THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF COURT

CV 2016 - 03778

BETWEEN

ALLOY WONG
as the Legal Representative of the Estate of
JOSEPH EUSTON COURTNEY MANNING

Claimant

AND

DBM REAL ESTATE SERVICES LTD.
DBM HOLDINGS CO. LTD.
RONALD LAWRENCE BOYNES

Defendants

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Ancil Moses for the Claimant

Mr Robin Montano instructed by Mr Gerard Boodram for the Defendants

Date: 07 June 2017

RULING

1. This is an application to set aside a default judgment.

2. The claim is one for breach of contract. The claimant filed the claim form and statement of case on the basis that there was a breach of an agreement signed by the parties on March 21, 2014. On the other hand, the defendants in their draft defence, assert that this agreement was predicated on an earlier agreement for sale of land where the claimant was the vendor and the defendants, the purchasers.

3. The claim was filed on November 14, 2016 and appearances were entered on behalf of defendants shortly after. Subsequently, the parties entered into discussions in an attempt to resolve the matter without the involvement of the courts. This apparently included an email dated November 24, 2016, where the claimant indicated that based on instructions, a new agreement was to be formalised. The defendants were making arrangements to sign this new agreement.

4. The defendants contend that they were nearing settlement when they received a request from the claimant that a better proposal was needed within 24 hours or he would have 'to contemplate his options'. The defendants further contend that by way of letter dated December 9, 2016, they informed the claimant of their proposal and requested seven (7) days to file their defence in the event their proposal was not accepted. There were further discussions between the parties after this point.

5. The third defendant then received on February 10, 2017, notice of default judgment dated and entered on December 21, 2016. After receiving this information, the defendants filed an application to have the default judgment set aside on February 16, 2017.

6. The claimant does not dispute the version of the facts stated above. I found it necessary to outline the course of dealings as it lends some assistance on how this matter has gotten to this stage.

The Law

7. **Part 13.3 of the CPR** provides that the court may set aside a judgment entered under Part 12 if -

    the defendant has a realistic prospect of success in the claim; and

the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.

Where this rule gives the court power to set aside a judgment, the court may instead vary it.

Realistic Prospect of Success

8. The first limb to be satisfied is whether the defendants have a realistic prospect of success. According to Pemberton J (as she then was), in the case of **CV 2012 – 04357 Ingrid Isaac v The Caribbean New Media Group Limited**, the two conditions under Part 13.3 are strict pre-conditions for a successful application to set aside a judgment.

9. The claimant also relies on the case of **CV 2011 – 03821 John Horsham v Roopnarine Linen Closer and Interior Accents LTD and Others**, in which Master Alexander relied on the judgment of Moosai J (as he then was) in the case of John v Mahabir, which stated:

> "[A] realistic prospect of success means that the defendant has to have a case which is better than merely arguable (International Finance Corporation v Utexafrica Sprl (2001) CLC 1361 and ED&F Man Liquid Products Ltd v Patel (2003) EWCA Civ 472). The Defendant is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable: White Book 2007 Vol 1 para 24.2.3. In determining whether the Defendant has a realistic prospect of success, the court is not required to conduct a microscopic assessment of the evidence nor a mini trial. In Royal Brompton Hospital NHS Trust v Hammond, the Times, May 11, 2011, CA, it was held that, when deciding whether a defence had a real prospect of success, the court should not apply the same standard that would be applicable at trial, namely the balance of probabilities. Instead, the court should also consider the evidence that could reasonably be expected to be available at trial: See O'Hare and Brown, Civil Litigation 12th Edn (2005), para 15.017."

10. The claimant submits that the defendants have failed to plead the particulars of the sale agreement, and that the evidence the defendants rely on is a letter from Juris Chambers which bears no connection with the claimant. I agree that it would serve the defendants well if the defence were to contain more detailed information regarding the agreement

between the parties. The claimant attempts to rely solely on the agreement dated March 21, 2014. However, based on the draft defence, it appears that this transaction finds its genesis in a much earlier transaction. This is not a simple agreement which acknowledges a debt. This is based on a previous agreement for the sale of land.

11. Although the claimant asserts that payments were made under an agreement dated 'March 21, 2017', with proof of payment annexed as 'B' to the claimant's affidavit of March 22, 2017, I have examined the attachment and I note that this payment was made on July 7, 2014, a date prior to when the defendants assert they received notification of the defect in title. As such, any payments made before the date the defendants received notification of the defected title, cannot be said to affect the ultimate success of the defence.

12. In any event, I find that the draft defence reveals a realistic prospect of success. Should the defendants successfully mount a defence regarding the lack of good title, the claimant must either remedy the defective title or the agreement is rescinded.

13. In the case of **CV2006-02852 COLVIN E. BLAIZE and CARLTON CORNEAL v SUBHADRA CHANKADYAL, RAMAKRISHIN CHANKADYAL and Others**, Tiwary-Reddy J stated as follows:

> "Every contract for the sale of land prima facie imports a term that the vendor will show that he has a good marketable title. The expression "good marketable title" does not necessarily mean a perfect title. It simply means that the vendor must show to the purchaser that the title being transferred is one that will enable the purchaser to hold the property against any person who may challenge his right to it: per Pollock CB in Jeakes v. White (1851) 6 Exch 873 at 881.

14. Additionally, in the case of **CV2007-03530 Goberhan Goberdhan v. Faizool Mohammed & Haniff Mohammed**, Jones J. stated:

> "…with respect to the sale of land a purchaser may elect to (a) treat the breach as discharging his further performance thereby entitling him to Page 7 of 11 damages, (b) require the vendor to cure the defect or (c) accept with or without a diminution in the purchase price."

15. The parties were desirous of bringing this matter to resolution. In as much as the claimant is desirous of obtaining the sums outstanding, he must be able to perform his part of the agreement which existed prior to the agreement dated March 21, 2014.

16. At this stage of the proceedings, all that is required is a determination of whether the defence has a realistic prospect of success and not a trial of the matter. Neither is it necessary, based on the authorities provided by the claimant, to perform a microscopic assessment of the evidence. There is more information that would be required should this matter proceed but this may be forthcoming as the claim progresses. The defendants appear to have a defence which is more than merely arguable. In these circumstances, I find that the defence reveals a realistic prospect of success. This limb is therefore satisfied.

Promptitude

17. The second limb which must be satisfied is whether the defendants acted as soon as reasonably practicable when they found out that judgment had been entered against them. The defendants contend that they found out about the fact that there was default judgment on February 10, 2017.

18. The claimant does not dispute this. The claimant's objection to this application hinges on the fact that the seven (7) days had elapsed since the December 9, 2016 letter and no defence had been filed.

19. I find this to be an odd position advanced by the claimant. Here we have a situation where the parties were in the middle of settlement discussions. The claimant requested a better deal within 24 hours and the defendants sent what they thought to be a better deal. The claimant gave no response to this letter. There were conversations held after this letter, where the attorney for the claimant indicated he was awaiting a response from his client. With no official decline of the offer, the claimant filed an application for default judgment. Further to which, the defendants were only notified of said default judgment in February of the following year.

20. The court will always encourage negotiations between parties with a view to the settlement of a matter without the costs and stress of litigation. To file a defence is to incur additional

costs which an attorney should be hesitant to do if there is a reasonable chance a matter could be settled. There is also the added issue of lack of communication. Until this point, when the defendants were made aware of the judgment taken up against them, there could be no application to set aside. In these circumstances, I find that at the point where the defendants were notified of the default judgment, they were prompt in their response, in their application to have the judgment set aside.

21. In these circumstances, I find that this limb is also satisfied.

22. In light of the above, this application to set aside default judgment succeeds.

Order

23. The defendants' Application to set aside the Judgment in Default of Defence filed on February 16, 2017 is granted. The defence is to be filed and served on or before June 30, 2017.

24. Parties will bear their own costs of this application.

Ronnie Boodoosingh

Judge