



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015CD00074

BETWEEN	DUANE THOMAS	CLAIMANT
AND	BARRINGTON GARDNER	DEFENDANT

And

CLAIM 2018CD00238 (formerly 2017 HCV03186)

BETWEEN	BARRINGTON GARDNER	CLAIMANT
AND	BALOGA FARMS LTD.	1ST DEFENDANT
AND	DUANE THOMAS	2ND DEFENDANT

Applications to set judgment aside, to remove caveat and for summary judgment-Applications in separate claims heard at the same time- Whether delay explained- Whether real prospect of defence succeeding - Whether interest in land such as to support caveat - Contract – Dispute settled – Whether independent legal advice precludes allegation of undue influence.

Garth McBean QC and Dian Johnson instructed by Garth McBean & Co. for Baloga Farms Ltd.

Rudolph Muir for Barrington Gardner

Caroline Hay QC and Nika Pagon instructed by Caroline Hay & Co. for Duane Thomas

Heard: 28th February, 2019

IN CHAMBERS

BATTS J

- [1] These two separate but related matters were listed for hearing at the same time before me. The application in suit 2015CD00074 is the Defendant's application to set aside a judgment entered in default. The applications in suit 2018CD00238 were an application by Baloga Farm Ltd. to remove a caveat and by the Defendants for summary judgment. The factual situation and the legal issues involved in each case are similar and overlap. They can therefore be conveniently determined at the same time.
- [2] The matters arose in the following circumstances. Mr. Barrington Gardner entered into a Memorandum of Understanding with others for the development of land owned by Baloga Farms Ltd., a company in which he was then sole shareholder. Mr. Duane Thomas, an attorney at law, became an investor in the development. The parties differ in their account as to how and why Mr. Thomas got involved. It is however common ground that Mr. Barrington Gardner and Mr. Duane Thomas had a disagreement. Further that they negotiated a settlement of the issue. In those negotiations Mr. Barrington Gardner was represented by Mr. Arthur Williams attorney at law. Mr. Charles Piper represented Mr. Duane Thomas. It is also common ground that the negotiated settlement took the form of a document entitled "Settlement Agreement" and was dated 4th July 2014. It was signed by the parties and witnessed by their respective attorneys at law, see exhibit D.T.16 to the affidavit of Duane Thomas dated 31st January 2019.
- [3] On the 28th February 2019, having heard oral submissions and considered written submissions, I made an order dismissing the application to set judgment aside. I also granted the application for removal of caveat and entered summary judgment. My reasons can be briefly stated.
- [4] The application to set judgment aside was dismissed because the applicant could not demonstrate that his defence had any real prospect of success and for the failure to adequately explain the delay. The Default Judgment was filed in Claim 2015 CD00074. In that action Mr. Duane Thomas sued Mr. Barrington

Gardner for amounts due and owing under and by virtue of the Settlement Agreement entered into between them. Mr Barrington Gardner, by his attorney Mr. Arthur Williams, entered an Acknowledgement of Service to that Claim on the 13th July 2015. No Defence having been entered a Request for Default Judgment was filed on the 28th day of September, 2015. However the Default Judgment was not entered by the Registrar until in or about January of 2018.

[5] It was urged on behalf of Mr. Barrington Gardner that the Settlement Agreement ought to be set aside for undue influence and non-disclosure of material facts. It was urged that Mr. Duane Thomas had been Mr. Gardner's attorney at law and had not, as at the date the settlement agreement was entered into, paid sums he had agreed to pay under the Memorandum of Understanding. Further that Baloga Farms Ltd. had entered into an agreement to sell a portion of land to a cemetery and thus manifestly changed the circumstances. The evidence presented did not support either assertion. In fact the documentary evidence clearly shows that both Mr. Duane Thomas and Mr. Barrington Gardner were separately represented prior to and at the time the Settlement Agreement was entered into, see for example letter dated 3rd May 2012 from Arthur Williams to Duane Thomas (Exhibit DT13 to the affidavit of Duane Thomas dated 31st January 2019). Additionally there is no indication from the correspondence that these were either preconditions, or fundamental, to any decision by Mr. Barrington Gardner to enter into the settlement. The Settlement Agreement involved Mr. Gardner buying back shares in Baloga Farms Ltd. from Mr. Duane Thomas.

[6] In the result Mr. Barrington Gardner's purported defence has no real prospect of success. He entered into an agreement and he is bound thereby. It is no defence to say the agreement is unfair or that it is no longer an attractive business venture. The law of contract does not concern itself in such value judgments.

- [7] There is a further reason for refusing to set the judgment aside. This is because there has been no, or no adequate, explanation for allowing a judgment in default and/or for the delay in making the application to set it aside. Mr. Gardner's attorneys had notice that a request for judgment had been made since 1st October 2015, see stamped receipt at page seven of the Core Bundle. Mr. Gardner had notice of the entry of judgment, according to his attorney's submission, since May 2018. The application to set judgment aside was filed on the 7th November 2018. There was no explanation, or no adequate explanation, either for the failure to file a Defence or for the late application to set judgment aside. It appears to me that Mr. Barrington Gardner has been culpable in allowing the judgment in default to be entered.
- [8] Mr. Barrington Gardner relied on the same arguments in response to the applications to set caveat aside and for summary judgment. He filed claim 2018CD00238 (formerly 2017HCV03186) seeking, among other things, to enforce the Memorandum of Understanding. Duane Thomas filed a Defence in which he relied on the Settlement Agreement. Baloga Farms Ltd. by notice of application dated 12th July 2018 applied to remove a caveat lodged by Mr. Barrington Gardner against its property. Duane Thomas and Baloga Farms Limited also applied for summary judgment. It is manifest that, whatever issue exists between Mr. Barrington Gardner and Mr. Duane Thomas, its resolution can give neither of them an interest in land owned by Baloga Farms Ltd. Their dispute concerns shares owned in the company. Mr. Barrington Gardner has no caveatable interest in land owned by the company nor does he have a cause of action against the company.
- [9] There is no evidence in this case to give rise to an equity against Baloga Farms Ltd. There is no proprietary or other estoppel that arises. Mr. Barrington Gardner, with legal advice, entered into a Settlement Agreement with Mr. Duane Thomas. That agreement expressly terminated the Memorandum of Understanding. It provided for the transfer of shares in exchange for a stated consideration. His effort to enforce obligations, contained in the Memorandum of

Understanding, against Mr Duane Thomas must therefore fail. No interest in land, owned by Baloga Farms Limited, was pledged or conveyed. Baloga Farms Limited. was not a party to that Settlement Agreement. Mr Gardner's claim has no real prospect of success against either Duane Thomas or Baloga Farms Limited.

[10] These therefore are the reasons, briefly stated, for the Orders made on the 28th day of February 2019. They were as follows :

- (i) Claimant's application to set aside judgment in Claim 2015 CD 00074 dismissed with costs to Duane Thomas.
- (ii) (Application to remove Caveat in Claim 2018 CD00238 granted as prayed
- (iii) Applications for summary judgment granted in favour of the 1st and 2nd Defendants in Claim 2018 CD 00238
- (iv) Costs to Duane Thomas and Baloga Farms Limited in Claim 2018 CD 00238.

David Batts
Puisne Judge