[2021] JMSC Civ. 190

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

Claim No. 2017HCV00601

BETWEEN	**ANTHONY THARPE**	**CLAIMANT**
AND	**CARIEF LIMITED**	**2ND CLAIMANT**
AND	**VERNON CHIN**	**DEFENDANT**
AND	**ALL NAMED AND UNNAMED PARTIES**	**DEFENDANT**

Mr. Anthony Tharpe – Self- Represented.
Mr. Nickardo Lawson instructed by Dunn Cox for the First Defendant.

In Chambers
Heard December 2, 2021 and December 17, 2021

Application to strike out the Claimant's statement of case – Application for summary judgment – Statute of Limitations in claims for Contract

CORAM: Carr, J

Introduction

[1] The Claimant (Mr. Tharpe) brought this action by way of claim form and particulars of claim filed on February 15, 2017 for breach of contract. Mr. Tharpe was advised to seek counsel in order to assist him with this matter, however he insisted that he was representing himself. At the end of the submissions on the part of the 1st Defendant the court was urged not to treat with this matter differently because Mr. Tharpe was self-represented. Mr. Tharpe also urged the court to consider this matter fairly and justly. I wish to place on the record that the decision below was based solely on the law and has not been influenced by any other factor.

The Claim As Set Out By The Claimants

[2] Mr. Tharpe averred that he was at all material times the developer of lands located at 15 Queens Drive, known as Palm Beach Montego Bay, in the parish of Saint James. The 2nd Claimant (Careif Ltd.) was the legal entity created by him to hold permits for approved developments and for the execution of pre and post development activities for individual real estate developments. He acknowledged that the 1st Defendant (Mr. Chin) was at all times the proprietor of property located at Duppy Pen Montego Bay, which lands consisted of approximately 6 acres. He describes this land as the "subject property".

[3] Mr. Tharpe claimed the following:

a) Breach of promise.

b) Breach of contract.

c) Breach of agreement granted by defendant to develop subject properties of Vernon Chin/Defendant, that fall under the National Environment Planning Agency (NEPA) permit et al granted to and owned by Claimants.

d) Intentional and negligent behaviour of the Defendant causing economic damage to Claimants including constantly increasing the sale price of the subject property from that which was agreed.

e) Contributory negligence by Defendant against Claimants funding strategies to finance Claimants approved development and balance to Defendant resulting in an inability by the Claimant to fund or finance development and acquisition of Defendant's property.

[4] Mr. Tharpe also sought the following as set out in his Claim Form:

1. Damages for breach of promise by Vernon Chin made to Claimants.
2. Claims aggravated and exemplary damages.
3. An order estopping Mr. Chin and or his agents, assigns, heirs from selling any of the property subject to the development permits granted to the Claimants and owned by the Claimants that gives a legal interest in and over the subject property to Claimants.
4. Special damages, the Jamaican equivalent of US$3,000,000,000.00 (Three Billion) payable in United States dollars for the development that cannot be built as direct result of Mr. Chin's actions.
5. An order compelling the defendant whether by itself its director's officer's servants or agents or otherwise to cease and desist all activities and actions which violate the rights of the claimants founded in the development permits without limitation to the claimant.
6. For this court to overturn and or rescind any pending sale, any sale that have occurred involving the subject property subject to the development permits.
7. An order declaring that the existing development NEPA permit have priority rights over the subject property and over all subsequent agreements signed by the defendant including any sales agreement closed or pending.
8. That Defendant is not allowed to enter any sales or lease agreements that prevent the Claimants from executing the development proposed and approved for the subject property.
9. The court rule that the defendant cannot enter any agreement that results in the proposed development located on Claimants property

or development site results in that portion of the Claimants development being landlocked

10. That the defendant by order of this court grant a right of way to the Claimants for Claimants subject developments or Claimants development site for execution of the NEPA approved development.

11. That the Defendant honour the agreed original sale price and the balance owed on the property.

The Application to Strike Out

[5] Mr. Chin filed an amended notice of application for court orders on March 2, 2021 seeking orders that Mr. Tharpe's statement of case be struck out and that summary judgment be entered on the claim against him and in favour of Mr. Chin.

[6] Mr. Chin in an affidavit in support of the application made reference to an option agreement which was executed between Montego Centre Limited, Mr. Tharpe and himself. The agreement was made on the 15th of March 2006. At the end of the option period Mr. Tharpe still did not exercise the option that was open to him, and as such the option lapsed. In those circumstances there was no agreement for sale of the subject property.

[7] Although Mr. Tharpe was given an opportunity to file written submissions he relied on his Affidavit of Urgency which was filed on March 1, 2021 and made oral submissions on the date of hearing.

Submissions On Behalf Of The Claimant

[8] Mr. Tharpe in his submissions to the court pointed out that nowhere in his pleadings did he say he was relying on the option agreement. He stated that the claim did not make mention of any option agreement. The claim he said arises out of a breach of contract. He submitted that the agreement for sale was an oral one which was made prior to the option agreement.

[9] It was his submission that in 2008 he was successful in obtaining permits from NEPA and as such the option agreement would be moot. He said in 2008 the parties were still in negotiations and that there was no termination of the agreement. It was his contention that Mr. Chin frustrated the agreement and that there were serious issues to be tried. He further indicated that the option agreement was not with Mr. Chin but was with a company.

Submissions On Behalf Of The 1st Defendant

[10] In an amended defence which was filed on the 29th of July 2020, Mr. Chin pleaded a statutory defence, that of limitation. This formed the main thrust of the submissions of Counsel on his behalf. It was argued that the only agreement which existed between the parties was the option agreement which was executed on the 15th of March 2006. The claim was filed on the 15th of February 2017. By virtue of the Limitation of Actions Act the time for filing a claim in matters involving contract was that of 6 years. The claim filed by Mr. Tharpe was therefore statute barred and was an abuse of the process of the court.

[11] Time, it was argued starts to run at the date of the breach of the contract and not at the date when the Claimant would have suffered damage. It was submitted that the option agreement was the only agreement between the parties and was a simple contract. The 1st Claimant failed to exercise the option open to him and as such the option lapsed, there was therefore no contract for a sale of land.

[12] In the event that the court does not find favour with this submission, Counsel further submitted that the claim ought to be struck out as there was no reasonable basis for bringing the matter to court.

Analysis and Discussion

[13] The Civil Procedure Rules sets out the power of the court to strike out a claim at Rule 26.3 (1) which states;

"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."

[14] The issue is normally determined by reference to the pleadings.[1] The pleadings in this case disclose a cause of action based in contract. Mr. Tharpe himself, in his submissions emphasized, that the matter was one involving a breach of contract.

[15] Although Mr. Tharpe in his particulars of claim referred to a contract or promise between himself and the 1st Defendant, there was no stated date of this agreement and no indication as to the terms of the agreement or the consideration set out in the pleadings.

[16] Mr. Tharpe submitted that the option agreement came after an oral agreement between himself and the 1st Defendant. The pleadings however, do not specifically refer to an oral agreement. At paragraph 11 of the Particulars of Claim a reference was made to a formal agreement between the parties;

"It was based on the above listed understanding between the parties that the parties entered a formal agreement to purchase the entire property, in exchange for Mr. Chin granting his permission to apply for the permits as well as proceed to design and show the development to the public."

1. City Properties Limited v. New Era Finance Limited [2013] JMSC Civil 23 (unreported judgment delivered on the 17th January, 2013).

[17] The term "formal agreement" does suggest an agreement in writing. In any event if Mr. Tharpe wished to rely on an oral agreement he would have had to set out the terms and date of that agreement in his particulars of claim. As it stands therefore the only agreement before the court is the option agreement. I therefore find as a fact on a balance of probabilities that Mr. Tharpe's reference to a formal agreement is a reference to the option agreement. There is no denial that this agreement existed, Mr. Tharpe only indicates that he is not relying on it. It is my view that there is no other agreement on the face of the pleadings that Mr. Tharpe can rely on in support of his claim.

[18] The option agreement was exhibited to the amended defence filed on behalf of Mr. Chin. It is noted that the agreement did not include the 2nd Claimant as a party. The terms of the agreement are as follows:

1. ***"In consideration of the non-refundable sum of One Hundred Thousand Dollars United States currency (US$100,000.00) paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor grants to the Grantee the single indivisible option (hereinafter called the option) to purchase all those parcels of land as a whole (but not part or parts thereof) described in the schedule hereto (hereinafter called the Land) for the sum of Six Million Six Hundred and Fifty Six Thousand Dollars United States currency (US$6.656,000.00).***

2. ***The option is granted from the date hereof and expires at 4:00pm on the 2nd day of October, 2006 (such period hereinafter called "the option period").***

3. ***The option may be exercised by the grantee at any time during the option period by the grantee completing signing and returning the form of agreement for sale attached hereto as Annexure 1 with the***

required initial payment to the Attorney-at-law having carriage of sale of the land.

4. ***The Grantor grants the grantee the right to enter upon the land from the signing of this agreement for the purposes of i) inspecting, surveying, taking samples, conducting tests and any other activities related to any application for the development of the land and/or construction of buildings, roads and infrastructure thereon; ii) marketing and advertising the development of the land including the posting of signage, without however causing any loss, damage or waste to the land.***

5. ***The grantor agrees at the grantee's sole cost to fully cooperate with the grantee in making such applications and obtaining the approvals (including executing expeditiously all documents presented by the grantee) with respect to the development of the Land and or construction of buildings, roads and infrastructure thereon."***

[19] It is clause 4 of that agreement that seems to have sparked this claim. Mr. Tharpe contends among other things that he was not permitted to market the property and as such was not able to raise the funds to meet the purchase price. The breach, by his timeline, would have occurred subsequent to the NEPA approval which was granted in 2008. Time would have started to run in or around that year. On the face of the pleadings therefore the claim would be statute barred.

[20] In any event, even if I accepted Mr. Tharpe's submission that it is an oral agreement that is to be relied on, the breach would still have effectively occurred in or around 2008 when the Claimant was not able to market the property as agreed in the option agreement. Any cause of action therefore would be statute barred.

[21] The claim in the circumstances must be struck out as an abuse of process, based entirely on the pleadings as set out. Having said that I need not go any further in relation to this aspect of the application.

[22] Counsel also made an application for summary judgment to be granted in light of the fact that the 2nd Claimant was never a party to any agreement. There is in fact nothing on the pleadings of Mr. Tharpe to indicate that the 2nd Claimant entered into any agreement with the 1st Defendant. Further the option agreement does not make any reference to that either. Having found however that the claim is statute-barred there is no useful purpose in making such an order.

Conclusion

[23] Mr. Tharpe raised the issue of constitutional relief in his affidavit of urgency. I wish to address that point briefly. The claim as set out did not raise any constitutional issues. He told the court that property disputes are constitutional claims and as such cannot be dismissed summarily. His submissions were based on the permit that he exhibited to his Affidavit of Urgency. I cannot agree with that proposition.

[24] The permit which was granted to Mr. Tharpe makes it clear that it is subject to any existing legal rights of third parties. The permit does not provide the Permittee with an interest in land. Mr. Tharpe acknowledged that Mr. Chin is the proprietor of the subject property. Further, as a general condition, the permit also states that *"if the permitted activity does not commence within five years after the date of this Permit, then this Permit is void and the Permittee shall re-apply for a new Permit"*. The permit is granted specifically to the Permittee in this case Mr. Tharpe. He having not commenced the activity within the stipulated time the permit has now expired. The claim that there is a dispute as to land is therefore devoid of any merit.

Order

1. The Claim is statute barred and is an abuse of process.
2. The Claimant's statement of case is struck out.

3. Costs to the 1st Defendant to be agreed or taxed.