[2014] JMSC Civ. 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008 HCV 00146

BETWEEN	**VERONA ROBINSON**	**CLAIMANT**
AND	**MARCIA ROBINSON**	**DEFENDANT**

Mr. Ewan Thompson for the claimant.

Mr. H. Charles Johnson, instructed by H. Charles Johnson & Co. for the defendant.

Alleged Breach of Agreement for Sale of Stock – Whether Claimant or Defendant at Fault – Whether Completed Contract – Credibility - Measure of Damages – Sale of Goods Act.

Heard: February 5 & 13, 2014.

DELIVERED AS AN ORAL JUDGMENT

Coram: F. Williams, J.

The Nature of the Claim

[1] In this matter, the claimant claims against the defendant for recovery of the sum of $586,410.00. This sum is allegedly the balance owing to the claimant arising from her sale to the defendant of her stock in her female-clothing store located in the Bank House Mall in Mandeville, Manchester. She contends that the original full sale price was $1,086,410.00 and that the balance was left after the defendant paid the sum of $500,000.00 on or about November 14, 2006, the day on which she took possession

and delivery of the claimant's stock and began operating a business from the claimant's former store.

[2] On the other hand, the thrust of the defendant's case is that there was no concluded agreement. She contends that although the sum of $500,000.00 was paid, the exact amount of the balance had not been agreed. The agreement between the parties was for some items in the stock that were old and/or otherwise unusable, to have been taken out by the claimant before the final price could have been agreed on. A written agreement was sent to her by the claimant, but she refused to sign it for that reason.

The Issues in the Case

[3]Subsumed under the over-arching issue of credibility are the following issues:

(i) Was there a completed contract between the parties?
(ii) If so, what were its terms?
(iii) Was there a breach of the contract by the claimant or defendant?

A Summary of the Evidence

The Claimant's Evidence

[4] In keeping with the above summary, the claimant testified to having discussed with the defendant the prospect of selling her business to the defendant some time in 2006. While she operated the store, she was residing in the United States of America (USA); and it was her two employees who had the day-to-day responsibility of running the store. The defendant knew that she was due to visit the island in December, 2006; but, wanting the claimant to sell her the stock and wanting to start running the business from the claimant's store before Christmas, she (the defendant) persuaded her (the claimant) to bring her visit forward to November instead, which she did.

[5] On her visit in November, the claimant and the defendant both went to the store, where, along with two employees of the claimant, and over a period of three days, a stock-taking exercise was done. The defendant's daughter also assisted. A copy of a

book, documenting the stock-taking exercise, with prices of the items, was left with the defendant. Additionally, there were price tags on all the merchandise. A firm agreement was reached thereafter, including a meeting of the minds on the price and the goods: the stock that was being sold; but not the items used to display the stock. Those would be made available to the defendant on loan for a period of time. As a follow up to this completed oral agreement, the claimant took the defendant to her landlord and she was introduced to the landlord as the person who would be taking over the operation of the store, for her to make her own contractual arrangements with the landlord. Thereafter the sum of $500,000.00 was paid to the claimant by the defendant. The claimant had expected the entire sum to have been paid. The defendant told her of a difficulty with a cousin which prevented her from paying the sum in its entirety and promised completion shortly thereafter.

[6] The claimant states further that she drafted an agreement, signed it and sent it to the defendant. However, the defendant never returned it. She made numerous attempts to make contact with the defendant (by way of both telephone calls and visits to the store on trips to the island); but was unable to speak with her. It was not until a day in April, 2007 that she was finally able to secure the return of her display items. At that time an attempt was made to hand her a letter, which she refused to take and which was eventually thrown into her car by the defendant. It turned out to be a letter written on the defendant's behalf by Mr. Hopeton Clarke, attorney-at-law and dated April 18, 2007. (The defendant objected to this letter being admitted into evidence).

The Defendant's Evidence

[7] The defendant's evidence is to the effect that there was in fact a stock-taking exercise; but this was done over two (and not three) days. It was done by the claimant and the defendant. The two then employees of the claimant (who later became the defendant's employees) did not participate. The agreement was not finalized: the claimant should have returned to take away stock that was defective and/or old. It was only then that a final price was to have been agreed. The claimant never did; and that was why she refused to sign the agreement.

[8] She denied hiding from or otherwise having been inaccessible to the claimant.

[9] In cross-examination she admitted that she had received a receipt from the claimant and that the said receipt stated a balance. She also admitted that she did in fact receive the book containing the details of the stock-taking that the claimant spoke of. This admission came after many suggestions to the claimant (and as many denials) that such a book was not left with the defendant. The defendant testified, however, that that book, although left in November of 2006, was taken away by the claimant in April of 2007. She admitted to having been introduced to the landlord as the claimant testified. She also admitted taking possession of the store on November 14, 2006; and of accepting delivery of the stock and of conducting business from the claimant's former store from that date.

[10] Interestingly, she also testified that she instructed her attorney-at-law at the time to write to the claimant to the effect that she was not in a position to pay the balance of the money, as the kind of returns that the store could have made that was represented by the claimant did not materialize. She said, however, that those were not her exact instructions to her said attorney-at-law. She had been in business in Southfield, St. Elizabeth as a clothing-store operator since about a year before her purchase of the claimant's stock and the taking over of her store.

Discussion

[11] As previously indicated, credibility is the central issue in this case, affecting the possible findings on the other issues. For example, the issue as to whether there was a concluded agreement or not, in this case in which there are two different contentions, hinges on whose account the court ultimately accepts. If it accepts the claimant's account, then it will find that there was a concluded agreement. If, on the other hand, it accepted the defendant's account, it would find that there was not.

[12] As is well known, demeanour is one aid to ascertaining which witness is being a witness of truth in any given case. In this regard, the court was more impressed with the claimant in its assessment of the two witnesses. The claimant gave her evidence in a calm, coherent and convincing way and sought to respond to all the questions that were directed to her. On the other hand the court found the defendant to be loquacious, with a tendency to speak about matters not directed to her though questions asked of her – especially in cross-examination. She also gesticulated dramatically (almost as if she wanted to be seen by and to influence the court from the outset) – even before she began giving evidence, until she was instructed not to do so. The way in which she gave her evidence did not exactly inspire the court to have confidence in finding her to be a witness of truth. In terms of demeanour, therefore, the court found the claimant to be the more credible witness.

[13] Demeanour aside, however, there are some aspects of the defendant's case with which the court had serious issues. For example, where she admits in cross-examination that she instructed her lawyer more or less in the terms in which he wrote to the claimant, that would suggest, not that there was not a completed agreement, as the defendant contends, but that the real reason for failing to complete was her disappointment with the sales that she had envisaged – perhaps based on representations that the claimant had made to her. This suggests a lack of due diligence on her part and undermines her contention that there was not a completed agreement. It suggests, further, that she did not pay because she could not afford to; not that there was no final agreement on the balance. In this regard, if it was that the real reason for non-completion was her disappointment with the sales, the maxim *caveat emptor* (let the buyer beware) – to the extent that it still exists today, would be applicable.

[14] In the case of **Miller v Jamieson** 2007 BCSC 1064 (Supreme Court of British Columbia), Meiklem, J (at paragraph 120) made the following observation on the maxim *caveat emptor* in a case relating to housing:

"[120] Caveat emptor has been described as operating passively

> because the vendor need not do anything to inform himself about the state of the property being sold or the existence of any defects: that burden falls to the purchaser. A vendor therefore has no obligation to review the condition of the home in order to be able to describe to prospective purchasers which areas are worn out, in need of repair, were constructed in a shoddy fashion or to the highest standard. Partly for historical reasons and in part because the buyer is in the best position to determine the quality of the home he wishes to purchase, the law has put the onus on the purchaser to determine the state and quality of the property being sold."

[15] To similar effect is the case of **Oldrieve v Anderson Co., Ltd**. 27 DLR 231, in which the Ontario Supreme Court (Appellate Division) held (in the headnote to the case) that:

> "The inspection of a quantity of lumber in esse at the time of the sale, followed by an acceptance of the shipment, brings into operation the rule of *caveat emptor* to exclude any implied warranties and settles all questions as to quality and quantity."

[16] Also of relevance in considering this transaction is the Sale of Goods Act.

<u>The Sale of Goods Act</u>

[17] The Sale of Goods Act (the Act) at section 2 (1), sets out what a contract for the sale of goods is. This is what is stated there:

> "2. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

[18] Without a doubt, that is what we are dealing with in this case. Whereas the defendant contends that there was some condition attaching to this sale, the court (in keeping with the claimant's contention) finds that the sale was absolute.

[19] Section 2 (3) of the Act is also relevant in establishing whether the transaction is an actual sale; or an "agreement to sell". It reads as follows:

> "(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell."

[20] In this case, the evidence from both the claimant and defendant is to the effect that the property in the goods passed or was transferred from the seller to the buyer on November 14, 2006; the transfer was not to have taken place at some future time.

[21] We are also dealing with persons (two businesswomen) who, without doubt, had the capacity to contract with each other; and had experience in the world of business.

[22] With respect to the defendant's contention that there was a condition that the claimant should have returned to remove goods that were old and/or otherwise not wanted by the defendant, the court rejects this. There is no good reason that has emerged for the court to consider or accept, explaining why, if items were to have been removed, that would not have been done during the stock-taking exercise that the court accepts and finds took place over three days, with the defendant's full participation. That would have afforded the defendant a reasonable opportunity to have examined all the goods. Her acceptance of them from the vendor placed on her the onus to carry out her part of the bargain – which was for her to have paid the agreed price. This is the position stated in sections 27 and 28 of the Act:

> "27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.
>
> 28. Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

[23] Any doubt that might have existed about the defendant's acceptance of the goods would have been removed by her own evidence, given in cross-examination, that she has been operating the business of vending female clothing, using at least some of the claimant's stock, and from the shop formerly operated by the claimant, with the two former employees of the claimant working for her since November 14, 2006. This, in the court's view, is an act inconsistent with the claimant's former rights in respect of the goods as reflected in section 35 of the Act. These are the terms of that section:

> "35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

[24] It is the court's considered view that the evidence in this case provides support to the claimant in respect of each aspect of this section – that is, that: (i) the defendant accepted the goods; (ii) she has treated them as her own (and thereby done an act that is inconsistent with the ownership of the seller; (iii) she has retained the goods after the lapse of a reasonable time without intimating to the seller that she has rejected them. There is no evidence that rejection of the goods was among her instructions to her

attorney-at-law who wrote that letter which was delivered to the claimant in April of 2007; or that it arose at all before featuring in her defence which was filed on June 1, 2010.

[25] The court has a concern, as well, with the non-production of a document, although it acknowledges that a party has a right to decide what to agree or not agree where documentary evidence is concerned. There are two concerns about the receipt that the defendant admits that she received from the claimant. One is that, if the receipt stated a balance (as the claimant admits it did), would this not have been the clearest and a very early signal to the defendant that the claimant was misstating the true nature of their discussions? In the court's view it undoubtedly would. And, if it did, is it really likely that with this early signal of what would have been the claimant's dishonesty, that the defendant would have continued operating the store from November, 2006 to at least April, 2007? In the court's finding, it is most unlikely. Another question is: why was the receipt not produced? It was last in the defendant's possession and she has offered no explanation for its non-production. Certainly, its production might have assisted the court in the resolution of the issues.

Conclusion

[26] In these circumstances, there is no doubt in the court's mind that there was in fact a completed contract, which the defendant at the end of the day decided was not in her favour and from which she now wishes to escape. The court finds that she is in breach of the said contract; and that its terms were exactly as stated by the claimant. So far as the stock and price book is concerned, the defendant now states that it was removed in April, 2007 – that is, five months after she took possession of the claimant's stock and began operating the business as her own. The significance of this is that, even if the court were to accept that the book was removed (which it does not), against the background of the evidence by the claimant that there were price tags on all the goods (which the court accepts), and with the passage of the five months, the removal of any such a book would not have been so significant (if significant at all) as it would have been had the book been removed at the outset.

[27] There is no evidence of fraud or misrepresentation on the part of the claimant in this case; nor any evidence of any latent defect in the goods that the defendant inspected during the stock-taking exercise.

[28] Having regard to the nature of the business and the type of goods involved, as well as the nature of a hire-purchase agreement, the court is of the view that this transaction could not reasonably be considered to be one in the nature of a hire-purchase agreement or a credit-sale agreement or a conditional-sale agreement.

The Claimant's Remedy

[29] Although it was suggested that one option of the claimant could be to try to re-claim the goods at this stage, the court finds that the claimant's claim for the price of the goods is one way of proceeding that she is given by the provisions of section 48 of the Act and that the claim cannot be said to have been improperly brought. That section reads:

> "48.-(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

[30] The claimant's claim is, therefore, well-founded both in terms of its substance and in terms of the remedy that she seeks.

[31] In light of these considerations, there will be judgment for the claimant as follows:

(i) Judgment for the claimant in the sum of $586,410.00, with interest thereon at the rate of 3% per annum from December 31, 2006 to February 12, 2014;

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