



[2017] JMSC Civ. 110

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 05382

BETWEEN	JAMROW TRADING AND MANUFACTURING COMPANY LTD	CLAIMANT
AND	DONALD HOO	1ST DEFENDANT
AND	GARY FRANCIS HOO	2ND DEFENDANT
AND	RICHARD CRAIG HOO	3RD DEFENDANT
AND	VAM SUPERIOR CONSTRUCTION AND FINISHES LTD	4TH DEFENDANT

IN CHAMBERS

Marvalyn Taylor-Wright and Cardena Clarke instructed by Taylor-Wright & Company for the Claimant/ Respondent

Peta-Gaye Manderson and Annaliesa Lindsay instructed by John G. Graham & Company for the 1st, 2nd and 3rd Defendants

Harold Brady instructed by Brady & Co for the 4th Defendant/ Applicant

Heard: 14th March, 2016, 27th April, 2016, 11th May, 2016, 6th July, 2016, 29th September, 2016, 20th April, 2017

**Summary Judgment – Whether claimant’s case has real prospect of success-
Limitation of Actions Act section 3 and 30**

BERTRAM LINTON, J

BACKGROUND

- [1] This is the judgment on a preliminary application made by the 4th defendant for summary judgment to be entered in its favour.
- [2] This matter concerns land registered at Volume 1309 Folio 688 of the Register Book of Title (hereinafter referred to as the 'Disputed Property'). The claimant (hereinafter referred to as "Jamrow") says it has been in possession of the Disputed Property since 1996. At that time the land was owned by Donald Hoo, who it is said agreed to sell the disputed property to Jamrow.
- [3] The claimant was given permission to occupy the property pending the completion of an agreement for sale. In 1998, the agreement for sale broke down but the claimant continued to occupy the disputed property. By this time, the property was fenced and the claimant had built a factory on it.
- [4] In 2014, the 1st, 2nd and 3rd defendants sold the disputed property to the 4th defendant. Since that time, the 4th defendant has sought to recover the property from the claimant who is now asserting that it is the owner.
- [5] The claimant filed a claim against the previous owners of the disputed property as well as the purported paper title owner so that the court can make a declaration that it is the rightful legal owner of the disputed property.
- [6] The 4th defendant filed an application for summary judgment asserting that the claimant's case has no real prospect of succeeding and seeking the court's determination as to whether the claim is subject to section 70 of the Registration of Titles Act. This preliminary application is the focal point of this judgment.

ISSUE

- [7] The issue for determination is whether the court is satisfied that the claimant has no real prospect of success and therefore ought to grant the summary judgment in this matter in favour of the 4th defendant/ applicant.

SUBMISSIONS

(1) The Applicant's Case

- [8] The 4th Defendant has asked to court to consider the grounds for granting a summary judgment order. Counsel directed the court to part 15 of the CPR pointing out that the claimant's case has no real prospect of success.
- [9] The court has been asked to evaluate what the law considers to be a "realistic" prospect of success. In this regard, counsel relied on the case of **Gordon Stewart, Andrew Reid and Bay Roc Ltd v Merrick (Herman) Samuels** Supreme Court Civil Appeal No.02/05 delivered November 18, 2005 and the Court of Appeal's adaptation of Lord Woolf's, MR, pronouncement on the issue in the case of **Swain v Hillman [2001] 1 All ER 91**. He further submitted that the burden of proof rests on the applicant while the respondent may show why his case has prospects of success.
- [10] In seeking to dispel the claimant's case, counsel argued that the 4th defendant has a legal interest as a bona fide purchaser for value without notice and since it had no notice of the Claimant's interest, the claimant's cause of action is that of breach of contract as against the 1st, 2nd and 3rd Defendants.
- [11] It was further submitted that the claimant's affidavit is in contravention of the CPR and it has not filed evidence on which it can rely. As such, though the claimant is relying on the Limitations of Actions Act particularly sections 3 and 30, there is no evidence before the court to substantiate their claim of an equitable interest in the disputed property.

(2) The Respondent's Case

- [12] In response, the claimant submitted that the 4th defendant's proposition that it did not file evidence upon which it can rely is unfounded. Counsel submitted that two affidavits were filed in response to the application for summary judgment; one from Beverley Ruddock and the other from Shari Ruddock. Both affiants are entitled to

act on behalf of the company based on the titles they hold. As such, the claimant argued that the evidence placed on its behalf is valid.

[13] Counsel for the claimant said that the nature of summary judgment is such that the case presented on its behalf should have no real prospect of success. It was argued that the 4th defendant's view that the claimant's case has no real prospect of succeeding is flawed having regard to the fact that:

- a. The 1st, 2nd and 3rd defendants' interest in the disputed property has been extinguished since 2010 as it contends that it has been in possession of the property since at least 1998.
- b. The 4th defendant's proposition that it is a bona fide purchaser for value without notice of the claimant's interest is debateable.

[14] In relation to the matter of the paper title, counsel for the claimant argued that the 4th defendant had notice of the claimant's interest as the evidence before the court suggests that their representatives were expressly told that the fenced portion of the property could not be part of the sale as it was owned by the claimant. In any event, counsel further submitted that whether or not the 4th defendant had notice of the claimant's interest is a question of fact to be determined by the court in a full trial of the matter.

[15] Counsel said that her client has been occupying the land adverse to the owners since 1998 when the agreement for sale broke down and as such the 1st, 2nd and 3rd Defendants' interest would have been extinguished since 2010 pursuant to sections 3 and 30 of the Limitation of Actions act. As such, the claimant would have gained possessory title in 2010. Since the property was not sold to the 4th defendant until 2014, the land would not have been available for sale at that time.

[16] In response to the 4th Defendant's position that it is a bona fide purchaser for value without notice, the claimant says that they had notice. The claimant has asked the court to consider that the disputed property was visibly fenced and there is a factory

on the land. It is the claimant's case that in 2013, the 4th defendant through their agents contacted the claimant who informed them of their possessory title and the promise made by the 1st defendant to sell the land to Jamrow.

[17] The claimant also argued that the 4th defendant's surveyors produced a report of the property which notified them of the fact that a factory was on the premises. Therefore, counsel submitted that the 4th defendant had actual notice of the claimant's interest.

[18] The claimant has asked to court to consider that none of the defendants denied that the length of time which the claimant says that it has been in possession of the disputed property. Further, the 1st, 2nd and 3rd defendants have confirmed that the claimant is not a paying occupier and it is not in possession pursuant to any agreement.

[19] The court has been asked to consider the decisions of ***International Hotels Jamaica Ltd v Proprietors Strata Plan #461*** [2013] JMCA Civ. 45, ***Rush Tompkins Ltd v London Council Anor*** (1989) 1 AC 1280 and ***Recreational Holdings (Jamaica) Ltd v Carl Lazarus and the Registrar of Titles*** [2014] JMCA Civ 34. Having regard to the cases, the court has been asked to consider that the claimant was a squatter and has factual possession of the disputed property and its offer to buy the property should not be regarded as adverse to the its case. Furthermore, the communication for the purchase was made without prejudice and it did not negate the claimant's interest in the disputed property.

LAW AND ANALYSIS

[20] Part 15.2 of the Civil Procedure Rules (hereinafter called CPR) empowers the court to grant summary judgment in circumstances where it is fit to do so. The part states that:

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 the issue; or*
- (b) *the defendant has no real prospect of successfully defending the claim or the issue.*

[21] In the case of ***United General Insurance Company Limited v Marilyn Hamilton*** Supreme Court Appeal No. 88/08 delivered 15th May, 2009, Morrison, JA (as he then was) said:

Lord Wolfe MR went on to observe that it was important “that a judge in appropriate cases should make use of the powers contained in [Rule 15.2]”, as a means of giving effect to the overriding objective of the rules (Rule 1.1(1)) by saving expense, achieving expedition, avoiding misuse of the court’s resources and generally promoting the interests of justice. However, Lord Woolf MR concluded:

“Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Pt. 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.”

[22] In the case of ***Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright*** [2016] JMCA App 34, the Court of Appeal discussed the principle which ought to guide the court in an application for summary judgment being “*whether there is a real prospect of succeeding on this claim or issue.*” After reviewing the authorities Phillips JA concluded in paragraph 43 that:

“[43] ...It is evident that to succeed on an application for summary judgment, the prospects of success must be “realistic” as opposed to “fanciful” and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice.”

[23] In the case of ***Cable and Wireless Jamaica Limited v Alliance Investment Limited and Reliant Enterprise Communication Limited*** [2012] JMSC ADM 1, McDonald-Bishop J (as she then was) noted that:

“...where the issue to be determined in a case involves only a question of law and no dispute as to facts, then it is an appropriate case for the court to hear full arguments and to decide the point even if it would determine the outcome of the substantive matter.”

[24] The crux of the claimant's case is that the legal title of the 1st, 2nd and 3rd defendant has been extinguished and therefore they had no title to transfer to the 4th defendant. It is now trite that a squatter need not formalize his interest after the requisite time has passed and as such the matter of whether the applicant had notice of the claimant's interest is now moot: see **Recreational Holdings case**. The critical issue is whether the claimant had in fact possessed the property adverse to the paper title owners.

[25] In order for the court to grant summary judgment, I must be satisfied that the claimant has no interest in the disputed property and that it has not had factual possession since 1998. On this issue alone both parties disagree as to the manner in which the claimant held the land.

[26] I am guided by the dicta of McDonald-Bishop J in the **Cable and Wireless Ja Case** and I must say that I agree that in granting summary judgment, there must only be a question of law to be answered. In this case, there are several issues which are in dispute or which need to be resolved before a final judgment can be granted. These include:

(a) Whether the claimant indeed had factual possession of the disputed property and for how long;

(b) Whether there was an agreement to sell the disputed property to the claimant and when did the purported agreement break down;

(c) Whether the claimant's offer to purchase the land affects their case and how; and

(d) What evidence is given supporting and/or negating the conclusion that the claimant treated the disputed property as though it was the rightful owner.

[27] It is not for this court to conduct a mini trial into the above issues. My sole consideration at this point in time is to determine if this case is one which is

appropriate for summary judgment. As such I must consider whether the claimant has a real prospect of succeeding on the claim. After evaluation of the matter before me, I find that the claimant does have a real prospect of succeeding having regard to the fact that:

- a) The case at bar is not one of pure law for the court's determination as there are factual issues which require resolution in court;
- b) There are issues which arise which are unclear and which need further clarity in a full trial. The affidavit evidence as presented is insufficient for the court to rely upon and use to make a final pronouncement in the matter.
- c) The claimant's case is not one that is frivolous or fanciful in keeping with the requirements outlined in case law.

[28] In the circumstances, I do not agree with the applicant that this case is one which the claimant has no real prospect of success. The evidence put forward requires full ventilation in open court where the evidence can be tested. Therefore, summary judgment is not appropriate in this matter.

CONCLUSION

[29] In conclusion the application for summary judgment is refused.