

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. B. 243 OF 1994

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| BETWEEN | LLOYD BENT | PLAINTIFF |
| A N D | MAURICE FONG | 1ST DEFENDANT |
| A N D | DULCIE FONG | 2ND DEFENDANT |

Miss Carol Davis instructed by
Messrs. O. G. Harding and Company
for Plaintiff

Mr. Owen Crosbie and Mr. Debayo Adedipe
instructed by Messrs. Robertson, Smith,
Legister and Company for Defendants.

REASONS FOR JUDGMENT

HEARD: 15TH AND 16TH FEBRUARY, 1996.

HARRIS, J.

On the 10th June, 1994, the Plaintiff filed a Writ of Summons in which he claims against the first Defendant specific performance of a contract made between himself and the first Defendant, concerning lands at Rhudd's Corner in the parish of Manchester and for an injunction. He also claims in the alternative, damages for breach of contract. The second Defendant was subsequently joined as a party to the proceedings.

The Plaintiff issued a summons for an interlocutory injunction on the 2nd August, 1994, which was heard and dismissed on the 27th September, 1994. An Appeal from the order of refusal of the injunction was allowed on the 27th February, 1995, when the Court granted an interlocutory injunction and issued directions for the reinstatement of a caveat which had been lodged by the Plaintiff.

By a Notice of Motion issued on the 4th July, 1995 the Defendants sought the following reliefs:

" 1. All Injunctions Relief/s and order/s,

and directions/s to the Registrar of Titles granted touching and concerning lands registered at Volume 8155 Folio 55 of the Registrar Book of Titles or howsoever be described and being the lands subject of the action and/or made by the Court of Appeal with Special reference to Interim Order made and dated 7th December, 1994 in the following terms, "that the Registrar of Supreme Court direct the Registrar of Titles to reinstate Caveat dated 11th February, 1993 connected with Certificate of Title registered at Volume 815 Folio 55 of the Registrar of Titles until further order so as to prevent any disposition or other dealings with the property;" and Interlocutory Injunction granted by the said Court December 3, 1994 as follows, "The Defendant be restrained from dealing or disposing of lands registered at Volume 315 Folio 55 of the Registrar Book of Titles until the trial of this action or until further order", be discharged, suspended recalled or removed.

2. The action be dismissed for want of prosecution, or having been aborted or terminated, the contract subject of the action having been terminated, substituted for, and replaced by a new contract for the sale and acquisition of the said property registered at Volume 815 Folio 55 between the said Plaintiff, Lloyd Bent and the said Defendants, hereinbefore referred to, as Maurice Fong.

3. The Court makes such order/s and grant such relief/s as it seems fit, including entering judgment for the Defendant/s granting permission for discontinuance or withdrawal of the Counter Claim."

I will now make reference to the first paragraph of the Notice of Motion. It is trite law that the decisions of an appellate Court are binding on a Court of inferior jurisdiction. This Court has no authority to amend, vary, alter, set aside or otherwise interfere with the orders of the Court of Appeal. It follows therefore, that the Defendants cannot succeed in obtaining an order, or directions with respect to the reliefs sought under that paragraph.

It is now necessary for me to proceed to consider the first limb of the second paragraph of the Motion which relates to dismissal of the action for want of prosecution. It is essential for me to recite the chronological history of the steps taken in the prosecution of this matter. An appearance to the Writ of Summons was entered on the 20th September, 1994. A defence and counter claim was filed on the 7th October, 1994. A summons to amend the statement of claim and for an extension of time to file a reply was issued on the 26th October, 1994. This summons was heard on the 25th January and an order made granting the Plaintiff 14 days within which to file the amended statement of claim and for the defendant to file amended defence and counter claim within 14 days of service of the amended statement of claim. The Plaintiff was also granted leave to file and serve reply and defence and counter claim, within 14 days of service of the defendant's amended defence and counter claim, or within 28 days of service of amended statement of claim if no amended defence and counter claim filed.

Amended Writ of Summons and statement of claim were filed on the 3rd February, 1995. This was followed by the filing of an amended defence on the 16th February, 1995. A reply and defence to counterclaim was filed on the 24th March, 1995. Summons for directions was issued on the 17th July, 1995. This summons came on for hearing on the 28th September, 1995 but was adjourned sine die.

The defendants did not proffer any evidence in support of their application to dismiss the action for want of prosecution. This notwithstanding, the court is empowered under its inherent jurisdiction to dismiss the action if certain conditions are satisfied. In considering whether the action ought to be dismissed, the fundamental principle by which the court should be guided, were propounded by Lord Denning M.R., in the case of *Allen v. McAlpine* (1968) 1 All E.R. 543, as follows:

The principle on which we go, is clear when the delay is prolonged and inexcusable and as such as to do great injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor, who has brought him to this plight."

Lord Diplock in the case of *Birkett v James* 1977 2 All E.R. 801, in making reference to the principles stated as under:-

"... To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by the rules of court) in proceeding promptly with the successive steps in the action."

To satisfy this test it must be established that one or other of the undermentioned conditions is fulfilled:-

- (a) There is evidence of an intentional or contumelious default by the plaintiff, or
- (b) There is evidence of inexcusable and inordinate delay on the part of the plaintiff and such delay would result in substantial risk of a fair trial or such that would cause serious prejudice or injustice to any of the parties.

No evidence demonstrable of any default on the part of the plaintiff which could be considered contumelious or intentional, exists. But is there any delay which could be interpreted to be inordinate and

inexcusable such as to give rise to the risk of a fair trial, or which would result in serious prejudice to the defendant if the action were to proceed? It has been observed that subsequent to the filing of the Writ of Summons all documents ranging from the appearance to the amended defence and counter claim were filed during the periods prescribed by law, or by the court, for their filing. Mr. Crosby submitted however, that the reply and defence to counter claim and summons for directions had been filed out of time.

The Judicature Civil Procedure Code Act section 230 provides:

"Where a counter claim is pleaded, a reply thereto shall be subject to the sections of this law applicable to defences."

Section 199 of the Act provides as follows:-

"Where a defendant has entered an appearance, he shall file his defence and deliver a copy thereof, within fourteen days from the time limited for appearance or from the delivery of the statement of claim whichever is the latter unless:-

- (a) the time is extended by consent in writing or by court or a judge....."**

The order of the court directed that the reply and defence to counterclaim be filed within 14 days of the delivery of the amended defence and counterclaim. There is no evidence of the date of service of the latter document. Consequently, there is no proof that the pleading of had been filed outside of the prescribed time, as urged by Mr. Crosby.

So far as the issuing of the summons for directions is concerned, the Judicature Civil Procedure Code act section 272 makes provision for the filing of a summons for directions within 7 days of the pleadings being deemed to be close. The pleadings in this action would have been considered closed on the 24th March, 1995 on the filing of the reply and defence to counterclaim. The summon for direction ought to have been issued on the 1st April, 1995 but was instead issued on the 17th July, 1995. There is a delay of approximately 3 months in the issuing of the summons. The time which elapsed

between the close of the pleadings and the filing of the summons, cannot in my opinion, be regarded as an extraordinarily extended period which would render it impossible for a fair trial of the issues to be secured. There is also a delay in obtaining an order on the summons for directions but the hearing of the summons had been deferred by the Master pending the outcome of the Motion filed by the Defendants.

The comparatively short period of delay from the time of pleadings for directions could in no way materially affect the trial of the issues, nor is it likely to result in grave injustice to the defendants. Further, by the very nature of the cause of action, the issues to be tried would be substantially based on documentary evidence and the defendants would in no way be jeopardised.

In my judgment, the time expiring between the close of the pleadings and the issuance of the summons for directions cannot be construed as excessive and inexcusable. The summons has not yet been heard as the hearing had been postponed by the Court. There is no evidence that if the matter proceeds the defendants would suffer any injustice or prejudice. Consequently, there are no circumstances which would warrant an order being made for the discontinuance of this action.

The final matter to be addressed, is whether the action should be struck out on the ground that the original contract of sale had been terminated and a new contract had been substituted therefor.

In or about March, 1989 the plaintiff entered into a written agreement for sale with the first defendant for the purchase of land at Rhudd's corner, in the parish of Manchester, for the sum of \$900,000.00. A deposit of \$150,000.00 was paid by the plaintiff and was accepted by the defendants although it had been paid outside the period stipulated in the contract. The sale was subject to a mortgage to be granted by the defendants. The plaintiff executed the mortgage deed and was let into possession, notwithstanding the document had not been executed by the defendants.

A series of affidavits were filed by the defendants in which they adverted to certain events which had transpired since the formation of the contract. It is their contention that these events would have effectually discharged the original contract and given birth to a new one. In an affidavit sworn on the 30th June, 1995 the defendants averred that by exchange of correspondence between the 7th and 16th February, 1995 between the attorneys-at-law for the parties, a new contract had come into existence.

It is necessary at this juncture to make reference to the correspondence to which the defendants alluded. The first letter dated the 7th February, 1995 from Mr. Owen Crosbie to Messrs. O.G. Harding and Company reads:

"Please say if your client will settle on the following basis.

1. He pays the balance of purchase money together with all interests up to the time of payment of balance as well as all costs to effect transfer to him or
2. With reference to paragraph 11 in Affidavit dated 23rd September, 1994 the dwelling house which Mr. Bent knew at all material times was the property of Mr. Fong's son and his wife which was discussed to be severed with the approval of the Parish Council, be severed with 1/3 acre with such approval and the Sale Price of Nine Hundred Thousand Dollars (\$900,000.00 be reduced to Seven Hundred Thousand (\$700,000.00) for the remainder of the premises.

The signature of Mr. Maurice Fong is hereby affixed below mine.

Yours truly,

signed Owen S. Crosbie

.....

Owen S. Crosbie

signed Maurice Fong

.....

Maurice Fong"

A second letter from Mr. Crosbie to Messrs. O. G. Harding and Company dated 16th February, 1995 was expressed in the following terms:

"My client, Mr. Maurice Fong accepts your offer in terms of yours of 14th February, 1995 and 7th February, 1995.

The transaction will not attract any penalty as our exchange of correspondence is to be treated as a novation and will only submit the Transfer for Stamping in due course, that is upon the payment of full purchase price and all interest due up to that time together with your client's moiety of costs.

Yours truly,

signed Owen S. Crosbie

.....

Owen S. Crosbie
Attorney-at-law and
Agent for Mr. Maurice Fong;"

There is nothing in the contents of the letters from which it could be inferred at this point of the proceedings that the existing rights and obligations of the plaintiff or defendants, under the contract of April, 1989 had been extinguished.

It was also contended by the defendants that on request by the plaintiffs attorneys-at-law for a statement of account to complete, the same was furnished by letter of the 2nd March, 1995 and failure of the plaintiff to settle the account within 14 days given in that letter rendered the contract obsolete. The statement of account shows the sum of \$1,328,693.75 due and owing to the defendants. This amount is inclusive of the balance purchase money with interest thereon as well as the plaintiff's moiety of costs. The plaintiff, by letter dated the 17th March, 1995, through his attorney-at-law requested six months to settle the indebtedness. By letter of the 20th March, 1995 the defendant's attorney-at-law replied to the plaintiff's attorneys-at-law, the first paragraph of which reads:-

"The vendor Maurice Fong makes time of the essence of the new contract and fixes the 24th day of April, 1995 as the last and final date to settle the account in respect of the ~~new~~ contract and will treat non compliance with this notice as abandonment and breach of the said contract with the usual consequences."

The original contract was silent as to a date of completion. The question as to whether the time given by the defendants to the plaintiff for completion is a reasonable period, is a matter to be decided by a trial judge.

The defendants also averred in an affidavit filed on the 9th October, 1995 as follows:

"That in further evidence of novation, the statement exhibit "A" referred to in paragraph 4 of our affidavit filed on the said 4th July, 1995 included the new cost of \$25,650.00 and was accepted by the plaintiff and all further exchanges of correspondence proceeded on this basis."

The new costs to which the defendants relate to the plaintiff's half costs of transfer based on the sale price of \$900,000.00. The matter of the costs, in my opinion, is with reference to payment of revenue and is completely divorced from any issue in relation to a new contract.

It was further stated by the defendants in their affidavit of the 30th June 1995 as follows:-

"That so as to give effect to the new contract for a consideration we obtained the consent of Mr. Osbourne Brown, who had acquired an option to purchase the property and had lodged a caveat No. 831661 to protect the option to withdraw the caveat and to suspend the operation of the option subject to the contract being completed. The obtain of this consent for consideration we contend was an act of part performance."

The indications here are that the defendants entered into a contract by way of an option to purchase the land, with a new party. But there is in existence an injunction restraining the defendants from dealing with the property. Consequently, any contract between the defendants and another regarding an option to purchase the land which forms the subject matter of this action would be in direct contravention of the order of the court.

The plaintiff, on the other hand, stated that the subsequent to the formation of the contract in 1989, it was agreed between the first

defendant and himself, that the original contract of sale be varied and and in particular, it was agreed that the first defendant would no longer grant a mortgage but he, the plaintiff, would secure his own mortgage financing. As a consequence, he entered into negotiations with an institution with a view to obtaining a mortgage. While his application was being processed, the sum of \$300,000.00 was remitted to the defendant's attorneys-at-law on account of the sale price. The receipt of the sum was acknowledged by the defendants and was applied towards interest. In June, 1995 a further cheque for \$1,028,693.75 in final settlement of the amount due was transmitted to them but was returned. It is my view that the matter of whether the \$300,000.00 ought to be apportioned to the payment of interest and whether defendants' alleged agreement to permit the plaintiff to procure his own mortgage affected the original contract, are issues which ought properly to be determined at a trial.

The statement of claim discloses a reasonable cause of action against the defendants. They have pleaded to the claims raised by him and have also filed a counterclaim to which the plaintiff has pleaded. The contents of the pleadings raise triable issues. Further, the question as to whether the contents of the correspondence which passed between the parties, or whether any transactions which had taken place between them since the date of the agreement in April, 1989 would have rendered that agreement invalid, or is such as to amount to a variation of that agreement, are crucial issues which must be resolved at a trial.

There are no circumstances cited by the defendants which could at this stage of the proceedings be regarded sufficient to have terminated the original agreement as alleged by them. The defendants have therefore failed to satisfy me that they are entitled to the reliefs sought. The Motion is consequently dismissed with costs to the plaintiff.