

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2017-02662**

BETWEEN

RAJKUMAR RAMADHAR

Claimant

AND

CHABELAL KHIMRAJ

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: Thursday 23 July 2020

Appearances: -

Mr. Prem Persad Maharaj for the Claimant

Mr. Farai Hove Masaisai and Ms. Antonya Pierre instructed by Mr. Anthony Noel Egbert

REASONS

1. On 09/07/2020 I dismissed the Defendant's application to re-amend the Defence and Counterclaim and I ordered the Defendant to pay the costs of the application. I now give my reasons for doing so.
2. I found first that there was no merit in the application, further and that having regard to the stage at which these proceedings had reached and the history, that the application amounted to an abuse of the process.
3. The trial of this action began on 13/12/2018 and after the evidence of the first witness was taken the parties indicated that they required time to settle and to produce a draft order. The

matter was adjourned thereafter from time to time at the request of both parties until 08/12/2019, when in the course of the hearing the Defendant's attorney sought leave to cease to act. This application to amend was made more than six months after the last date of hearing and only after there was change of attorney for the Defendant.

4. I think it necessary to set out some more details of the case. By the time it got to trial the central issue was whether the Claimant and the Defendant had entered into an agreement (written or oral) for sale for three parcels of land measuring approximately 15,000 sq. ft., or whether the Defendant had simply agreed to allow the Claimant to use and occupy two plots of land measuring 15,000 sq. ft. more or less at a fee for both of \$32,000.00 with and understanding that the moneys would be repaid when the Claimant no longer needed the lands, or when he left. (The proposed amendment to the Defence does not change this).

The Pleadings

The Statement of Case

5. The Claimant filed these proceedings on 21/07/2017 alleging a written agreement for sale dated 08/04/2004 of three lots measuring approximately 15,000 sq. ft. The three lots were part of a larger parcel of land (RPA) in respect of which the Defendant is the registered owner under C.T. Vol.1909 Folio 389. At the time of the agreement, there were no individual portion plans, the lands had not been surveyed and no approvals had been obtained for the subdivision of the Defendant's larger parcel. The Claimant said the parcels were identified on the ground, and he was to bear the costs of all approvals etc. Sometime in early 2017, the Claimant's surveyor prepared a survey plan defining the plots the Claimant claimed were the subject of the agreement. The Defendant has since refused to co-operate to complete.
6. The Claimant annexed to his statement of case, correspondence from the Defendant's former attorney at law, Ms. Amanda Mohammed dated 27/05/2016 and 06/06/2017. Both letters

confirmed and acknowledged the agreement for sale of lands. I shall indicate the material parts of the letters.

The first letter dated 27/05/2016 stated:

*27th May, 2016
Mr. Ramesh Deena
Attorney at law
No. 20 Irving Street,
San Fernando*

Dear Sir

Re: Proposed Litigation – Rajkumar Ramadhar vs Chabelal Khimraj

I act on behalf of Mr. Chabelal Khimraj.

With reference to the above captioned matter and further to my last dated 16th May, 2016 please be advised that I am instructed as follows:-

- 1. That in sometime in early 1995 the said Rajkumar Ramadhar came to my client's house late one evening at about 6:30 to 7:00pm. He said that he had a fight with his family and that his father had put him out. My client offered him a place to stay for the night as they were friends. He refused the offer saying he needed some place to live. He wanted to build a small place to stay. My client agreed and he built a small wooden structure. My client assisted him with transporting and sourcing the material and even helped him to construct. He lived there for about 9 months before he asked my client to buy. My client agreed and told him to pay what he could. He started to build a concrete structure. He set a price of \$12,000.00 which he paid over a year and a half. My client did show him the pickets before he actually built the wooden structure as my client was quite clear which lots were for his own use and therefore my client showed him the pickets at that same time. Those pickets had been there since 1986 when my client went to live on those lands. Sometime after - perhaps 2-3 years he came and told me he wanted to plant crops on the remainder of the lad to the back of his piece. My client said yes and he fixed a price again of \$21,000.00. There*

was no written sale agreement and the lands were not surveyed or measured. It could be more or less than 3 lots. Your client never asked my client to survey it and if he did a survey he never informed my client or showed my client the survey results.

2. My client told him clearly that the lands had no town and country approval and that he would have to undertake the costs and do all the paper work. The parties agreed this was only fair as the price for the lands were very low. My client agreed to assist if his signature was ever needed. At no time did your client ever asked for my assistance. Your client was well aware at the time of purchase that any statutory requirements necessary to develop the land residentially would be undertaken at his own cost and at his own risk.
3.
4. ...
5. ...

.....

Yours faithfully,

.....

*Amanda Faria Mohammed
Attorney-at-Law*

7. The second letter dated 06/06/2017 stated:

*06/06/2017
Mr. Prem Persad Maharaj
Attorney at Law
No.9 Keate Street,
San Fernando*

Dear Sir,

Re: Survey of Lands at Boodoo Trace, Pointe-a-Pierre

I act on behalf of Mr. Chabelal Khimraj and write in reference to yours dated 20th December, 2016 and 23rd May, 2017.

With reference to the above captioned matter please be advised that I am instructed as follows:-

1.
2.
3.
4.
5. *My client does not recall the written sale agreement annexed to your letter dated May 17th 2017 however considering this then your client has failed to pay the full purchase price of \$35,000.00 since 2004. My client therefore is not minded to complete the transaction and rescinds same. My client is happy to refund the monies paid as indicated in your letter dated 20th December, 2016 in the sum of \$33,000.00.*
6. *Further, the lands are not yet vested in your client's name and as such my client remains the legal owner. My client therefore requests that your client remove a sign reading "No Trespassing" which he has placed upon the lands without permission of my client and also requests that all debris on the lands be cleared within twenty-eight (28) days failing which my client reserves the right to remove these items at the expense and risk of your client.*
7.
8.
- 9.

Yours faithfully

.....
Amanda Faria Mohammed
Attorney-at-Law

The Defence

8. In his original defence the Defendant denied the written agreement claiming it to be a forgery, but at all times he accepted that there was a verbal agreement for the sale of some lands. He

said there was no measurement of three lots. There was some dispute about the price, in fact his price was two thousand dollars less than the \$33,000.00 claimed by the Claimant and he accepted that the parties “verbally agreed that the Claimant would meet any costs and engage in any procedure necessary in order to render it possible to complete transfer of title”, but he complained that the Claimant never spoke to the Defendant about excision and subdivision of lands. He was notified of the survey but he neither objected to it nor did he participate in it. (Paragraph 4 Defendant filed 04/12/2017) The Defendant admitted the correspondence of his former attorney, Ms. Mohammed. The Defendant filed a counterclaim for a declaration that the written agreement for sale dated 08/03/2004 was fraudulent, null and void and of no effect, a declaration he was the lawful owner of the lands, and an order for vacant possession.

Pleadings are Amended

9. Early in the course of case management I asked the Claimant to consider that since the pleadings confirmed an agreement for sale, at least an oral one, with the payment of the purchase price, or a substantial part of it, whether it was necessary to rely on the written agreement, since the issues of fraud and forgery if they were pursued would necessarily involve the parties incurring costs for forensic examinations as well as the allocation more judicial time, which could be avoided. The Claimant agreed to consider his position and thereafter filed an amended statement of case. The Defendant consequently amended the Defence.

10. This time the Defendant changed the Defence to one of an agreement to allow the Claimant who was having some problems, to use two plots of land for a total fee of \$33,000.00 on the understanding that the Defendant would repay the money when the Claimant left the land. By the amendment, the Defendant denied any agreement written or verbal for the sale of the lands.

Further Directions/Disclosure

11. Directions were given with a view to proceeding to trial. The statement of agreed issues filed on 20/09/2018 identified the following inter alia, the following:

- (1) Whether there was any arrangement for the Claimants to use and occupy two*
- (2) portions of land owned by the Defendant for the cost of Thirty-Three Thousand Dollars (\$33,000.00), on the condition that the Claimant would be refunded when he ceases use and occupation of same?*
- (2) Whether there was an agreement, either written or verbal, for the Claimant to purchase one (1) lot of land owned by the Defendant?*
- (3) Whether there was any agreement, wither written or verbal, for the Claimant to purchase two (2) portions of land owned by the Defendant?*
- (4) Whether the alleged written agreement for sale is a fraudulent document?*

12. The Claimant filed his List of Documents including the letters from attorney Ms. Mohammed. The Defendant (who was represented by other counsel) listed that correspondence in the “unagreed list”. The trial was eventually fixed for 13/12/2018. What was clear leading up to trial is that the Defendant was not going to agree to the admission of the letters written by his former attorney.

13. In his witness statement filed on 09/11/2018, the Defendant said:

*“By letter dated 27/05/2016, Ms. Amanda Mohammed, attorney at law responded to Trilaw’s letter stating that I had agreed to let Mr. Ramadhar occupy a piece of land in 1995 for which he paid me the total sum of \$33,000.0 for its use. **As for the rest of Ms. Mohammed’s letter, I cannot remember telling her these things as there was never any agreement between Mr. Ramadhar and myself for him to purchase the piece of land from me”.***

I took this to be more than a claim to a lapse in memory. It was a denial that he had given the instructions as there was never any agreement for sale. It was a departure from what was

reflected as his instructions in the pre-trial correspondence from his attorney. The Claimant sought and was granted leave to issue a witness summons to Ms. Mohammed to have the letters admitted into evidence since the Defendant would not agree to their admission.

14. On the morning of the trial Counsel indicated Ms. Mohammed was present. Ms. Mohammed indicated she would not give evidence unless the court compelled her to do so because she was concerned about client attorney/privilege. Given what I understood was the purpose of her evidence (to put in the letters), I indicated that I would hear her evidence. The letters were not covered by privilege. They had been sent to the Claimant. By putting in issue the contents of the letters and whether they accorded with his instructions, I was entitled to infer that the Defendant had waived his privilege. The instructions no longer attracted the cover of confidentiality.

15. The Defendant's counsel raised no objection, except to indicate that the witness had not disavowed his instructions, he had simply said he did not remember giving them, but I understood his position to be he would not have given instructions because there was no agreement for sale. If he was maintaining that position, it could only mean that the letter did not reflect his instructions. The Defendant had thereby impliedly waived his privilege by injecting a factual issue of the accuracy of the position stated by the attorney in the pre-action letters on an issue that was central to the case. In the circumstances, I was entitled to take the view that the Defendant no longer wished his communications and instructions on that central issue to be privileged.

16. Ms. Mohammed gave evidence that she had taken instructions to respond to correspondence emanating from the Claimant's attorney and had on the basis of the instructions sent off the letters. No privilege attached to the letters which had been sent to the Claimant's attorney. Ms. Mohammed was asked whether she had written instructions, she produced signed written instructions. She also claimed that she had had the Defendant sign copies of the letters she prepared, before she dispatched them and after she had read them to him.

17. Immediately after Ms. Mohammed concluded her evidence on 13/12/2018, Counsel for the Defendant asked me to stand the matter down for the parties to have some discussions. The parties were allowed time and when the matter was recalled, I was informed that the matter had been resolved but that because these were RPO lands, an order could not be finalized. There were surveying issues to be sorted out, but a draft consent order had been prepared.

18. The matter was thereafter adjourned from time to time for the presentation of the final version of the consent order. The flysheet reflects:

- On 31/01/2019 - The parties asked for further time. The matter was adjourned to 14/03/2019 for a consent order;
- On 14/03/2019 - Parties indicated they had arranged a site visit for Saturday 16/03/2019;
- On 02/05/2019 - More time was sought for the site visit;
- On 27/06/2019 - Survey plan had only recently been received;
- On 19/09/2019 - Parties indicated an issue with the survey plan. The lands are located along short road which ends in a cul de sac. The surveyor had indicated a turning point on the plan;
- On 17/10/2019 – Counsel indicated a third party (Mr. K. Persaud) who had purchased a plot from the Defendant, had an issue with the turning point. Part of his property falls on the area identified as the turning point; and
- The parties agreed to continue to speak to resolve the matter. It was adjourned to 08/12/2019 for further directions if not resolved.

19. On 08/12/2019, the court spent almost 45 minutes listening to the parties hearing the third party informally on the issue of “the turning point” which is what was standing in the way of the settlement. What was explained from the bar table was that the plan prepared at the request of the parties which had been submitted indicates a turning point, which according to Mr. Harvey Ramrekha, the Claimants’ surveyor is in his experience a necessary feature on the ground. Approval would not be granted unless there is allowance for a turning point in a cul

de sac. It emerged that the plan which the third party submitted for approval for the registration of his own transfer from another plot owned by the Defendant, is the same one which shows the turning point.

20. Once again I urged the parties to resolve the matter so that both Claimant and the third party could get their title documents. In the course of the discussions, Counsel made an oral application to cease to act and I granted it.

21. A notice of change of attorney was filed on 16/03/2020. It was against this background that I refused the application. In his speaking note on the application a Procedural History was set out by new counsel. Paragraphs 14 and 15 of the Counsel's note indicate:

"14. Mr. Egbert therefore sought to retain Counsel Farai Hove Masaisai on behalf of the Defendant. On the 5th day of March 2020, the Defendant met with Counsel and Mr. Egbert and he was advised that on his instructions, not everything had been properly pleaded in his defence. Counsel therefore advised him of a need to amend his defence to properly particularize the non-existence of any verbal agreement as well as a counterclaim for possession. Counsel and Instructing Attorney-at-Law were therefore properly retained on the 5th day of March 2020.

15. However, the Defendant was still unable to obtain all of the documents from his previous attorney at law so an office copy of the file was ordered by the Instructing Attorney. Before the Defendant was able to make this application, the COVID 19 practice directions were issued on the 16th March 2020 which only allowed for filing of emergency documents".

22. The Defendant is essentially seeking more than 18 months after a trial was adjourned for settlement, to unnecessarily amend the statement of case to include facts which take the matter no further. The "new facts" are not new. They are relevant to issues which were agreed over two years ago. The evidence of the Defendant in support of his Defence has addressed all the issues identified.

23. The Defendant's reason for the re-amendment is set out at Paragraph 19 of his speaking note begs the question – Why is this necessary. He states:

“The defendant is making this application to change his defence and Counterclaim, the Defendant's Notice of Application was filed under Part 20.1(3) of the CPR 1998 which allows changes to a statement of case with the court's permission. The Defendant is only seeking to change the pleadings not to change the nature of his defence”.

24. He claims a change in circumstances arose because he was ambushed by the fact that his former attorney gave evidence at his trial when she was not listed as a witness. The Defendant could not have been ambushed by Ms. Mohammed's appearance. His refusal to admit the letters and his deliberate putting in issue his instructions are what permitted her appearance. The attorney's evidence was received 18 months ago in the course of the trial. One year after that date, former attorneys were engaged in efforts to produce a consent order pursuant to their representations to the court. In my view what happened here is that there has been a change of attorneys not a change of circumstances to justify an amendment.

25. As for the Counterclaim, the amendment seeks late in the day to include a claim under S3 of the RPA, which is in any case misconceived. The Claimant has at all times recognised the legal title of the Defendant. His claim is to specific performance of an agreement for sale. This necessarily acknowledges the paper title of the Defendant. The issue of whether the Claimant was in occupation of the lands may be relevant to the issue is part performance and credibility of the claims as to the nature of the arrangement, but the Claimant has at no time relied on his occupation or control of the lands as evidence to support a case of adverse possession. The Claimant at all times claims an equitable lien over the lands owned by the Defendant which he contracted to sell. There is no issue as to the Defendant's legal title.

26. This Defendant has already had more than a fair share of the allocation of judicial resources. To permit him the opportunity to change his case simply because a new attorney has a different view of the matter is to undermine the overriding objective of the CPR.

Carol Gobin

Judge