



[2019] JMSC CIV 76

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 03781

BETWEEN	LOREN EDWARDS (Pursuant to a Power of Attorney)	CLAIMANT
AND	ANN MARIE VACIANA	DEFENDANT

IN CHAMBERS

Mr. Glenroy Mellish instructed by Byfield, Mellish & Rushton for the Claimant.

Miss Nicola Allison instructed by Brown, Godfrey and Morgan for the Defendant.

Heard: June 4, 2018 and April 12, 2019

Summary Judgment - Application for – Registered Land – Memorandum in Writing – Proprietary estoppel – CPR Part 15

HENRY-MCKENZIE, J (Ag)

BACKGROUND

- [1] The claimant claims on behalf of Keith Currie and Sybil Currie, the registered proprietors of the property now in dispute, that is, property registered at Volume 1212 Folio 467 of the Register Book of Titles with civic address at Comfort Hall in the parish of Manchester. The claimant is authorized to bring this claim by a Power of Attorney registered in the Island Records Office.

- [2] The Curries relocated to Jamaica in 1991 and in about 1996, the defendant was hired by them to perform general household duties. In about 2003, the defendant, because of personal issues at home, was allowed by the Curries to live on the property through some arrangement the nature of which is disputed. The defendant as a result, with the consent of the Curries, built a small board structure on the property to house her two children and herself, which was eventually upgraded to a concrete structure.
- [3] Overtime differences developed between the parties and the defendant's employment was terminated with effect from March 31, 2015. A notice to quit was served on the defendant on May 6, 2015, but she refused to give up possession. The claimant as a result brought a claim for the recovery of possession of the land and for a declaration that all gifts of money made to the defendant by the Curries were made as a result of undue influence of the defendant over the Curries. The claimant also sought an order for the repayment of the monies.
- [4] The defendant filed a defence to the claim in which she denies and disputes the particulars of claim. She alleges that the land was gifted to her by a memorandum in writing executed by the Curries and that she constructed the dwelling house thereon in the full view of the claimant and his principals (the Curries). The defendant counterclaims for a declaration that she is entitled to have legal title to that parcel of the land transferred to her, an order that the claimant and/or his principals procure a subdivision plan, an order for splinter title and an order that the said splinter title be endorsed in her name. The claimant in response to the defendant's defence and counterclaim put the defendant to strict proof of the authenticity of the document which purports to make a gift of the disputed land. The claimant has now filed an application for summary judgment pursuant to Part 15 of the Civil Procedure Rules 2002 (CPR). It is this application which is now before the court.

THE APPLICATION

- [5] In the Relisted Notice of Application for Court Orders, supported by affidavit of Loren Edwards, the claimant seeks an order for summary judgment to be entered against the defendant in that, “*the Counterclaim and Defence which were filed herein on November 22, 2016 have no real prospect of success.*” The application is grounded on the fact that the memorandum relied on by the defendant is inadmissible and could not convey an interest in the lands belonging to the claimant’s principals, the land being registered. The claimant also raised the point that the purported gift of land is incomplete and the court has no jurisdiction to perfect an imperfect gift. Further, that the arrangement for gifting part of the land was illegal and the court could not enforce it.
- [6] Counsel for the claimant, Mr. Mellish, indicated that the claimant would not contest the validity of the document being relied on by the defendant for the purpose of this application.

CLAIMANT’S/ APPLICANT’S SUBMISSION

- [7] Mr. Mellish in making his submissions, contended that no effective gift of land by the document, “Memorandum in Writing” was made and the court cannot perfect an imperfect gift, nor can the owners be forced to give up a part of their land. Counsel advanced that this document relied on by the defendant is fraught with imperfections. According to counsel, the document is not only unstamped, but that its contents express a conditional gift which no evidence has been brought to show has been satisfied and it also fails to properly identify the parcel of land.
- [8] Mr. Mellish also submitted that the gift was not effective, as the land being registered land, the prescribed procedure for transfer of registered lands must be followed, which was not done in this case. The document presented does not resemble any such form of transfer. He relied on the case of **Diana Ramona Johnson v Ivy Johnson** Suit No E 379 of 2000 (unreported) Supreme Court,

Jamaica, (judgment delivered October 25, 2002) to ground his submission. I will rehearse counsel's synopsis of the facts: The father had made a grant of land to his daughter in a passage in his divorce papers. There was no evidence whether the land was registered, but the court concluded, obiter, that a gift of registered land takes effect only by registered transfer and as such the gift was unenforceable. Counsel also relied on **Halsbury's Laws of England** Volume 20 paragraph 62 which states:

"If a gift is to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do....An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete. No question of conscience enters into the matter, for there is no consideration and there is nothing dishonest on the part of an intending donor who changes his mind at any time before the gift is complete."

- [9] Reference was also made by Counsel to two statutory provisions, which he argued will affect any gifting of the land, that is, The **Local Improvements Act** and the **Records of Deeds, Wills and Letters Patent Act**. In relation to the **Local Improvements Act**, counsel focused on sections 5, 12 and 13. These sections detail the requirement to submit subdivision plan to parish council before building on land or sale of land, the penalties for failing to comply and the unenforceability of a contract for sale where there is noncompliance. Counsel submitted that under the Act, a gift is also defined as a sale. As it relates to the **Records of Deeds, Wills and Letters Patent Act**, counsel submitted that if the document in question, that is, the Memorandum in Writing, was intended to be a deed of Indenture, it would be affected by section 2 of the Act, which requires acknowledgment, proof and recording of a deed before any freehold interest can be passed, thereby affecting the defendant's claim. As such, Counsel continued, this claim can be summarily decided given the legal position in relation to

registered land. He further argued that the defendant has cast her lot on a document which cannot achieve what it tries to do.

DEFENDANT'S /RESPONDENT'S SUBMISSIONS

- [10] Ms. Allison for the defendant opposed the application for summary judgment. She relied on the authorities of **Swain v Hillman** [2001] 1 All ER 91 and **Victor Gayle v Jamaica Citrus Growers and Anthony McCarthy** claim no. 2008 HCV 05707 (unreported) Supreme Court, Jamaica (judgment delivered April, 4, 2011) for a definition of the expression “real prospect of success.” She pointed to the fact that Lord Woolf MR in **Swain v Hillman** said the expression, “real prospect of success” did not need any amplification as the words spoke for themselves. Further, that the word “real” directed the court to examine whether there is a realistic as opposed to a fanciful prospect of success. Counsel cited examples of situations in which a claim is considered to be fanciful. These include situations where a statement of case is contradicted by all documentary evidence or any other material, where the defence put forward is clearly a sham and where similar defences shown to be false, was advanced in previous litigation.
- [11] Counsel then went on to argue that in the instant case, there is much merit to the defendant’s case and that the defendant has a real prospect of successfully defending the claim. Her defence is not merely fanciful. According to counsel, certain representations were made to the defendant by the Curries, and the defendant as a result, acted on those representations to her detriment by expending money to build a concrete structure home with the encouragement of the Curries. As such, counsel submitted, although certain formalities were not complied with, the defendant has a shield and sword in equity.
- [12] In grounding the defence on the doctrine of proprietary estoppel, counsel referred to the authorities of **Hughes v Metropolitan Railway Co** [1877] UKHL 1 and **Central London Property Trust Ltd v High Tress House Ltd** [1947] KB 130 which provide an exposition of this equitable principle. Based on these

cases, counsel pointed out that the doctrine of proprietary estoppel articulates that if a party leads another party to believe that he will not enforce his strict legal rights, which that party had acted on to his detriment, then the courts will prevent him from doing so at a later stage.

[13] Counsel also placed reliance on the cases of **Maxville Trenchfield v Leslie** [1994] 31 JLR 497; **Osbert Powell, Frank Powell, Karl Linton Powell and others v David Powell** [2017] JMSC Civ.72; which she submitted, are exceptions to the equitable principle, that equity will not perfect an imperfect gift.

[14] In **Maxville Trenchfield**, [supra] the Appellant, who was co-executor of the Will of the deceased and also one of the beneficiaries under the Will, brought an action against the respondent for recovery of possession. The respondent refused to leave the property. The respondent contended that there was an oral agreement between the deceased and herself whereby the deceased promised to make a gift of his house and the land around it to her in return for her taking care of him. The respondent as a result of that promise, moved into the house, repaired its facilities and took care of the deceased. The Court of Appeal found in favour of the respondent and held:

[15] *“Where there has been a definite concluded contract for the disposition of land, but there is an absence of a sufficient note or memorandum to satisfy the requirements of the Statute of Frauds, a court of equity will grant relief by way of an order for specific performance if the party seeking to enforce such a contract shows sufficient acts of part performance...”*

[16] The court continued:

“When the parties to a transaction proceed on the basis of an underlying assumption on which they have conducted their dealings, neither will be allowed to go back on that assumption when it would be unfair and unjust to allow him to do so; the principle of promissory (or proprietary) estoppel applies. In the

instant case, the respondent's case is based on estoppel by encouragement or acquiescence" and there is sufficient evidence to support a finding that the deceased promised the respondent the gift of his house and the land around it and that the respondent acted to her detriment on the basis of this promise."

[17] In **Osbert Powell**, [supra] the court also had to make a determination regarding the applicability of the doctrine of proprietary estoppel, in relation to an imperfect gift. In that case, the claimants claimed a beneficial interest in the subject property on the basis that they made substantial financial contributions to the development of the house and property with the defendant's knowledge and without any objection. The defendant on the other hand claimed to be the sole legal and beneficial owner of the property by virtue of a promise of the house to him by his parents and the fact that he carried out several renovation and expansion jobs as a result. Thompson-James J in considering whether the property was a gift to the defendant stated:

"It is a longstanding principle that a land transaction will not be upheld in a court of law unless it is evidenced by sufficient memorandum in writing (section 4 of the Statute of Frauds). This principle holds true for purported transfers of land by way of gift. The starting point is that an appropriate deed of transfer must be effected to legally pass title. In the case at bar, there is no dispute that the deceased Curley Powell failed to transfer the property by way of deed to the Defendant during his lifetime. Even if Curley Powell had purported to give David the subject property as alleged, the gift would have been imperfect owing to the lack of a memorandum in writing and ordinarily the Court could not countenance such a gift [Dillwyn v Llewelyn [1861-73] All ER Rep 384].

However, there is an exception where the person to whom the gift was purportedly given, acted to his detriment in reliance on said gift....”

[18] [Thompson-James J found that the defendant was promised a gift of the property on which the defendant had expended money to his detriment, some of which was with his father’s approbation based on the promise that this property belonged to him. She concluded that from the authorities:

“it can be deduced that in cases where a party asserts interest in land by virtue of a gift or promise, and said land has not been transferred in the requisite manner, the Court will only give effect to that gift or promise where it can be demonstrated that the person to whom it was made acted to his detriment owing to his reliance on said gift or promise with the acquiescence or approbation of the owner. This is based on the doctrine of proprietary estoppel.”

[19] In reliance on these authorities, counsel for the defendant submitted that it would be unfair and unjust for the claimant in this case through his principals, to go back on an assurance made to the defendant and on which she relied and eventually acted to her detriment. She based her submissions on the fact that the law has provided a remedy in equity, where an owner of land has invited or expressly encouraged another to expend money, on part of his land on the faith of the assurance or promise that the land will be made over to the person expending money. As such, she concluded that in the instant case, the defendant has a real prospect of successfully defending the claim.

APPLICANT’S/CLAIMANT’S RESPONSE

[20] Mr. Mellish advanced further arguments in response to the defendant’s submissions. He submitted that the defendant’s resistance to the summary

judgment application should fail for a number of reasons, partly having to do with procedural issues, but mainly due to substantive legal issues.

- [21]** In respect of the procedural grounds, counsel relied on rules 8.9 and 10.7 of the CPR which oblige a party to set out the case it intends to pursue in the statement of case. According to Mr. Mellish, the defendant is for the first time setting up both a defence and counterclaim of estoppel due to the legal challenges encountered with the memorandum in writing. Counsel has also argued that the defendant has failed to comply with rule 15.5(2) and that it is not open to Counsel to make submissions assuming facts not placed before the court either in the statement of case or in the affidavit evidence.
- [22]** On the substantive issues, counsel argued that even if estoppel were to be taken into account, the ingredients of proprietary estoppel are missing. As it relates to the requirement of assurance/representation counsel seems to be of the view that there is a lacuna in the defendant's version of how she came to occupy the premises, highlighting that the defendant had come to live on the premises before the date of the document she relies on, thereby casting doubt on her version of the events and the purported gift. Counsel also contended that there was much uncertainty in the document relied on in respect of the condition put in place and the phrasing of the defendant's purported entitlement. Counsel further submitted that the claimant's principals could not gift the land by virtue of the mortgage instrument.
- [23]** In objecting to the defendant's defence of estoppel, counsel for the claimant argued that the precondition for the application of proprietary estoppel are met only if the representee is left unconscionably disadvantaged by his reliance on the relative assurance of entitlement. This he highlights was not so in this instant case as the defendant does not personally occupy the property, the occupants being her adult relatives and she has built alternative accommodation demonstrating that she is not deprived of accommodation. He asked the court to

find that there should be summary judgment in favour of the claimant for possession.

ISSUE

[24] In considering whether or not to grant the summary judgment which the claimant seeks, the main issue for the court's consideration is whether the defendant has no real prospect of successfully defending the claim or the issue.

THE LAW

[25] Part 15 of the CPR confers upon the court the power to decide a claim or a particular issue without a trial. The court has the power to enter summary judgment by virtue of Part 15.2 of the CPR which states:

The court may give summary judgment on the claim or on a particular issue if it considers that-

(a) the claimant has no real prospect of succeeding on the claim or issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue

The relevant test applied in such an application is whether there is a "real prospect of success." This applies to an application made by the claimant as well as the defendant.

[26] The defendants in opposing this application, cited the case of **Swain v Hillman** in which it was stated that a real prospect of success connotes that the defendant must have a "*realistic as against a fanciful prospect of success*". He must have a case that is more than arguable. This position of "*realistic as against a fanciful prospect of success*" was also accepted by the Court in **International Finance Corporation v. Ute Africa S.P.R.L.** [2001] EWHC 508.

[27] The overall burden of proving that the defendant has no real prospect of success rests on the claimant/applicant. There is however an evidential burden on the defendant to bring material to show the contrary. This principle was set out by Brooks JA in the case of **ASE Metals v Exclusive Holidays of Elegance Limited** [2013] JMCA Civ. 37, page 14 and 15. He said thus:

*“The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent’s case has no real prospect of success. In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ. 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment: “...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...” [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case “which is better than merely arguable” (see paragraph 8 of *ED & F Man*). The defendant must show that he has “a ‘realistic’ as opposed to a ‘fanciful’ prospect of success”.*

[28] On hearing an application for summary judgment, the court has a discretion whether or not to grant it and is given the power by rule 15.6 to make several orders. The rule provides that:

“(1) on hearing an application for summary judgment the court may-

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.”

[29] The court is not required at the hearing of an application for summary judgment, to embark on a mini trial of the issues. In **Cecilia Laird v Ayana Critchlow and Kinda Venner** [2012] JMCA Civ 157 at paragraph 19, Simmons J looked at **Bolton v Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others** [2006] EWCA Civ 661 where that court in looking at CPR 24, which is similar to our CPR Part 15, discussed the procedures and approach to be taken in hearings for summary judgment. Simmons J, quoted from **Bolton** as follows:

“The court should exercise caution in granting summary judgment in certain kinds of case, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a trial where, even though there was no obvious conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case”.

[30] As such, summary judgment is designed to be given in straight forward cases, but where there are cases in which issues require investigation, these must be determined in a trial and not on a summary judgment application. The pertinent question in the hearing *“is whether there [is] material which demonstrates that there are issues to be investigated at trial.”* See: **Fiesta Jamaica Limited v The National Water Commission** [2010] JMCA Civ 4 per Harris J.A at paragraph 35

ANALYSIS

- [31] The claimant and the defendant have given two conflicting accounts. Except where they agree that the defendant worked as the household helper of the Curries and that she was put in possession of the land by the Curries, they agree on very little. To commence with, the purpose for which the defendant was put in possession of the land is in issue. The claimant on the one hand is saying that the defendant was put in possession to facilitate her job as the household helper by the Curries. The defendant on the other hand is saying that she was put in possession by way of a gift made to her by the Curries, as evidenced in the Memorandum in Writing executed by them.
- [32] The claimant has rejected this position. The claimant has forcefully argued that this Memorandum in Writing does not in law vest an interest in the land as it does not conform with the formalities, which in law, are necessary to effect transfer of title of the registered land.
- [33] The claimant has pointed out what he says are several difficulties with the Memorandum in Writing. The claimant argued that the document is unstamped, is imprecise in its terms and lacks certainty. The document he argued, is conditional upon a successful application, and there is no evidence as to what application this is. In all the circumstances, according to the claimant, the Memorandum in Writing would constitute an imperfect gift, which the court cannot perfect.
- [34] The defendant has sought to rely on the Memorandum in Writing which she says was signed by the Curries, and which gifted to her, a portion of their land to build a house. The defendant has indicated further, that she acted to her detriment in reliance on the promises and assurances made to her by the Curries, as well as their encouragement, and as such, expended sums to construct and improve the dwelling house. She is therefore relying on the principle of proprietary estoppel to

ground her claim that she is entitled to legal title of the parcel of land of which she is in possession.

- [35] I have found the authorities cited by counsel on both sides to be helpful and instructive in my determination as to whether the claimant should succeed in his application for summary judgment.
- [36] I note that the facts in the case of **Maxville Trenchfield** [supra], though not on all fours with the instant case, is similar on the facts. In that case, the court had to contend with an imperfect gift, as in this case. The court found that the principle of promissory or proprietary estoppel applied on the facts.
- [37] Similarly, in the case of **Osbert Powell** [supra] which also had to do with an imperfect gift and which on the fact bears similarities to this case, the court ruled in favour of the defendant based on the doctrine of proprietary estoppel, where it found that the defendant acted on the promises and representation made to him by his father to his detriment, in expending money on the subject property.
- [38] The defendant's contention in this matter is similar to that of the defendants in both cases.
- [39] In coming to my decision on whether a summary judgment should be granted, I have analysed the defence and its prospects of succeeding against the claim. I have also considered the relevant law and I do not find the defendant's case to be fanciful. The defendant's case is more than arguable, taking into consideration that she has produced documentary evidence of the purported gift made to her in the form of a Memorandum in Writing against the backdrop of contentions by the claimant that no gift was made, but rather that permission was given for occupation to facilitate her employment as a live in helper. This together with the fact that she indicated that she acted on that purported gift by expending money and constructing her home which the claimant acknowledged was done, raise issues which must be ventilated in court.

- [40]** I am cognizant of the general rule that land transactions and in particular an assignment of an interest in real property, must comply with certain formalities in law, and should be evidenced by sufficient memorandum in writing. It may very well turn out to be, that this Memorandum in Writing in and of itself does not create a legal interest in the property in favour of the defendant, but does this necessarily mean that the defendant in reliance on it, would be left without a remedy?
- [41]** Among the issues therefore, that must be considered are: whether the memorandum in writing created a valid and enforceable gift of land; whether the claimant's principals had the capacity, in light of an existing mortgage, to make such a gift; if the memorandum in writing was not sufficient to transfer an interest in the land, can the defendant ground her defence in equity under the doctrine of proprietary estoppel; and whether the gifts of money was obtained by the undue influence exercised over the claimant's principal.
- [42]** In my view, in order to arrive at a resolution of these issues raised, it would necessitate further investigation at a trial. There must be an assessment of the evidence and an application of the relevant law. This assessment must involve an examination of the materials and the testimonies which must be done at the trial.
- [43]** It is to be noted that the claimant in opposing the defence advanced by the defendant, has brought to the fore, issues which the defendant's case has highlighted. These are issues not meant to be resolved on summary judgment, but are those that necessitate further examination by the court. They are serious legal and factual points to be investigated.
- [44]** I note the submission by counsel for the claimant, that the defendant had not filed an affidavit in response to the application for summary judgment. I find that for these proceedings, the absence of that affidavit is not fatal. The position of the defendant is clear in all the pleadings and it is to her expressed position that the

claimant has campaigned in his Reply and Defence to Counterclaim and all subsequent submissions.

CONCLUSION

[45] In all the circumstances, I find that there is material before me which demonstrates that there is a plethora of issues to be investigated at trial. Accordingly, I am of the view that the defendant has a real prospect of successfully defending the claim. I am of the opinion therefore, that this is not an appropriate case for the grant of summary judgment. I therefore make the following orders:

ORDERS

- [46]**
1. The Relisted Notice of Application for court orders for Summary Judgment filed on January 15, 2018 is dismissed.
 2. The matter is to proceed to case Management Conference to be held on a date to be fixed by the Registrar
 3. Cost to the defendant to be taxed if not agreed.
 4. Defendant's attorney at law is to prepare file and serve orders herein.