claimant, Mrs. Gentles-Silvera shared with the Court one of the oldest authorities in the area which remains instructive.

In **Porter v. Lopes [1877] 7 Chan 356 at page 363** Jessel M.R said in commenting on section 4.

> "Now therefore, there is an absolute right in the owner of a moiety to require sale subject to this, unless it sees good reason to the contrary, the Court shall direct a sale.....
> Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see good reason why there should not be a sale. I do not say there may not be some other good reason from the peculiar nature of the property, but it must be a good reason against the sale."

[8] It is significant to note that the land in this instant case is subject to a restrictive covenant which would make it difficult to be partitioned.

The title clearly states that there shall be no sub-division of the said land.

Hence the claimant's efforts to have the property sold seem to be her only recourse in her dealings with the land so as to end her ownership of it.

[9] The Court's discretion in matters such as this, therefore, is only engaged when addressing the issue of the distribution of the proceeds – the Court has to order a division according to the co-owner's entitlement.

Guidance, in how to approach this issue, has to be had from the approach in matters related to the division of property between couples whether married or unmarried.

One recent decision in this area that reviewed the law as it existed and outlined relevant principles in charting the way forward in **Jones v. Kernott [2012] 1 A.C. 776**

[10] Mr. Frankson for the defendant relied heavily on this decision and this reliance is well placed since it is quite instructive.

In the joint judgment of Lord Walker and Lady Hale at paragraph (a) page 794 it was stated inter alia-

> "In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of cohabiting couple who are responsible for any mortgage, but without express declaration of their beneficial interests.
>
> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
>
> (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home or (b) that they later formed the common intention that their respective share would change.
>
> (3) Then common intention is to be deduced objectively from their conduct....."
>
> (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset or (b) had changed

their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property". Chadwick L.J in **Oxley v. Hiscock [2005] Fam 211 para 69.**

In our judgment "the whole course of dealing.....in relation to the property" should be given a broad meaning enabling a similar range of factors to be taken into account as may be relevant as ascertaining the parties actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)] or fair (as in case (4)]

[11] Lord Collins put it succinctly at para. (c) page 797 where he said:-

> "I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Lady Hale that, in joint names cases, the common intention to displace the presumption of equality, can in the absence of express agreement, be inferred (rather than imputed.....) from their conduct and where in such a case, it is not possible to ascertain or infer what share was intended each will be entitled to a fair share in the light of the whole course of dealings between them in relation to the property".

[12] A more general pronouncement relating to these matters found in Halsbury's was relied on by Mrs. Gentles-Silvera for the claimant. At paragraph 714 Halsbury's Laws of England Fourth Edition [2007] Reissue it is stated inter alia:-

> "Where, however, two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests, and contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity unless there is evidence of a contrary intention on their part at the time of the purchase or transfer or there are circumstances from which such an intention can be inferred. If they contributed the purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint

> names, there is a tenancy in common between them in equity, although even in this case the equitable tenancy in common may be rebutted by evidence or circumstance."

The Evidence

How and why was the land acquired?

[13] In her affidavit the claimant said that at the time of purchase of the land her intention was to build residential a dwelling house.

Under cross-examination she did resile from this stated intention where she first said she had no intention as to what it was going to be used for when it was purchased and then said she had planned to eventually build on it, sell it "or whatever".

[14] For his part, the defendant was insistent that his sister's name was put on the title as a matter of convenience. He explained that her name was put on for the simple reason that in case anyone was to ask if he had a piece of land someone would be around to say yes.

In his affidavit he said that it is his desire that in his late Will and Testament the premises or the proceeds from its sale; should be placed in trust for the educational benefit of his several nieces and nephews or other related family members and he did not want to "will this premises to the claimant herein." He also stated the claimant was well aware that the property was needed to provide income on his retirement.

Under cross-examination he said he had five (5) other brothers and four (4) sisters but was virtually not in touch with any of them.

[15] The defendant maintained that it was he who saw the land being advertised, went into discussions with the seller and agreed on a price.

He applied for a loan from the Bank of Nova Scotia, King Street, Kingston, an institution where he then worked as a credit officer. It was at the point of setting up the loan on the books of the bank that he said he asked for the claimant's name to be added for convenience.

The claimant's recollection was however, that although she resided abroad at the time, she happened to have been in Jamaica on vacation when they had discussions about

purchasing this land in both their names. It was, she claimed, agreed between them that he would take care of all the paper work necessary to obtain a mortgage; given his employment at the Bank. The agreement, she insisted, was so they could purchase the property in their joint names for the benefit of them jointly.

[16] The claimant was adamant that it was she who paid the mortgage by sending monies on a regular basis to the defendant to make the payment.

He on the other hand said the repayment was by way of deductions from his staff account for which only credits for salary was allowed, thus the loan was repaid from his salary.

Endorsements on the title indicate that the mortgage dated the 21st of February and registered in the 1st of March 1974 was discharged on the 2nd of October 1978.

[17] The claimant exhibited eight (8) money orders as evidence of the payments she made on the property.

Under cross-examination, it was demonstrated that two (2) of the money orders were for periods before the mortgage was obtained.

Further the claimant admitted that there was another property she was making payments on that her brother was also assisting her with. The money orders did not expressly state which property the payments were in relation to.

In any event, the defendant was insistent that no monies were sent to him to assist with repaying the mortgage. He did not account for or explain the money orders exhibited which bore his name as the payee.

He also denied the claimant's assertion that he assisted in opening any bank account to facilitate her assisting with the mortgage payment.

[18] The claimant further explained how she had eventually paid off an outstanding balance to avoid the property being sold.

She explained how she visited the Workers Savings and Loan Bank in 1987 and had received a notice demanding monies owed on a mortgage dated July 1981 made

between the defendant and the bank and in default of payment the property would be sold.

She exhibited the notice and also exhibited a cheque dated January 30, 1987 made out to Workers Savings and Loan in the account of twenty-four thousand, five hundred and forty-five dollars ($24,545) which had endorsed on it "re 2nd mortgage – Beverly Hills".

She thereafter received the title for the property which she has kept in her possession from that time.

[19] In her affidavit she explained that she was aware that the defendant had transferred the mortgage over the property from the Bank of Nova Scotia.

However the endorsement on the title indicate clearly that this mortgage had been discharged from October 1978.

Another mortgage is endorsed as being obtained from the Workers Savings and Loan in 1981. This was the mortgage referred to in the statutory notice which was issued in 1984.

It is also noticed that in that notice the amount outstanding was $85,800.00.

Hence the assertion of the claimant that some three years after the notice was issued she paid off the initial mortgage obtained to purchase the property, does not appear credible.

[20] The defendant's version is that after discharging the first mortgage from the Bank of Nova Scotia, a second mortgage was obtained in order to explore and pursue plans to develop the land in some way. The possibility being contemplated was to construct accommodations which could then be rented out.

These plans were however aborted after the claimant paid off the sums outstanding and took possession of the title.

In light of the documentary evidence this appeared to be the more likely and reasonable scenario.

[21] The claimant exhibited several receipts from the Inland Revenue Department indicating payment of the taxes for the property. These date back to 1993 for amounts increasing from $1,242.00 to $8,480.00.

She explained that she had sent monies to a friend to make the payments and keep the receipts until she was able to collect them.

The defendant however while not commenting on these receipts, claimed that property taxes were deducted from his staff account at the Bank of Nova Scotia – along with the mortgage payment.

The defendant offered no documentary proof to support any of his assertions.

[22] It is perhaps useful to note that one serious bone of contention was seen when the claimant sought to explain why she did not return the title to the defendant upon his requesting it from her.

She declared she did not want to lose this property in a manner similar to how she had lost her house.

The issue, then explained, was that at some point previously she had bought a house in Harbour View which the defendant seemed to have been overseeing for her. By her account he tricked her into signing over the title for that property to him.

He asserted that he had bought the property from her and she had duly transferred it to him.

It became apparent that the dispute surrounding that house fueled the acrimony that now exists between this once close brother and sister.

It is also clear that this acrimony has lead to their inability to now agree on anything concerning the property now in dispute.

The decision – analysis of the law and the facts

[23] The starting point in an analysis of this matter must be the regretful fact that neither of these distinguished looking elderly persons seem to have told the whole truth.

Their recollection of certain matters is significantly clouded by the breakdown of their relationship.

This makes it that more difficult to determine what common intention existed at the time the property was purchased.

[24] The law is clear that once a co-owner ask for partition of property in circumstances such as this, the court must accede.

Further in circumstances such as this were the property cannot be partitioned an application for the property to be sold can only be refused if good reason to the contrary is demonstrated.

[25] The submission of Mr. Frankson, that the evidence of the claimant was very badly shaken whereas on the other hand the defendant maintained a consistent position both in his affidavit and under cross-examination, may be largely true.

His evidence however, has failed to verify his claim that the claimant had no interest in the land, save and except that she is a registered proprietor. Indeed the defendant did not impress as the kind of man who would have permitted his sister's name to be included on the title of his property for mere convenience. In any event, he has failed to establish clearly what that convenience was intended to be.

Given his then position at the Bank one would expect that he would have truly appreciated the significance of having her named as a joint tenant.

[26] In effect, I have heard nothing credible to oust the presumption that equity follows the law and that they are joint tenants both in law and in equity.

The orders sought by the claimant will therefore be granted.

[27] It is hereby ordered:-

(a) There shall be a sale of all that parcel of land of Beverly Hills formerly part of Mona and Papine Estates in the parish of Saint Andrew being the Lot numbered One hundred and seventy-nine on the plan of Beverly Hills aforesaid deposited in the Office of Titles on the 1st day of December 1959 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of

Title registered at Volume 798 Folio 48 and being all the land now comprised in Certificate of Title registered at Volume 966 Folio 116 of the Registrar Book of Titles which is jointly owned by the parties herein.

(b) Messrs. Livingston Alexander and Levy, Attorneys-at-law shall be responsible for carriage of sale of the said property.

(c) The proceeds of sale of the said property to be paid to Messrs. Livingston Alexander and Levy.

(d) All incidental and related expenses of the sale of the said property to be deducted from the proceeds of the sale.

(e) The balance of the proceeds of the sale of the said property, after deduction of all incidental and related expenses of the sale be divided equally between the parties.

(f) The Defendant's share of the proceeds of sale of the said property is to be paid to him or into this Honourable Court for payment to him.

(g) If the Defendant fails, neglects or refuses to sign or execute any document or agreement required for the sale or transfer of the said property within fourteen (14) days of such requirement, a Registrar of the Supreme Court is empowered to sign or execute such agreement on his behalf.

(h) Liberty to apply.