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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007/HCV 01949

BETWEEN	DAWKINS BROWN	1ST CLAIMANT
AND	GLEN BROWN	2ND CLAIMANT
AND	ANNIE LOPEZ	DEFENDANT

Ms. Althea McBean instructed by Frater, Ennis & Gordon for the claimant.

Mr. Lancelot Cowan instructed by Cowan, Dunkley & Cowan for the defendant.

Heard: 9th, 10th, 11th July 2008 and 19th May 2009

Campbell, J.

(1) The claimants, who are brothers, chartered accountant and educator respectively, filed an action seeking declarations of their interest in lands at Lot 2, 9 Panton Road, Stony Hill, St. Andrew (the premises). The defendant, a fashion designer, was the registered owner of the premises.

(2) The brothers claim that on the 1st of January 2004 they entered into a lease agreement with an option to purchase the premises. In consideration of this agreement, they paid the defendant $540,000.00 during 2004. The premises adjoins the defendant's home and uses a common driveway. The brothers state that before the relationship deteriorated, their relationship with the defendant was that of mother and sons.

(3) The brothers contend that the option to purchase was to have been exercised by November 2004 but when this was not achieved, they were granted an extension. They further allege that sometime in early 2005, they expressed their intention and readiness to exercise the option. They commissioned a land surveyor to survey the property and applied for a mortgage. They claim that breaches were unearthed by the surveyor; as a result, a second surveyor's report was commissioned at the defendant's request, the cost of which was borne by the claimants.

The Claimants' Case

(4) The claimants allege that they had taken steps to implement the recommendations for rectification of the Certificate of Title and spent large sums making improvements to the property. They contend that the defendant later sought to withdraw the offer to purchase, stating that the offer had lapsed and subsequently served the claimants with a Notice to Quit. In their claim filed on the 4th May 2007, the brothers sought special damages amounting to $833,000.00, representing expenditure on the surveyors' reports, valuation reports, and cost of improving the property, among others. They claimed specific performance of the agreement to purchase the premises, and a declaration that the claimant is bound by a proprietary estoppel in favour of the claimant, and an injunction restraining the defendant from interfering with their occupation of the premises until resolution by the Court.

The Defendant's Case

(5) The defendant contends that the claimants failed to exercise the option to purchase granted in the lease agreement of 2004. As a result of their failure, the option which was exercisable sixty days before the expiration of the lease agreement had lapsed. The claimants were never granted an extension of the option and their subsequent attempts to exercise the option were out of time and accordingly, null and void. The defendant admits that the surveyors' reports disclosed breaches and discrepancies in respect of the Certificate of Title. In late 2005, without ever notifying the defendant, the claimants purported to pre-qualify for the purchase of the premises. The defendant denies that she was notified by the claimants in early 2005, or at any time, that they were going to exercise the option to purchase. The defendant counter-claimed for two months rent.

The Issues for Determination

(6) The claimants posited that among the issues the Court had to resolve, were:

(a) Whether the option to purchase lapsed or whether its life was extended by subsequent agreements and actions of both parties

(b) Whether the claimants have an equitable interest in the said property and if so, whether the defendant is estopped from exercising her legal

rights to the said property in such a manner to deny the claimants' interest.

The defendant identified the issues as inter alia;

(a) Whether the option had lapsed and was null and void in 2005.

(b) Whether the defendant or her attorneys-at-law ever granted any extension of the option period to the claimant at any time.

Had the Option Lapsed?

(7) The defendant argued that S 4 of the **Statute of Frauds**, which provides;

> *No action shall be brought...upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.*

made it obligatory for an agreement for sale of land to be in writing. An option to purchase land is an agreement for sale, and must, along with any variation also be in writing to satisfy the Statute of Frauds.

(8) The defendant contended that for any of the alleged subsequent oral agreements which purport to extend the terms of the option to have legal effect it *had to be reduced to or set out in writing to satisfy the Statute of Frauds* ... in the absence of such reduction to writing, the oral agreements cannot be enforced or sued upon at law. There was no agreement adduced by the claimant stating the terms, consideration, the deposit and any further payment time for completion, or any of the express terms needed to define an agreement for sale of land. The defendant argued, there being no new agreement, the acts of the claimants were done long after the option to purchase had lapsed. There being no agreement, there cannot be specific performance.

(9) The defendant submitted that there was no conduct referable to the owner that could give rise to a belief in the claimants that they had acquired some right or interest in the property, and which would have encouraged them to act to their

detriment. It was further submitted that the claimants continued to pursue the purchase long after they knew the option to purchase had lapsed as a way of trying to steal the property for a price severely below the market price. Mr. Cowan maintained, the steps taken by the claimants were to pre qualify for a mortgage not in any reliance on any representation from the defendant, at least after November 2004 that the property was being sold to them. There was no acquiescence by the defendant in actions being taken, allegedly in pursuance of such a sale.

(10) Ms. McBean contended that the claimants did not have their own attorney and until 2007, acted under the impression that the defendant's attorney also acted for them. The parties agreed to extend the option to purchase in 2004, and accordingly a new lease was entered into on the 1st of January 2005, although a separate option to purchase was not prepared.

Analysis

(11) The claimants' contention is that there was an extension of the option to purchase. In support of this contention, the claimants rely on correspondence between the parties and specifically letters written by counsel for the defendant and on the conduct of the defendant. The option to purchase states that the notice must be given or made only in writing. The claimants acknowledge that there was no such notice given during the operational period of the option in 2004. It is common ground that the defendant was not in a position to pass a good legal title and that a new lease was executed which did not contain a concurrent written agreement of the option to purchase as was the case in 2004. The claimants submit that if the option to renew had lapsed and not renewed or extended, there would be no need for further consideration or discussion, as there undoubtedly was.

(12) The claimants commissioned an appraisal report, inspection for which was done on the 14th July 2005. In addition, there were two surveyors' reports, dated 7th November 2005 and 10th January 2006 respectively. The defendants claim that these acts were not done pursuant to any extension granted by the defendant, but were with a view of the claimants pre-qualifying for a mortgage. The letters from Jamaica National, of the 6th and 11th January 2006 respectively, confirm that mortgage financing was being sought by the 1st claimant but was being placed on hold because of a breach of covenant identified in the surveyor's report. Were these acts done by the claimants' unilateral acts on their own, amounting to gross folly, without any agreement or acquiescence on the part of the defendant?

(13) The answer lies in a series of letters commencing with Mr. Dawkins Brown's letter of 11th January 2006, to the defendant, (ex19) which was entitled **Re; Purchase of property situated at 9a Panton Road, Stony Hill, St. Andrew**, in which he opens by referring to "our" previous discussions and makes recommendations concerning the terms of the agreement for sale. Mr. Cowan's response dated 16th January 2006, on behalf of Mrs. Lopez, is similarly entitled. And recommends the re-surveying and re-registering of the Lot and ends 'once your surveyor agrees above recommendations, then we can agree the remaining recommendations set out on page two of your 11th January 2006 letter. To my mind, the January 11th letter supports the claimants' contention that there were on-going discussions which post-dated any lapse of the option in the 2004 agreement which may have taken place. The caption to the letters indicates that, the sale of the property was still a live issue, and recognizes that the cost of the survey of the premises is being undertaken by the claimants, with the reference "your surveyor".

(14) On 6th February 2006, the claimants' surveyors wrote the defendant's attorney advising that he finds no discrepancy with the plan and opines that Mr. Cowan's suggestion would amount to an encroachment. Mr. Cowan next, on the 18th February 2006 writes the 1st claimant, "It seems that there will be some work that will have to be done to resolve the apparent issues that have arisen concerning the title to Lot 2, 9 Panton Road, Stony Hill. She instructs that having regard to the need to resolve the issues related to the said title, **she is withdrawing her offer of sale of the property to you** until the issues are resolved."(Emphasis mine) Under cross-examination the defendant testified that 'she was withdrawing the claimants request to renew the option. "I was withdrawing from his request to renew the option." Mr. Cowan's letter is clear and unambiguous, and cannot be ascribed the meaning the defendant maintains.

(15) It is clear that although the claimants had not exercised the option to purchase in the lease of 2004, the parties had been engaged in discussions re the sale of the lot. Mr. Dawkins Brown's letter of the 7th June 2005 to Ms. Annie Lopez indicates that "he would like to exercise the option, and complete the purchase before November 2005. On the witness stand, the defendant denied having seen that letter before. The letter had been part of the discovery process, and had been before the court as a part of the case management regime. I accept that the defendant had been aware of the letter. The letter is also important because on its face, it fixes the defendant with notice of a visit by surveyors at the behest of the claimants. Despite Mr. Cowan's letter of 18th February 2006, which purports to withdraw the option until the matters had been resolved, it is clear that efforts were still being made to resolve the concerns raised in relation to the title.

(16) On 4th May 2006, Mr. Cowan's letter indicates that meetings between the parties were continuing, and that certain agreements were struck between the parties, which anticipated a new boundary wall, new plans were to be drawn, new titles to be obtained and an application made to modify the covenant. The letter also indicated that the surveyors' fees will be paid by the 1st claimant. A further letter dated 3rd July 2006 repeats that the defendant is withdrawing the option to purchase, until the issues were resolved.

(17) Both letters, to my mind, provide ample evidence that the option to purchase was certainly open to the claimants up to July 2006. I accept Dawkins Brown's testimony that there was a meeting between the parties in Mr. Cowan's office. I find that at this meeting or soon thereafter, the option to purchase was extended. The acts of the claimants in making good the defects in the title, particularly the payment of the fees of the surveyors, would be sufficient acts of part performance that would entitle the claimants to specific performance. See Herbert Wellesey Eldmire v Peter Honibal (191), 28 J.L.R.

(18) Even if, I am wrong on the question as to whether the option to purchase was extended or renewed, the claimants would succeed on the principle of proprietary estoppel. Reliance on this principle does not require a contract, agreement or a grant, and recognizes that *in strict law*, the defendant may be entitled to her land, however, the principle is in *the realm of equity* and arises out of the conduct and the relationship of the parties. In **Crabb v Arun D.C (1976) I Ch. 179**, a landlocked landowner who had no claim of necessity, no grant, no enforceable contract, no prescriptive right and whose case, in the words of Scarman L.J., "has to be that the defendants are estopped by their conduct from denying him a right of access over their land to the public highway." In that same case, Lord Denning opined that, "It is commonly supposed that estoppel is not itself a cause of action; but that is because there is estoppel and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppels called proprietary estoppels, it does give rise to a cause of action.

(19) Scarman L.J., in Crabb v Arun D.C. (Supra), was of the view that Lord Kingsdown statement of the law in **Ramsden v Dyson L.R. 1 H.L. 129**, was the modern starting point of the law of equitable estoppel. The court, in **Willmott v Barber (1880) 15 Ch. D. 96**, analysed **Ramsden** and held that in order for a party to establish the equity by estoppel, the following should be present. (1) There must be a mistake as to his legal rights (2) Must have incurred some detriment as a result of his mistaken belief (3) The defendant must be aware of his right which is inconsistent with the right being claimed (4) The defendant must know of the

claimant's mistaken belief of his rights. (5) The defendant must have encouraged the claimant in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right.

(20) To my mind, the areas for resolution before me would be (4) and (5). The defendant has argued that the actions of the claimants were to pre-qualify for a mortgage. That argument imbues the defendant with knowledge of the actions undertaken by the claimants and places on her a responsibility to assert her own rights. The first manifestation of such assertion is the letter from Mr. Cowan dated 18th February 2006, purporting to withdraw the option to purchase. That assertion was ambiguous and too late.

(21) I reject the submission of Mr. Cowan that there was no conduct on the part of the defendant which represented or encouraged the claimants to believe that they had acquired an interest in the property and accordingly acted to their detriment on that basis. Whereas, the improvements of tiling and the payment of outstanding light bills may be construed as acts consistent with a tenancy, it has not been demonstrated how the other act concerned with the title could so be interpreted. Mrs. Lopez must have been aware of the efforts being made by the claimants to remedy the defects in the title.

(22) How could such conduct be referable to a mere tenancy agreement as argued or a unilateral act, by the defendant. The landlord was made aware of the application for the mortgage, the obtaining of the valuation reports and the obtaining of two surveyors' ID reports. In addition, the claimants had the property re-surveyed, and obtained a pre-checked plan. These are the actions consistent with that of a prospective purchaser, as alleged by the claimants. I reject the defendant's testimony, when confronted with the letter of 4th May 2006, that Mr. Brown recommended the solution in that letter, so that she should have a proper title and that Mr. Brown did it on his own accord. I accept that Mr. Cowan had asked of Dawkins Brown if he would agree to pay the professional cost for the re-surveying and that sum would be deducted from the "closing cost", and Mr. Brown had agreed. It was after Brown agreed that Mr. Cowan requested a quotation of the professional cost, after which a letter was sent giving permission to conduct the survey. Why would a landlord consider the cost of remedying the defects in the title, at the expense of the tenant, a gift to the landlord? Why would a tenant be interested in perfecting the landlord's title, at his own expense?

(23) In the witness box, the defendant said that she was unaware that Mr. Brown had agreed to pay for new titles. She also claims to be unaware that Dawkins

Brown was planning on erecting a new boundary wall around the perimeter. Did the defendant encourage or made such representation that would cause the claimant to act to their detriment? The defendant admits that she did see a man cutting trees on the premises and another one surveying, she said she inquired of him, what he was doing. The man's response was, surveying. She said, having seen this man on her property, who she had not commissioned to do a survey, there were no further discussions between them. That, according to her, took place in November of 2005. Her testimony that she was unaware of the claimant's efforts to perfect the title strains credulity.

(24) Did the defendant encourage the claimants to think that they had or was going to be given a right? Had she done it directly or had she done it by abstaining from asserting a legal right? Surely, the action of seeking the claimants to bear the professional expenses, the obtaining of surveyors' reports, the valuation reports, the acts done with the assistance and compliance of the defendant were direct encouragement of the belief in the minds of the claimants that they were to be sold the property.

(25) The instances of not acting when men were observed by the defendant surveying the property, constitutes an acquiescence, a remaining silent, an abstaining from an assertion of rights which inured to the detriment of the claimants. I hold that it would be unconscionable and unjust to allow the defendant to set up her undoubted rights against the claim being made by the claimants. (See Crabb v Arun, Scarman L.J. page 195 letter E) There is no denial that the claimant incurred large expenses in respect of the property.

I find that the increase in the rental was agreed at a meeting between the parties in January 2005, and recognizes that an additional time would be needed to rectify the boundary problem.

(26) I find for the claimants and on the claim and the counterclaim and make the following orders:

(i) That there be specific performance of agreement to purchase property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew between the claimants and the defendants for the sum of $10m, less $540,000 allocated as rent towards the purchase price, such rent being for the period January to December 2004.

(ii) The claimants are declared to have an equitable interest in the property at Lot 2, 9 Panton Road, St. Andrew by virtue of proprietary estoppel.

(iii) That if the parties fail or neglect to sign an agreement for sale and transfer then the Registrar of the Supreme Court shall be empowered to sign the agreement for sale, transfer and any document necessary to effect the sale and transfer of the property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew.

(iv) That all sums in account #001-101-034-6143 in the names of Althea McBean and or Lancelot Cowan at RBTT Bank (Ja.) Ltd., Duke and Tower Streets Branch, to be paid forthwith to Robertson Smith Ledgister & Co. on behalf of Annie Lopez.

(v) Stay of Execution granted for a period of 21 days.

(vi) Costs to the claimant to be agreed or taxed.