REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2021-04600

BETWEEN

SUNIL NARINE

First Claimant

TERRENCE HINDS

Second Claimant

AND

DAVE KANGAL

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of delivery: Wednesday June 30, 2022.

Appearances

Claimant: Mr. R. Boodoosingh

Defendant: Mr. R. Jaggasar

REASONS

1. On June 10, 2022 the court dismissed the application of the Claimants for an interim injunction. These are the reasons for the decision.

2. The case as pleaded is that the Claimants were tenants of the Defendant having entered into an unregistered tenancy agreement dated July 1, 2020 for a period of five (5) years with a first option to renew for three years and a subsequent option to renew for two years. The premises were rented for the operation of a bar and rent was set at five thousand dollars ($5,000.00) for the first month from July 1, 2020 to July 31, 2020. The agreed monthly rents as pleaded were as follows:

    i. August 1, 2020 to December 31, 2020, eleven thousand dollars ($11,000.00).

    ii. January 1, 2021 to December 31, 2021, thirteen thousand dollars ($13,000.00).

    iii. January 1, 2022 to December 31, 2022, fourteen thousand ($14,000.00).

    iv. January 1, 2023 to December 31, 2023, (erroneously pleaded as January 31, 2023), fifteen thousand dollars ($15,000.00).

    v. January 1, 2024 (erroneously pleaded as January 1, 2020) to December 31, 2024, fifteen thousand dollars ($15,000.00).

3. The agreement provided that should the option to renew be exercised the monthly rent would not exceed seventeen thousand dollars ($17,000.00). The tenants were responsible for paying the electricity rates but the Landlord would contribute one thousand dollars ($1,000.00) to each bill. Electricity is billed every other month. They were also to pay water rates and there were other standard covenants to be performed on their part.

4. Specifically, the parties agreed that the Tenants would undertake repairs and the cost would be offset against a part of the monthly rent provided that the bills for the repairs were provided to the Landlord. Further, they agreed that the Landlord would pay by way of an offset at least one

thousand dollars ($1,000.00) per month. Amongst the other covenants there was one for re-entry for non-payment of rent for seven (7) days and breach of any of the covenants. The clause provided for the Landlord to remove the belongings of the Tenants placing them outside the demised premises without liability on his part save in the event of negligence.

5. The pleaded case of the Claimants further set out that for the period August 1, 2020 to December 31, 2020 rent was paid in the sum of eleven thousand dollars ($11,000.00) per month as agreed but there was a monthly set off of five thousand dollars ($5,000.00) per month as allegedly agreed in clause 7 of the agreement.

6. Due to the adverse effects of the pandemic and the closure of bars, the parties entered into a partly verbal and partly written agreement for the payment of six thousand dollars ($6,000.00) per month for six (6) months from December 5, 2020. It was pleaded that the subsequent agreement effectively and validly altered the said tenancy agreement. Further, that starting in May 2021 the Defendant accepted monthly rent in the sum of two thousand, five hundred dollars ($2,500.00) and three thousand dollars ($3,000.00). Oddly enough, the months for which these sums were "accepted" are not set out suffice to say that it is pleaded that same is reflected in a receipt dated July 2, 2021. It is also pleaded that the Claimants agreed to assist with the payment of the arrears of the T&TEC and WASA bills. This is despite the fact that it was pleaded that they were obligated to pay same as set out in the tenancy agreement.

7. The Claimants also aver that extensive repairs were done by them.

8. On November 23, 2021, the Defendant's Attorney wrote to the Second-named Claimant demanding arrears of rent for August 2020 to November 2021 in the sum of one hundred and ten thousand dollars ($110,000.00). The Attorney for the Claimants asked for time to respond but on the weekend of December 18, 2021, a Bailiff was sent by the Defendant to collect the arrears or levy on the goods for the arrears. There is no pleading that the Claimant surrendered the keys to the bar to the Bailiff, however, it is pleaded that the bar has been closed for some time due to Corona virus and that "the Defendant is encouraging the Claimants to open same to be able to levy on the goods of the Claimant" (see paragraph 17 of the Statement of Case).

9. Finally, it is pleaded that the Defendant has been refusing to accept the monthly rent of six thousand dollars ($6,000.00).

10. The Claimant sought declarations that the tenancy agreement was validly varied, that repairs were done to the demised premises and that the Defendant still owes the Claimants for such repairs. An injunction was also sought as part of the relief to prevent the Defendant from levying on the goods of the Claimants, an injunction preventing the Defendant from harassing the Claimants or disrupting the business and restraining the Defendant from entering the premises for the purpose of evicting the Claimants.

11. The Defendant has pleaded that the Claimants have admitted breaking the terms of the tenancy agreement and to owing substantial sums. He pleads that at the time of signing the tenancy agreement the restrictions on bars and the effects of the pandemic lock down was well-known hence, the staggering of the rental sums. That the Claimants have had exclusive uninterrupted possession of the bar since July 2020. That the Claimants chose to pay how much they saw fit per month in breach of the agreement resulting in arrears of one hundred and twenty-six thousand, five hundred dollars ($126,500.00).

12. That the Attorney for the Claimant asked the Attorney for the Defendant to hold his hand from filing a Claim on December 16, 2021 but then proceeded to file the Instant Claim on December 22, 2021.

13. The Defendant admitted that he re-entered the demised premises and placed a new lock on the door but averred that the Claimants' agents broke the lock and continued to access the bar without restriction and without paying rent. A photo allegedly of the broken lock and a video allegedly showing the sister of the Second Claimant (his agent who has been the person representing the Claimants in court in these proceedings), exiting the bar with inventory are annexed to the Defence. It is also pleaded that at the date of the Defence the sum owing in rent is two hundred and thirty-five thousand, five hundred dollars ($235,500.00). There is a counterclaim for the said amount and damages for breach of contract.

14. By application of June 10, 2022 the Claimant sought interim injunctive relief to compel the Defendant to remove the chain and lock, to prevent the Defendant from levying on the demised

premises, from harassing or interfering with the Claimants and their possession, from entering upon the premises and order that they be allowed to cut and break the locks on the doors.

15. The affidavit in support of the application repeated in material particular the averments set out in the Statement of Case save and except that at paragraph 22 of the affidavit of the Second Claimant filed on April 28, 2022 it is deposed that the parties were able to negotiate and re-execute a supplemental agreement for the operations of the Bar. That alleged supplemental agreement (the execution of which has been denied by the Defendant) purports to have been signed by the parties on July 1, 2020. The court is of the view that the year may be erroneously stated having regard to the contents of the agreement. It purports to state that the Landlord admitted that the rents owing for November and December 2021 is the sum of six thousand dollars ($6,000.00) for each month. That the Tenants shall pay same upon being allowed entry unto the premises. That the new rent from January 1, 2022 shall be six thousand dollars ($6,000.00) per month and shall continue until "the end of the present COVID-19 pandemic". That the option to renew at clause 7 shall be exercisable some six (6) months before the expiration of the term. The agreement also provided that the Claimants would withdraw the present Claim with no order as to costs. Finally, there was an agreement as to the sole entrance to the premises.

16. In his Affidavits in Opposition the Defendant set out that he was owed a substantial amount for rent and that he received numerous threats from the Claimants and persons acting for them including but not limited to pictures of a gun. He denied having signed the supplemental agreement and deposed that he had not seen that document until it was shown to him by his Attorney.

Law

17. 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, and ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)*** [2009] UKPC 16. These principles are widely accepted and not in issue so that the court does not propose to traverse them in these reasons but directed itself in terms of the cases in coming to its decision.

18. Additionally, the court made no findings of fact as that was not within its remit at this stage of the proceedings.

Serious Issue to Be Tried On the Claim

19. In determining whether there was a serious issue to be tried in this case, the court considered the law as applies to the variation of written contracts. The tenancy agreement was a written contract with particular terms and the Claimants' case is that the written contract was varied by a partially oral and partly written agreement. If it was that the law does not permit of such variation by such means then quite simply there would be no serious issue to be tried in this case. A contract in writing for valuable consideration cannot be validly varied or amended orally. Further, a purported amendment made in writing would only be valid in the case where it is either registered or is made for valuable consideration. In the absence of consideration for the amendment, the obligation on the part of the promisor remains but a mere promise unenforceable within the ambit of the law of contract.

20. The supplemental agreement was allegedly made in January 2022 when the basis of the pleaded case was an agreement allegedly made prior to the instituting of the Claim that varied the tenancy agreement, the Claim having been filed in December of 2021. This was not the basis of the Claim filed in court when it was filed. The written supplementary agreement is not pleaded in the Statement of Case. It follows that the written supplementary agreement appeared to be at the highest (assuming without finding that it was validly executed) an attempt to resolve the case itself but in all of the circumstances it formed no part of the Claim. There was therefore, no relation between the Claim and the supplementary agreement that appeared to be the basis for injunctive relief.

21. Further, in this case, the supplementary agreement could not in law have been an enforceable variation of the tenancy agreement on the basis of failure of consideration. **Halsbury's Laws of England,** Contract (Volume 22 (2019)) set out at page 116 on the issue of consideration and privity the following:

> *Consideration must move from the promisee.*

1. *The consideration necessary to make a promise binding at the suit of the promisee must move from that promisee or, perhaps, from his joint promisee: that is to say, it must be given by him in exchange for the promise made by the promisor; and it is not sufficient that the promisee is merely a near relation of the party from whom the consideration moves. This rule may be bound up with the doctrine of privity of contract; or it may be entirely independent of the privity rule.*

22. The alleged consideration in this case was at the highest a promise made by the Defendant to accept less rent should the Claimants withdraw the case. The Defendant is therefore, the promisor who has received no benefit for his promise. The withdrawal of a Claim that is denied and defended by the promisor is not in the court's view a benefit to the promisor particularly in this case where the promisor has a counterclaim for substantial rent due and owing. Further, there is no detriment to the promisees as they can only benefit from the supplemental agreement. In other words, the Claimants have brought an action on the basis of an alleged variation but then appears to use that action as a basis to obtain the very benefit they have alleged in the original Claim (by a promise to withdraw it). In the court's view therefore, there was an absolute failure of consideration in law.

23. ***Halsbury's Laws of England*** Volume 22 (2019) Para 380 also states:

> *A concession granted by one party (B) to the contract to the other (A) before breach and supported by consideration or in the form of a deed will, subject to any requirement of writing, constitute an effective variation. A similar concession after breach constitutes an accord and satisfaction or release. Nevertheless, where the concession lacks the support of consideration or a deed, it may still have an effect as a waiver by estoppel or forbearance of the obligations under the contract….."*

24. In this case waiver was not pleaded neither argued so that the sole question was whether there was a serious issue to be tried on variation of the agreement. The court having found that there could be no consideration in law for the variation, a matter solely of law and not of facts, there was consequently no serious issue to be tried in respect of the Claim and the application was dismissed without proceeding to the other matters such as the balance of justice.

25. It must be noted that it is not that the court was of the view that the Defendant had a stronger case having regard to the information before it, a consideration that the court is entitled to factor in in general form in terms of the relative strengths of the cases. It is that the court was of the view that the Claimant had no sustainable case in law on the Claim having regard to the law.

26. In the result, there being no serious issue to be tried, the court found it unnecessary to consider the other factors such as whether damages are an adequate remedy and the balance of convenience or justice.

Ricky Rahim

Judge