[2016] JMSC Civ. 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 02198

BETWEEN	**MARY CAMPBELL**	**CLAIMANT**
AND	**CONSOLIDATED CARIBBEAN INVESTMENTS LIMITED**	**DEFENDANT**

IN CHAMBERS

Denise Senior-Smith, Olivia Derrett and Vanessa Taylor, instructed by Oswest Senior-Smith & Company for the Claimant

Garnet Spencer, instructed by Robinson, Phillips & Whitehorne for the Defendant

HEARD: March 1 and June 17, 2016

DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT – REALISTIC PROSPECT OF SUCCESS – PLEA OF NON EST FACTUM – CARELESSNESS – NO INDEPENDENT LEGAL ADVICE – CLAIMANT ALLEGEDLY SEMI-LITERATE – UNDUE INFLUENCE – TRUST AND CONFIDENCE – ABUSE OF INFLUENCE – WHETHER MORTGAGE DEED WAS OF A FUNDAMENTALLY DIFFERENT CHARACTER IN TERMS OF PAYMENT SCHEDULE AND INTEREST RATE

ANDERSON, K., J

[1] The claimant has, in her amended claim form, which was filed on February 29, 2016, claimed for certain reliefs and has briefly set out the reasons underlying her claim to those reliefs.

[2] She has sought a proper statement of account in respect of any monies loaned to her. The defendant's counsel informed the court during the hearing of the defendant's application for summary judgment in respect of this claim, that the defendant is willing to provide same.

[3] She has sought injunctive relief, restraining the defendant from selling, transferring and/or dealing with the property which forms the subject – matter of this claim. That injunctive relief must be relief that can properly be obtained by the claimant, if reliefs numbers 1, 3 and 4 as are also being sought by the claimant, is/are, either individually or collectively granted by this court. The converse though, is also true.

[4] The defendant's contention is that the claimant's claim has no realistic prospect of success. They rely on **rule 15.2 of the CPR** and the oft-cited case of **Swain v Hillman** – [2001] 1 ALL ER 91. This court has, for its part, applied the aforementioned rule of court, **Swain v Hillman** (*op. cit.)* and also: **ASE Metals NV v Exclusive Holiday of Elegance Ltd.** – [2013] JMCA Civ. 37. Additionally, the defendant has contended that it should be awarded summary judgment on its counterclaim.

[5] The claimant has sought a Declaration that the mortgage agreement which was executed by her was so done without her having obtained independent legal advice and hence, the said mortgage registered as mortgage no. 1623001 on the Certificate of Title registered at Volume 1185 Folio 876 of the Register Book of Titles, is void as a mortgage deed.

[6] There is no legal requirement for any party to any contract entered into under Jamaican law, to have independent legal advice before entering into any contractual obligation. Accordingly, the defendant's failure to ensure, as also, the claimant's own failure to ensure that she had access to independent legal advice prior to her having 'executed' (signed) the mortgage agreement/deed,

cannot and does not, under Jamaican law, constitute the basis for a claim, whether for Declaratory, or any other type of relief.

[7] In the claimant's amended particulars of claim, she has alleged that she had, on October 21, 2009, borrowed from the defendant, the sum of $800,000.00. She has also therein, averred that in 2009, she was told to pay $11,000.00 per week, in respect of that loan and that she is semi-literate and not able to understand the contents of a mortgage agreement and the schedule attached thereto. According to the claimant's further averments in her amended particulars of claim, she was not instructed by the defendant to get independent legal advice before signing the mortgage deed dated October 23, 2009. She had reposed confidence in the defendant that they would have advised her of her rights under the mortgage agreement and the payment terms of same. Instead, she was merely given all relevant applications to sign her name, without having them read over or explained to her. The claimant alleges that the mortgage agreement sets out a different payment schedule than she was told and that moreover, she was never advised that the interest rate was 59 ½ %.

[8] To the contrary of those averments of the claimant, the defendant's defence contends that the claimant is literate and always understood all of her obligations, *'which is demonstrated by the competence with which she managed the first two (2) loans that she borrowed from the defendant. In addition to the foregoing the claimant wrote to the defendant in a well structured way, when seeking further financing.'* That letter, sent by the claimant to the defendant and under the claimant's hand, was attached to the particulars of claim as Exhibit 'K A 4' and this court has duly noted the contents of same. Furthermore, the defendant has contended, in its defence, that the claimant was fully advised of all the terms of the mortgage agreement, including the payment terms thereunder and that the claimant has made some payments in accordance with the said mortgage terms.

[9] The defence of a plea of *'non est factum'* (it is not my deed), is an exception to the general rule that a party is bound by his signature to a document, whether he

reads it, or understands it, or not. See: The Law of Contract, by Sir Guenter Treitel, 11th ed., at p.326.

[10] It is a plea which is typically relied on as a defence to a claim. In the case at hand though, the claimant is relying on the plea of *non est factum*, as one of the foundations of her claim for declaratory relief. She is seeking a Declaration that the 2009 mortgage deed which she entered into and ascribed her signature to, is void as a mortgage deed.

[11] In setting out her claims with precision, just prior to her certification of her amended particulars of claim, the claimant sought a Declaration, *'that the mortgage agreement executed by the claimant was so done without obtaining independent legal advice and hence the said mortgage registered as mortgage number 1623001 on the Certificate of Title registered at Volume 1185 Folio 876 of the Register Book of Titles is void as a mortgage deed.'* This court has, for reasons earlier given, already disposed of that claim, in that form.

[12] The claimant has also though, alleged in relation to that particular mortgage deed, that she did not understand same, because she is semi-literate and that she was given all relevant applications to merely sign her name without having them read over, or explained to her. To remind you, the claimant is stating that the mortgage agreement sets out a different payment schedule than she was told and that moreover, she was never advised that the interest rate was 59 ½ %.

[13] Having so alleged, this court believes it to be prudent to address its mind to the plea of *non est factum*.

[14] Courts have long recognized the need to keep that plea within a narrow compass, because of the deleterious effect which a void document may have on an innocent third party and in an effort to preserve the validity and credibility of a signed agreement. Thus, as Lord Reid in **Saunders v Anglia Building Society** – [1971] AC 1004, at p. 1016, stated that, '*the plea cannot be available to anyone*

who was content to sign without taking the trouble to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers, without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different ...' Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change.'

[15] Lord Wilberforce, in that same case, observed that, '*the principle on which a plea of non est factum is admissible, is that a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended.'* (At p.1026)

[16] Thus, in the words of Lord Reid, at p. 1017, *'there must ... be a radical difference between what he signed and what he thought he was signing – or one could use the words 'fundamental' or serious' or 'very substantial.' But what amounts to a radical difference will depend on all the circumstances.' As stated by Viscount Dilhorne at p. 1022 – 'The difference ... must be such that the document signed is entirely – the word used by Byles J. – or fundamentally different from that which it was thought to be, so that it can be said that it was never the signer's intention to execute the document.'*

[17] It used to be, that at one time, the plea only applied in respect of blind or illiterate persons, but that is no longer so. It now applies in favour of persons who are permanently or temporarily unable, through no fault of their own, to have, without explanation, any real understanding of a particular document. The effect of the plea is that, if it applies, it renders the document in question, void.

[18] From the law as set out above, as regards the plea, it is apparent that said plea cannot succeed in the case at hand, even if it were to be accepted by a trial court, that the claimant is not fully literate, or in other words, semi-literate. This court has, at this time, reached no conclusion as to whether or not the claimant is semi-literate. That is a matter of fact, which is disputed as between the claimant and the defendant and for present purposes, it has not been necessary for this court to resolve that dispute.

[19] The claimant's own evidence in response to the defendant's application for summary judgment, has made it apparent, that prior to having signed the mortgage deed which enabled the registration of that mortgage dated November 2, 2009, against the title to her property which constitutes the foundation of this dispute, that being property at Great Pond, in the parish of St. Ann, which is registered at Volume 1185 Folio 876 of the Register Book of Titles, she had on two (2) occasions, entered into two (2) separate mortgages, on March 10, 2008 and May 19, 2009. Accordingly, she was familiar with what a mortgage entailed and would also, no doubt, have been familiar with what a registration of a mortgage on her title, would have entailed. She may not have ever or even now, have had or have, a detailed understanding of all of the undoubted complexities of same, but that does not mean and is not the equivalent of her not having understood that she was signing mortgage agreements, for the purpose of obtaining loans, based on using her property in St. Ann, as security for those loans. Those two (2) prior mortgages were entered into by the claimant, with the defendant.

[20] In the present claim though, what is in issue, as one of the issues in this claim, is whether the third loan of $800,000.00 which was obtained via a mortgage and registered on the claimant's title to the aforementioned land parcel, in October of 2009, should be declared void and whether the plea of *non est factum* can at all, assist the claimant in achieving that objective, by means of this claim. The defendant is contending that the said plea has no realistic prospect of success.

[21] This court accepts that the defendant is entirely correct in that regard, based on the particular facts of this particular case.

[22] The claimant's amended particulars of claim has not alleged that the claimant signed that November, 2009 mortgage deed believing it to be a document which is of a fundamentally different character than what she signed to. What she has instead alleged, is that she did not realize that she was signing to a document which had a different payment schedule than she was told and that she was never told that the interest rate was 59 ½ %.

[23] The claimant knew that she was signing a mortgage deed. She knew that it was a loan agreement, secured by her property. That indeed, is exactly what it was. She did not sign a document which was, 'fundamentally different' from the one which she had fully known and appreciated that she was signing.

[24] In any event, she has not made any allegation in her amended particulars of claim that would even serve to remotely, either outrightly suggest, or reasonably enable the inference to be drawn, that she was not, at the very least, careless in having signed that mortgage deed as and when she did, if indeed, it is believed that she is semi-literate. Since it is the claimant who is asserting the plea, it was incumbent on the claimant, in her amended particulars of claim, to have enabled this court to conclude from the claimant's statement of case, that she was not careless in having signed the relevant document, in the context and as and when she did so. Not even in response to the defendant's application for summary judgment, in her affidavit evidence, has the claimant brought forward any evidence that is capable of properly enabling this court to conclude that the claimant acted with all reasonable care in the circumstances.

[25] Having failed to do so, either in her amended particulars of claim, or in her affidavit evidence filed in response to the defendant's application for summary judgment, it is evident that the claimant's contention as per her plea of *non est factum*, has no realistic prospect of success.

[26] That plea it should be noted, is one which is very rarely relied on by anyone and no doubt, this is primarily so, because it is such a difficult plea to establish. At this stage, this court has not at all concerned itself with whether the plea has been established. That would have been a matter to be determined by a trial judge, if this claim were to be tried. This court though, having reached the conclusion that said plea, as raised in the context of this claim, is one which has no realistic prospect of success, has no choice other than to not allow that plea to be pursued any further, herein.

[27] On the issue of carelessness in the signing of documents and the law that a party who is careless cannot successfully rely on the plea of *non est factum* and as to proof of carelessness, see: **Saunders and Anglia Building Society** (*op. cit.),* at p. 1023, per Viscount Dilhorne and p. 1019, per Lord Hudson and pp. 1016 and 1017, per Lord Reid, and **CF Asset Finance Ltd. and Okonji, Siaw and Ishirosoft Ltd**. [2014] EWCA Civ. 870, esp. at para. 36, per the Master of the Rolls; and **Lloyds Bank Plc. v Ronald Waterhouse** – [1990] EWCA Civ. J0201 – 7.

[28] The claimant has also contended, in her amended particulars of claim, that the defendant had advised her in 2010, that they were offering her a loan of $220,000.00. It has also been alleged by her, in that court document, that she did not apply for that loan and accepted that sum, having not had explained to her, the terms of that loan and that it would fall under the said terms of the mortgage registered as mortgage no. 1623001, on the Certificate of Title pertaining to her property. She did not sign any mortgage deed, 'to her knowledge,' but both the mortgage registered as mortgage no. 1623001 and the $220,000.00 were treated as one loan. The second loan of $220,000.00 was not registered. The claimant did not agree to such terms. The defendant has, '*caused the claimant to enter into an unconscionable bargain and by way of undue influence has caused her to be indebted to them for much more than she*

thought thereto.' The defendant has foreclosed on the claimant's property and intends to sell same.

[29] The defendant has, for its part, in its defence, accepted that the mortgage no. 1623001 does not secure the $220,000.00 which was loaned by them, to the claimant. The defendant's contention, as they have asserted in para. 12 of their defence, is that the claimant did not sign a mortgage deed in respect of the loan for $220,000.00, but the mortgage and the loan for $220,000.00 were treated as one, with the consensus of the claimant as outlined in a letter dated September 17, 2010 – that being a letter which was signed by the claimant and was attached to the defendant's defence and marked as 'K A 7.' The claimant has contended, in her affidavit which was filed on February 29, 2016, that when she signed that document, she did not know exactly what she was then signing to. In addition, she has alleged that the said document was prepared by an 'agent' of the defendant, whose name has not been made known to this court, or for that matter, to the defendant, by the claimant.

[30] The defendant has, in its defence stated that it has no issue with separating the loan which is the subject of the mortgage that is registered on the title (the $800,000.00 loan). Accordingly, the claim for that particular relief is not one which either needs to, or should go to trial. This court can and should therefore, acting on its own motion, award summary judgment in favour of the claimant, on that particular relief being sought by the claimant. This court will do that.

[31] The claimant's contention that the defendant caused her to enter into an unconscionable bargain and that, by way of undue influence, the defendant has caused her to be indebted to them for much more than she thought.

[32] With the greatest of respect to the claimant's counsel, that contention is a wholly untenable one. Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted

unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. See: **Royal Bank of Scotland plc. v Etridge** (No. 2) – [2002] 2 AC 773 and **National Commercial Bank (Jamaica) Ltd. v Hew & ors.** – [2003] 63 WIR 183, esp. at para. 29, per Lord Millett.

[33] The equitable doctrine of undue influence, involves two (2) elements. Firstly, there must exist a relationship capable of giving rise to the necessary influence. Secondly, the influence generated by the relationship must have been abused.

[34] The necessary relationship is vicariously described as, 'trust and confidence,' or of, 'ascendancy and dependency.' Such a relationship may be presumed or proven. If it is to be proven, then it ought to be averred in the claimant's particulars of claim, in the case at hand. Equally, if it is to be presumed, then that ought to have been averred in the claimant's particulars of claim. The claimant's amended particulars of claim, has not at all, so averred. Furthermore, if it is to be proven, then, in order for the defendant to know the case that it has to meet, it is necessary to set out as allegations in the particulars of claim, the claimant's allegations as to what was the nature of the relationship between the parties, which, if proven, can properly enable the trial judge to conclude that such a relationship existed between the parties. See: **Rule 8.9 (1) read along with Rule 8.9A of the CPR**. It may be that the claimant has met this requirement. She may have done so, by means of what she has averred in para. 9 of her amended particulars of claim, which stated – *'The claimant had reposed confidence in the defendant that they would have advised her of rights under the mortgage agreement and the payment terms of the mortgage agreement. Instead the claimant was given all relevant applications to merely sign her name without having them read over or explained to her.'*

[35] It is good for her, that she made that averment, because the relationship of banker and customer does not give rise to a presumption that said relationship, generated the necessary influence. See: **NCB v Hew & ors.** (*op. cit.)* at para. 31.

[36] The second element though, is of equal importance/significance, if a claim for undue influence is to be found proven, in a Jamaican court. As has been so clearly stated by Lord Millett in the **Hew** case (*op. cit*.) –

> *'However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimized by other people: See* ***Allcard v Skinner*** *[1887] 36 Ch D 145, 182. Thus it must be shown that the ascendant party has unfairly exploited the influence he is shown or presumed to possess over the vulnerable party. It is always highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside, though this is not always necessary: See* ***CIBC Mortgages plc v Pitt*** *[1993] 4 ALL ER 433. But 'disadvantageous' in this context means 'disadvantageous' as between the parties. Unless the ascendant party has exploited his influence to obtain some unfair advantage from the vulnerable party there is no ground for equity to intervene. However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction between the parties to it.'*

[37] This court has, in the circumstances, no hesitation in concluding that the evidence provided to this court by the claimant, in response to the defendant's application for summary judgment and even the claimant's amended particulars of claim, fall woefully short of what would be the making of necessary averments so as to enable a claim for undue influence, as raised in the present context, to have any realistic prospect of success.

[38] The defendant entered into a typical mortgage transaction with the claimant. That was a type of transaction which she had some familiarity with, as she had engaged in two (2) similar mortgage transactions, with the same financial institution, at earlier points in time. As things evolved, life became more difficult for the claimant from a financial standpoint and as such, she is now on the verge of having the mortgaged property – on which she presently lives, foreclosed on. As such, the last mortgage agreement entered into between the parties, has proven to be commercially disadvantageous to the claimant. That though, is no foundation whatsoever, sufficient to enable a claim for undue influence to be successfully pursued in any Jamaican court.

[39] Even if there had been undue influence utilized by the defendant to inveigle the claimant into giving a letter to them, which she signed, as to the $800,000.00 loan and the $220,000.00 loan being treated as a single loan, that is now no longer a pertinent issue, since the defendant has, in its defence, stated that it is prepared to treat those two (2) loans as separate and their counsel informed this court at the hearing of the defendant's application for summary judgment, that they are prepared to provide updated statements of account to the claimant, for each of those loans. As such, this court is prepared to and will, acting on its own motion, award summary judgment to the claimant on each of those reliefs being sought by her.

[40] The defendant though, will also be awarded summary judgment on the other aspects of the claimant's claim for reliefs.

[41] The defendant has applied for various declaratory reliefs, as part and parcel of its application for court orders which was filed on August 12, 2015 – that being the same application in which the defendant also applied for summary judgment.

[42] This court is unable, pursuant to that application, to grant those declaratory reliefs. This court cannot do so, because, those declaratory reliefs sought in that application, are identical to three (3) of the main reliefs being sought by the

defendant in the defendant's counterclaim. Accordingly, this court could only now grant those reliefs if an application were to have been made to it, before now, for summary judgment on the defendant's counterclaim to be awarded to the defendant, or if an application were to have been made to it, for the claimant's defence to counterclaim, to be struck out. As things have turned out, no such application has been made by the defendant and therefore, it is not now, properly open to this court, to grant those reliefs, pursuant to the defendant's present application for court orders. See **rule 11.13 of the CPR** in that respect. The defendant has not sought summary judgment in respect of its ancillary claim (counterclaim), but it follows inexorably, that since, as of the date when this court makes its orders on the defendant's application for summary judgment, the claimant's claim will be at an end, it would be pointless for the defendant to be pursuing its ancillary claim, since the defendant's ancillary claim relates to the same issues which form the subject of the claimant's claim.

[43] In the circumstances, it is hoped by this court, at this time, that the defendant's ancillary claim will be withdrawn, in which event, this court will order that there be no order as to the costs of that ancillary claim. If though, the defendant were to decide to maintain that claim, it seems distinctly possible, that the defendant's attorneys may very well be ordered to pay the costs of that ancillary claim, as that ancillary claim is superfluous.

[44] As far as the costs of the claimant's claim and the defendant's application for summary judgment are concerned, this court is of the considered opinion that each party should bear her or their (as the case may be), own costs.

[45] This court's orders will therefore be as follows:

(1) The claimant is awarded judgment on aspects of her claim for reliefs herein, to the extent as set out in orders nos. 3 & 4 below.

(2) The defendant is awarded judgment on all other aspects of the claimant's claim for reliefs herein, other than as set out in orders nos. 3 & 4 below.

(3) The defendant is ordered to provide to the claimant, by or before June 30, 2016, updated statements of account related to the loans of $800,000.00 and $220,000.00, provided by the defendant to the claimant.

(4) It is declared that the loan to the claimant, by the defendant, of the sum of $220,000.00, does not form part of the mortgage no. 1623001 on the Certificate of Title registered at Volume 1185 Folio 876 of the Register Book of Titles and is a separate loan from the sum of $800,000.00 which the defendant had also loaned to the claimant.

(5) Each party shall bear her/their own costs, as regards this claim.

(6) Each party shall bear her/their own costs, as regards the defendant's application for summary judgment, which was filed on August 12, 2015.

(7) The defendant shall file and serve this order.

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Hon. K. Anderson, J.