

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-01753

Between

MAKEDA CASTELLANO

Claimant

And

THOMAS MOSES

1ST Defendant

KERRY ROCHFORD

2ND Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: September 9, 2020

Appearances:

Claimant: Mr. F. H. Masaisai instructed by Mrs. J. Farah-Tull

Defendant: Mr. S. Mitchell instructed by Ms. E. Cummings

Decision on application for Injunction

1. This is a decision on an application by the claimant for an interim injunction to prohibit the defendant from selling or otherwise transferring property situated at Hibiscus Lane, Bois Bande Village Sangre Grande (the subject property) to the second defendant or anyone until determination of the claim. It is the claim of the claimant that the first defendant is the owner of the chattel house situated on the land but is not the paper title owner of the land. However, he has been in occupation of the land for over 30 years. The claimant who found out about the first defendant's intention to sell from her grandmother who resides next to the first defendant, engaged her step father Mr. Smith, to negotiate the purchase price for her.
2. Mr. Smith visited the first defendant and negotiated a purchase price of \$20,000.00. A down payment was to be made and the purchase completed by the end of March 2020 but the first defendant would be permitted to occupy the house until the middle of April 2020 to put arrangements in place to move into his son's residence. On 28th March 2020, the claimant visited the first defendant and confirmed that the option to purchase was still open and on the 30th March 2020 a deposit was paid on her behalf to the first defendant by Mr. Smith. A receipt was issued.
3. One week later the first defendant informed Mr. Smith that relations had soured with his son so that he could not vacate by April as previously promised and the balance of the purchase price could therefore be paid by the end of the year. However, on the 11th April 2020, a further payment towards the down payment in the sum of \$4,000.00 was paid and accepted

and a receipt was issued. Half of the purchase price was therefore paid at that date.

4. The claimant alleges that the first defendant has since sold the property to the second defendant (the cousin of the claimant) for the same price in May 2020. Further, the first defendant has since denied selling to the claimant or receiving any moneys from her or issuing receipts to her. To date the defendant has refused to return the deposit or complete the agreement for sale.
5. Both receipts name Mr. Smith as the purchaser and records the full purchase price, the balance outstanding, the description of the property as being one plot of land, the address and the fact that it is occupied by the first defendant. There is a signature on each that purports to be that of the first defendant and an identification card number. The claim against the first defendant is that of breach of contract and the claimant seeks damages and the relief of specific performance. She also seeks damages for willful blindness against both defendants and damages for fraud against the first defendant.
6. In the defence the first defendant denies having entered into any agreement for sale with the claimant or anyone purporting to act on behalf of the claimant. He admits that he sold the property to the second defendant on May 1st 2020 for the price of \$20,000.00 with the condition that he the first defendant could remain on the property for the rest of his life. He deposed that he had made the arrangement with the second defendant since March 2020 and told him that he could bring the money and the papers when he had both available. He has denied receiving money from Mr. Smith and signing receipts. He also states that if he did

sign receipts he was tricked into so doing by Mr. Smith. In that regard he alleges that the receipts are forged or that he was tricked into signing them. Essentially, the defendants have denied all the material averments of the claimant. The defence further alleges that the receipts therefore do not amount to a sufficient memorandum in law to satisfy the requirement of section 4(1) of the Conveyancing and Law of Property Act.

Law

7. The well-established and well-known principles for consideration of the court when treating with interim injunctions are set out in the cases of **American Cyanamid v Ethicon** (1975) AC 396, **Jetpak Services Ltd v BWIA International Airways Ltd** (1998) 55 WIR 362, **East Coast Drilling and Workover Services Ltd v Petroleum Company of Trinidad and Tobago Ltd** (2000) 85 WIR 351, **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16 and **Chief Fire Officer and Others v Felix Phillip and Others** (7th December 2013)(Unreported). These principles are widely accepted so that the court does not propose to traverse them in these reasons but directs itself in terms of the cases.

8. The court does however note that while the attorneys for the claimant have dealt with the authorities above in the context of their application when the court is considering whether to grant the injunction, attorneys for the defendants have not and have chosen instead to rely on an authority which is not binding on this court and which prescribes a first stage test that is far removed from the development of the law on injunctions in this jurisdiction. Further the long submissions of the defence have been about the facts of the case as they relate to the causes of action. However, the remit of the court is not to conduct a trial of the issues or the facts at this stage and save for looking at the relative strengths of the cases

on a preliminary basis the court cannot and will not make findings of fact or treat with the details and weight of the evidence in the manner set out by the defence in their submissions.

Serious issue to be tried

9. There is no doubt in the court's view that there are serious issue to be tried in relation to the claims for breach of contract and fraud. In that regard it must be borne in mind that the injunction is only sought against the first defendant. The court notes that the cases of the claimant and the defendant are factually diametrically opposed to each other on material issues. The claimant says her agent agreed with the first defendant, paid the deposit and received receipts that amount in law to a memorandum of agreement to sell land. The first defendant says he made no such agreement with the agent, was paid no money and signed and issued no receipts whatsoever so that the purported receipts are fraudulent and therefore cannot in law amount to a memorandum. He also says that he agreed to sell the property to the second defendant in March and the sale was completed in May. Almost every material fact in this case is contested. A recital or consideration of all of the protracted evidence set out in the affidavits filed by all parties is therefore unhelpful and can be grossly misleading in the absence of cross examination which is a matter for trial.

10. On the face of the evidence, the claimant has produced documents that tend to support her case. On the face of the documents she is able to argue from a relatively strong position that the receipts amount to a memorandum of sale however, the strength of that aspect of the claim is wholly reliant on a finding of fact as to the bona fides of the receipts which is a matter for cross examination and which this court cannot therefore determine at this stage. In that regard the long and compendious

submissions which include relevant authorities on the whether the contents of the receipts are sufficient to amount to a memorandum of sale in law are made prematurely as those material issues are all predicated on the factual issue of the bona fides of the documents.

Specific Performance/ Damages an adequate remedy

11. Specific performance is a discretionary remedy with its underpinning in the law of equity. It is awardable however only if the court finds that damages are not an adequate remedy. Section 7 of the Conveyancing and Law of Property Act Ch. 56:01 enables both vendors and purchasers to apply to the Court in respect of questions arising out of or connected with a contract for the sale of land. Section 7(2) and (3) reads;

(2) Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit.

(3) This section applies to a contract for the sale or exchange of any interest in land.

12. The learned authors of Halsbury's (Halsbury's Laws of England, Volume 23 (2016) para 453) defined specific performance and whether equity requires such an order.

"Specific performance of a binding contract for the sale of land is a discretionary remedy which can be ordered by the court in cases where damages for breach of contract would not adequately compensate the innocent party's loss."

13. Further, in considering whether to grant specific performance, the learned authors set out the bars to specific performance.

“Specific performance is an equitable remedy and its grant is subject to the general exclusions which apply to such remedies most of which are based on the principle that lack of mutuality between the parties will preclude the grant of a decree. A decree will therefore not be awarded where:

- a) an award of damages would provide adequate compensation to the innocent party;*
- b) one of the parties to the contract lacks full contractual capacity;*
- c) a third party has acquired an interest for value in the property;*
- d) the award would cause exceptional hardship to the guilty party;*
- e) the enforcement of the order would require the constant supervision of the court;*
- f) the contract contains a vitiating element such as fraud, mistake or misrepresentation;*
- g) the seller cannot make good title;*
- h) the applicant is himself guilty of some misconduct (such as misrepresentation);*
- i) there is no binding contract in existence;*
- j) the contract is for the grant of a loan;*
- k) the property is subject to a spouse's matrimonial home rights;*
- l) the seller is a joint tenant but has purported to sell as beneficial owner.”*

14. In **Mungalsingh v Juman** [2015] UKPC 38, the Board cited the observations of Lord Hoffmann in **Co-Operative Insurance Society Ltd v Argyll Stores** [1998] A.C. 1. at para 33, that

“Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right.”

15. In **Co-Operative Insurance Society Ltd v Argyll Stores**, supra Lord Hoffman further observed at p. 15;

“But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.”

16. It is the claimant's case that she paid a deposit of half of the purchase price. At the highest she will be entitled to damages for breach of contract being the measure of her deposit and consequential loss. Should she be successful on the issue of fraud, the measure of damages would be the same unless there are special characteristics of the claim that warrant a higher award (which has not been demonstrated thus far). In any event it is noted that while fraud has been included in the relief in the statement

of case, fraud has not been pleaded nor particularized so that the claim for fraud appears dubious at the highest at this stage.

17. Further, while there is relief claimed against both defendants for willful blindness, the pleaded case in that regard lies only against the second defendant and not the first defendant. That cause of action is therefore not relevant to the present application save and except that it is the second defendant's case that he was unaware of any sale of the property by the first defendant to the claimant. If he is successful on his case, it may mean that he was a bona fide third party purchaser and the remedy of specific performance will not lie in favour of the claimant. These are however strictly matters of facts to be determined on the hotly contested evidence that is yet to come in this case.

18. When the chaff is dusted off therefore the gravamen of the claim lies in the claim for breach of contract. In that regard there appears to be no exceptional circumstances in this case that would mitigate in favour of the grant of the remedy of specific performance and indeed none has been pleaded or set out in the affidavits in support of the application. It follows therefore that damages are likely to be an adequate remedy given both the law and the preliminary circumstances of the claim.

Balance of convenience/justice

19. The court having found that damage would be an adequate remedy in this case, it will nonetheless weigh the consequences to both parties should the injunction be granted or not. The court therefore has examined the consequences likely to be suffered by the claimant should the injunction not be granted and the claimant ultimately be successful on the claim and

has weighed those matters against the consequences likely to be suffered by the defendant should the injunction be granted and he be ultimately successful on the claim.

20. In so doing the court finds that the consequences likely to be suffered by the claimant are almost nonexistent. The effect of the refusal of the injunction would mean that the first defendant is free to do what he will with the property, the admission being that it has already been sold and he now has a life interest therein. Success on the part of the claimant in the claim means that she would be entitled to the return of her deposit together with interest regardless of what the first defendant does or did with ownership of the property. This is so in the context of the relief for specific performance being one that is unlikely to be available in the circumstances of the case when viewed at this stage of proceedings. So that her success on the claim is not likely to lead to an order in her favour that the sale be completed and that possession of the property be handed over to her.

21. In relation to the consequences likely to be suffered by the first defendant, similarly there is unlikely to be major consequences should the injunction be granted and he be ultimately successful at trial. His success at trial would mean that he would have been in possession in any event as someone having a life interest and residing thereon. It must be borne in mind that the application for the injunction is one that seeks inter alia to prohibit him from disposing of his interest in the property and not one that requires that he surrenders possession thereof. The consequences to him therefore appear to be of equal weight as those to the claimant.

22. In all of the circumstances however, the court is of the view that the balance of convenience or justice does not weigh in favour of the grant of

the injunction when the court considers the fact that damages will be an adequate remedy to assuage the wrong that may be found to have been committed against the claimant through any breach of contract or fraud. This is a material factor that must be accorded considerable weight.

23. The application of the 9th July 2020 is therefore dismissed and the costs of the injunction proceedings are reserved to be dealt with upon determination of the claim.

Ricky N. Rahim

Judge