REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2010-03611

BETWEEN

EDMUND CHEE

CLAIMANT

And

BISSOONDATH MAHARAJ

FIRST DEFENDANT

MAHARAJ BUILDING ENTERPRISES LIMITED

SECOND DEFENDANT

CLAIM NO: CV2010-03613

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And

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FIRST DEFENDANT

MAHARAJ BUILDING ENTERPRISES LIMITED

SECOND DEFENDANT

Before the Honourable Madame Justice C. Pemberton

Appearances:

For the Claimant: Mr. P. Lamont instructed by Mr. A. Edwards

For the Defendants: Mr. A. Manwah

DECISION

[1] **BACKGROUND**

Mr. Edmund Chee, the Claimant claimed that he entered into two Agreements with the Defendants, Mr. Bissoondath Maharaj (BM) and Maharaj Building Enterprises Limited (MBEL).

The First Agreement

The First Agreement was entered into on March 16, 2007[1]. Mr. Chee agreed to lend the Defendants the sum of $600,000.00 for the purposes of building **two townhouses** on lands described in Deed No. DE 20071404664D001. The Agreement provided for a repayment of the $600,000.00 in addition to a return on investment in the sum of $200,000.00 upon the completion of each of the townhouse. In all, Mr. Chee was to have received the sum of $1,000,000.00 to be paid on or before 31st December 2007. The agreement stated that the said townhouses were to be built by 31st December 2007. The agreement continued that even if the townhouses were not completed Mr. Chee would have received the sum of $1,000,000.00 on or before **31st December 2007**.

[2] Pursuant to this Agreement, Mr. Chee parted with his $600,000.00 as evidenced by the bundle of receipts attached as EC 2. Suffice it to say the townhouses were not completed by the stated date, neither did Mr. Chee receive his capital loaned or the expected return on investment. By what is styled the Supplemental Agreement, dated 10th July 2008, BM agreed to pay to Mr. Chee "all outstanding claims" that is, the sum of $1,000,000.00 together with interest at the rate of 8% per annum by 15th September 2008. This agreement was attached to the pleading as EC 3. Despite repeated requests, the Defendants have failed to make good their agreement to liquidate this sum as promised. The latest request was 15th April 2010.

[3] *The Second Agreement*

The Second Agreement was entered into on November 20, 2007[2]. Mr. Chee agreed to lend the Defendants the sum of $600,000.00 for the purposes of building **two houses** on

[1] See CV 2010-03613.
[2] See CV 2010-03613.

lands described in Deed No. 17798 of 1987. The Agreement provided for a repayment of the $600,000.00 in addition to a return on investment in the sum of $145,000.00 upon the completion of each of the house. In all, Mr. Chee was to have received the sum of $1,000,000.00 to be paid on or before 30th May 2008. The agreement stated that the said houses were to be built by 30th May 2008. The agreement continued that even if the houses were not completed by the 30th May 2008 Mr. Chee would have received "his initial investment of $600,000.00 in addition to the sum of $390,000.00 as liquidated damages" from the Defendants.

[4] Pursuant to this Agreement, Mr. Chee parted with his $600,000.00 as evidenced by the bundle of receipts attached as EC 2. The houses were not completed by the stated date neither did Mr. Chee receive his capital loaned or the expected return on investment. By what is styled the Supplemental Agreement, dated 10th July 2008, BM agreed to pay to Mr. Chee "all outstanding claims" that is, the sum of $1,000,000.00 together with interest at the rate of 6% per annum by 1st June 2008. This agreement was attached to the pleading as EC 3. Despite repeated requests, the Defendants have failed to make good their agreement to liquidate this sum as promised. The latest request was 15th April 2010.

[5] Mr. Chee claims that he never received any of the sums agreed upon in any of the Agreement. In fact, in relation to both agreements, BM repeatedly informed Mr. Chee that neither the houses nor the townhouses were completed. However, during the months of July and August 2010, BM has advertised for sale both the houses and the townhouses in the Express Newspapers. On September 1, 2010, Mr. Chee filed these two actions against the BM and MBEL for the return of his monies.

[6] **DEFENCES**

On October 29, 2010 BM and BMEL filed their Defences in both matters. It is noteworthy that the Defences mirrored each other, except where the Agreements contained different terms. They admit the contracts but deny that the monies were advanced as loans. Instead they style Mr. Chee's parting with his monies as his "contribution towards a joint

venture business with the Defendants". They further state that despite those agreements **"there were expressed oral terms"**[3] which spoke to the following:

a) The initial outlay of $600,000.00 "as an investment" and the other sums as estimated returns on this investment"

b) The capital and returns would be payable "only upon the sale" of the townhouses and houses.

c) That the time for the completion of the houses and townhouses "was subject to the final approval being obtained from the relevant authorities".

Mr. Manwah further stated in the Defences that the payments made by Mr. Chee to his clients "*were not made pursuant to the said agreement but were deposits paid towards the purchase of lands*[4]" and "*2 townhouses*"[5]. Whilst the Defendants admitted that neither the houses nor the townhouse were completed, they still claimed that the sums of $1,000,000.00 on each agreement were not due and owing to Mr. Chee. They completely deny the correspondences of 10th July 2008, in which BM admitted the debts on the ground that "it is not true". They further admit that the houses and townhouses were advertised as pleaded but say that final approvals have not yet been granted. They say that the sums stated in the agreements as liquidated damages are "*not a true measure of damages but a penalty".* They further aver that the $600,000.00 in each instance were advances of loans and the sums of $290,000.00 and $400,000.00 represent interest thereon the transaction was in breach of the **MONEYLENDERS ACT**.

[7] I mention in passing that neither BM nor a representative of MBEL signed the Certificate of Truth, which was signed by Mr. Manwah.

[8] On March 2, 2011 Mr. Chee caused applications to be filed in both matters requesting *inter alia* that the Defences as filed, be struck out pursuant to Part 26.1(c) and that judgment be entered pursuant to Part 15.2(a). The grounds for these applications are,

[3] Emphasis mine.
[4] CV 2010-03611
[5] CV 2010 - 03613

1. The defendants have admitted the joint venture agreement, the payment of money thereon by the claimant, the debt owed and the failure to pay in accordance with the terms or at all.
2. The Defendants' defences consist of an attempt to add or alter the terms of a written agreement.[6]

These applications were supported by affidavits which reiterated the facts as pleaded. Mr. Chee further explained that the Defendants gave him receipts for all the sums that he paid. He further deposed that *"when the first defendant gave me receipts for these sums he wrote on two of the receipts only, that the monies were for purchase of two townhouses at Apen Gardens Chaguanas. I did not demur because that is where the lands upon which the two townhouses were to be built is situated. I did not enter into any other agreement to purchase two townhouses at Apen Gardens from the Defendants, and the Defendants have failed to produce any such agreement."* The Defendants represented through Attorneys did not ask to reply to the affidavit and did not supply the Court with any affidavit evidence to counter the allegations contained in Mr. Chee's affidavit. At the Case Management conference on March 21, 2011 the Court ordered that both parties file submissions on these issues.

[9] *Defendant's Submissions*

Mr. Manwah, filed submissions as per the Order of the Court but did not indicate which were pitted specifically against Mr. Chee's claim for summary judgment. In fact, his submissions were brief and I reproduce them.

1. *The Claimant pleads that the transaction was a loan (paragraph 1 of the Statement of Case). The Defendants deny that it was a loan and avers that it was part of a joint venture arrangement with the Claimant, which arrangement had the additional oral terms as set out in paragraph 2 of the Defence. The issues for the Court then is what was the terms of the arrangement between the parties.*
2. *The Claimant pleads that payments were made pursuant to the agreement and attached the relevant receipts. The Defendants*

[6] Notice of Application. Filed Mar. 2, 2011 CV 2010-03613, CV 2010-03611.

deny that these payments were made pursuant to the agreement and avers that they were for the purchase of lands as indicated on the said receipts. The issue for the Court then is, were these payment loan advances claimed by the Claimant, or payments for the purchase of lands as shown on the receipts.

3. *The Claimant avers that the supplemental agreement dated 10th July 2008 was to be paid to him in final settlement of all outstanding claims and annexed the agreement (paragraph 6 of the Witness Statement). The Defendants denied that this was not so on the ground that it was not true. On the face of the annexed agreement this allegation by the Claimant is not there and so not true. The issue then is what was the purpose and effect of this document*

(Emphasis mine).

Mr. Manwah submitted no authority for his submissions.

[10] *Claimant's Submissions*

Mr. Lamont submitted that in addition to striking out of the Defences in both actions because they do not reveal defences to the claim, the Court should also grant summary judgment in favour of Mr. Chee, as BM and MBEL's Defences "has(ve) no realistic prospect of success"[7]. Mr. Lamont relied on **SWAIN v. HILLMAN[8], HOSANG v. BHAGGY[9]** in support of his application for summary judgment, to show that the Court has the power to dispose summarily of matters "which have no real prospect of being successful". This also achieves the overriding objective of the **CIVIL PROCEEDINGS RULES, 1998 (CPR 1998)** in the administration of justice[10]. Mr. Lamont guided me as well to **HOSANG** which referred to **BANK OF BERMUDA v. PENTIUM** in which Saunders CJ opined:

A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic

[7] Submissions of the Claimant. Filed on Apr. 15, 2011.
[8] **SWAIN v. HILLMAN 1999 EWCA CRIM. 2251**
[9] **HOSANG v. BHAGGY CV2009-02286**
[10] Submissions of the Claimant.

prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.[11]

Mr. Lamont further noted that this Honourable Court should be "loathe to make an order for summary judgment" which would be unjust or inappropriate[12].

[11] Mr. Lamont did an extensive review of the pleadings in both actions to show that the Defendants did not dispute Mr. Chee's claims so that there are no evidential issues outstanding. In his mind, this case would turn on: *whether there was any material dispute in the evidence and whether the Defendants had a realistic prospect of successfully defending his position by leading evidence to fill a vacuum".* It is only if these conditions were not satisfied that the court should be minded to make an order for summary judgment.

[12] **SUMMARY JUDGMENT AND STRIKING OUT OF STATEMENT OF CASE**

The overriding objective mandates that the Court must deal with cases justly. Part 25 (1) directs that the Court "must further the overriding objective by actively managing cases". This includes, disposing summarily of issues which do not need full investigation and trial. This power to dispose of issues can be exercised pursuant to Part 15 and or Part 26. Part 15 details the procedure for a Court giving summary judgment by which the Court may decide a claim without a trial[13]. The Court also has the power to give judgment on a claim after a decision on a preliminary issue[14]. The Court has powers as well to strike out a statement of case if it appears that it discloses no grounds for defending a claim. On the application to strike out the claim or defence, the Court may proceed to enter judgment for the successful party. In the case of an application for summary judgment, the Court must consider whether the Defendant has no realistic prospect of success on his defence to the

[11] **BANK OF BERMUDA v. PENTIUM BVI Civil Appeal 14 of 2003.**
[12] Submissions of the Claimant.
[13] CPR 1998. Part 15.1
[14] CPR 1998. Part 26.1(k)

claim. When deciding whether the defendant has no realistic prospect of success, the Court should consider the evidence which can reasonably be expected to be available at trial.

[13] The Caribbean Civil Court Practice states that,

> When deciding whether or not to strike out, the Court takes into account all the relevant circumstances and makes 'a broad judgment after considering the available possibilities'. It is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective…[15]

[14] **ANALYSIS**

As seen above, Mr. Mahwah's submissions were short on analysis. He makes mistaken references to witness statements. We have not yet reached that stage of proceedings. This matter is to be considered purely on the pleadings and the affidavit and annexures filed in support of Mr. Chee's applications. Further, whether the transactions were loans or payments, made pursuant to "*joint venture arrangement(s)*" or "*for the purchase of lands as indicated on the said receipts*" is immaterial. The Defendants have not denied that monies were paid to them by Mr. Chee. The Defendants admit that the houses were not completed and therefore this would naturally bring into focus, those parts of the Agreements which provide:

> *The First Agreement*
>
> *If the said townhouses are not built by the said date the 31st December 2007 Third Named Party shall immediately receive his investment of SIX HUNDRED THOUSAND ($600,000.00) DOLLARS in addition to the sum of FOUR HUNDRED THOUSAND ($400,000.00) DOLLARS as liquidated damages from the First Named Party and the Second Named Party.*[16]
>
> *The Second Agreement*
>
> *If the said houses are not built by the said date the 30th May, 2008 Third Named Party shall immediately receive his investment of SIX HUNDRED*

[15] At pg. 230.

THOUSAND ($600,000.00) DOLLARS in addition to the sum of THREE HUNDRED AND NINETY THOUSAND ($390,000.00) DOLLARS as liquidated damages from the First Named Party and the Second Named Party.[17]

The Agreements are clear. They speak to the **building** of the townhouses and the houses, and not to the sale of them as pleaded by the Defendants. Moreover, there is no mention in the Agreements of any sale being conditional upon final approval from relevant authorities. I do not think I need state it, but I shall; that a written agreement can only be varied **by the parties** through another written agreement. A written agreement among parties can never be varied by "expressed oral terms" as advanced in the Defences[18]. Since those are the bases of the Defendants' defences, I need go no further.

[15] In any event, in the affidavit in support of this application for summary judgment, Mr. Chee exhibited a document marked E.C. 3 which bore two signatures, and that document stated as follows:

The First Agreement

Further, to the agreement dated 31st March, 2008, it is hereby agreed that the monies due, that is One Million Dollars ($1,000,000.00) will be paid by 15th August, 2008 together with interest at the rate of eight percent[19].

The Second Agreement

Further, to the agreement dated 20th November, 2007, it is hereby agreed that the monies due, that is One Million Dollars ($1,000,000.00) will be paid by 15th September, 2008 together with interest at the rate of Six percent from 1st June, 2008[20].

Mr. Manwah denied these Agreements in the Defences and stated that they were not true. He does not give the bases of his denials or give any explanations of why these

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[16] The First Agreement. Dated March 16, 2007

[17] The Second Agreement. Dated 20th Nov. 2007.

[18] The law as to this rule is clearly set out in **Chitty on Contracts, 30th ed. Paragraph 12-096 page 864**; ***"if there be a contract which has been reduced to writing, verbal evidence is NOT allowed to be given so as to add to or subtract from or in any manner to vary or qualify the written contract".***

[19] Statement of Case. Document Marked EC3.

agreements were not true. He does not deny that BM signed these Agreements or even assert that the signatures do not belong to BM. To my reading of these provisions, it is clear that these are admissions by BM, the first defendant, that $1,000,000.00 in each case is due and owing to Mr. Chee from himself.

[16] I have also looked at all of the receipts in this action. Mr. Chee has paid $500,000.00 in the first instance and another $100,000.00 in the second instance for "payment for land at Orange Field Chaguanas". The Defendants do not indicate in their Defence that this land was transferred as per receipts. Further, Mr. Chee has produced evidence that he parted with the sums of $100,000.00, $200,000.00 and two payments of $150,000.00 each, totaling $600,000.00 "towards the purchase of townhouse at Chaguanas". He explains why the receipts bore that inscription and I accept that explanation. In any case, the Defendants have provided no evidence to support their assertion.

[17] The Defendants' Defences also raise suspicions in my mind. Why would they advertise the houses and townhouses for sale in an incomplete state (which they admitted), and without first having obtained final approval which they put in their Defences was pivotal to paying Mr. Chee in accordance with the Agreements. What evidence could they bring to render Mr. Chee's cases untenable?

[18] Having reviewed the pleadings and attachments, the application for summary judgment, or in the alternative for striking out of the defences and the written submissions by both parties, and the clear direction given by Saunders CJ (as he then was) in the **BANK OF BERMUDA** case, I am of the view that Mr. Chee's application for summary judgment meets with favour. It is clear, that there are no evidential issues outstanding. The Defences raise no answers to the disputes as identified by Mr. Chee. Furthermore, there is nothing contained in the Defences which can successfully meet Mr. Chee's claims. In case I am wrong, I am sure that based on the above, that the Defences disclose no ground for defending Mr. Chee's claims.

[20] Statement of Case. Document Marked EC3.

ORDER: CV 2010-03613

1. That judgment be and is hereby entered for the Claimant against the Defendants.
2. The Defendants to pay the Claimant the sum of $1,000,000.00 with interest at the rate of 8% per annum from 15th August 2008 until 1st September 2010, and thereafter at the rate of 12% per annum from the date of this order until payment.
3. Costs to be paid by the Defendants to the Claimant in the sum of $59,950.00, as prescribed.
4. Stay of execution 28 days.

ORDER: CV 2010-03611

1. That judgment be and is hereby entered for the Claimant against the Defendants.
2. The Defendants to pay the Claimant the sum of $1,000,000.00 with interest at the rate of 6% per annum from 15th September 2008 until 1st September 2010, and thereafter at the rate of 12% per annum from the date of this order until payment.
3. Costs to be paid by the Defendants to the Claimant in the sum of $59,950.00, as prescribed.
4. Stay of execution 28 days.

Dated this 21st day of July 2011.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE