

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 228 of 1981

CHAMBERS

BETWEEN CECILE ESCOFFERY PLAINTIFF

A N D HOWARD HAMILTON DEFENDANT

Raphael Codlin for Plaintiff.

Hugh Levy for Defendant

Heard: 21st, 22nd October, 1982, 4th March, 1983

Delivered: 25th March, 1983

Morgan J:

The defendant Mr. Howard Hamilton is the registered proprietor of Apt. 18 Acadia Court registered at Volume 1115 Folio 966 of the Registered Book of Titles.

On the 27th January, 1981 the plaintiff, Miss Cecile Escoffery, entered into a contract of sale with him for these premises. The agreement was prepared by her.

The sections of this agreement which are relevant for this purpose are:

Sale price:	\$20,000.00
How payable :	A deposit of \$2,000.00 shall be payable to Howard L. Hamilton on the signing of the agreement. Balance on completion.
Possession:	On payment of the purchase money in full.
Date of completion:	On or before April 31, 1981.
Conditions:	Subject to the purchaser obtaining a loan of \$15,000.00 on the usual terms and conditions provided that if the loan is not obtained by 31st March, 1981 then the vendor may terminate this agreement and refund the deposit to the purchaser.

The applicant, Miss Escoffery, paid the deposit of \$2,000.00, the tenants were ejected and with the consent of the defendant she went into occupation of the premises. There is some dispute as to when she paid the deposit and when she went into occupation. She says she paid in two instalments of \$1,000.00 each in January and February 1981 and went into occupation in August 1981 after a letter was written to the Jamaica Public Service to install lights.

The defendant says that the keys were handed to her in March 1981, and she was cross-examined to the effect that she paid the instalments in July and August of 1981. Mr. Hamilton impressed me as a very forthright person and I believe him when he says he handed her the keys in March. As to the payment of the instalments there was nothing in his affidavit to contradict her and though he was cross-examined nothing emerged on this point. She remains unchallenged that she completed the payment of \$2,000.00 by February 1981 and I accept it.

The plaintiff made an application for a loan to the National Commercial Bank and by letter of the 9th February she was advised that approval for a loan of \$14,000.00 was granted and offered to her which offer was good for three months to the 9th May, 1981. She communicated this information to Mr. Hamilton. The offer contained "Additional Conditions" in respect of "Security" for which she had to obtain documents from the defendant - the Land Surveyor's Certificate and a Certificate from the Statutory Corporation. All these were in place by the 30th April, 1981.

There was now a balance of \$4,000.00 which was to be secured and paid to Mr. Hamilton. This sum was not forthcoming. Mr. Hamilton made several demands for it and he spoke to Miss Escoffery in April, May, June, July and August. She told him she did not have it to pay. Miss Escoffery was just not able to find that sum.

- 3 -

By this time the offer of the bank expired and on her application it was extended to the 9th August. Mr. Hamilton had been advised of this. She now required the Instrument of Transfer for the bank. In an effort to save cost they agreed to ask the bank to prepare the Transfer. The bank refused and so he asked his Attorney, Mr. Hugh Levy, to have it prepared.

On the 4th August he wrote a letter to her indicating he was frustrated by the delay of the payment of \$4,000.00, the balance of the purchase price and if it was not paid by August 11 he would be calling off the sale. Notwithstanding that letter, on the 13th August, 1981 the Instrument of Transfer required by the bank was executed by both parties. She also requested him to assist her with obtaining lights and having so instructed his lawyer a letter dated 26th August, 1981 was written to the Jamaica Public Service stating that she had purchased the apartment from the owner.

When an attempt was made to have the transfer registered at the Titles Office, however, it failed as it was discovered that a Caveat was lodged in respect of the property. She reported this to the defendant but he had not been aware of it and so he communicated with the Attorneys who had been responsible for the sale of the premises to him. It transpired that in 1970 when he purchased the apartment from the developers, Realco, he took a second mortgage and because of that they lodged a Caveat. He had subsequently satisfied this mortgage and he was entitled to a release but they had forgotten to lift the Caveat. At the date of the agreement for sale to the plaintiff the Caveat should not have been there. The Solicitors were instructed to have it removed.

The transfer was now in the hands of the Attorneys acting for the bank; he was in possession of \$2,000.00; there was a mortgage offer of \$14,000.00 (expired), she was in possession of the premises, the date for completion had passed with no

- 4 -

fixed date for completion, and the balance of purchase money was still not paid or available.

In September he received from the bank a copy of a letter addressed to her advising that the mortgage offer of \$14,000 was extended to December 9.

He then had a conversation with her about the balance of purchase money and her inability to perform and told her he was not satisfied. She asked him to let her know what he meant to do. Obviously she still did not have the money.

On November 3 he wrote a letter to her rescinding the contract and returning the deposit of \$2,000.00 as, he said, he had waited long enough and could wait no more, he had acted in good faith in giving her possession and had expected to receive the difference between sale price and mortgage to complete the sale, he had been paying the out-goings and was receiving no revenue and he was satisfied that she was unable to find the balance of \$4,000.00 to complete the sale. The letter is copied here in full:

Re: Apartment 18 Acadia Court

"I refer to my letter dated August 4, 1981 and to subsequent discussions which we have had concerning the unaccepted delays with respect to the finalising of the sale of the above apartment.

You will recall that a Proposal for Sale Agreement was signed in January of 1981 and on your insistence my tenant in the above apartment was asked to leave so that you could take occupancy. In fact, you will recall that you, yourself, were personally involved in getting the tenant out of the apartment during the month of March 1981. It follows from that that I have had no income to help defray some of the costs related to this apartment since then.

You will further recall that I made constant appeals to you to have the matter resolved as quickly as possible since I had made certain irrevocable commitments with my bankers. I have, in the meantime, incurred unnecessary expenses involving maintenance costs which are normally paid by the tenant of some \$1,500, legal and other expenses i.e. of transfer tax, stamp duty, cost of discharge of mortgage, etc. in the region of some \$2,000. To date, all I have received from you are two cheques of \$1,000 each.

In June I received a letter from your bankers advising that they were extending their commitment for mortgage to

- 5 -

"August 9, 1981. This prompted my letter to you dated August 4, 1981. In September 1981 I again received a copy of a letter from your bankers advising a further extension to December 9, 1981 by which time I was unable to accept any further delays.

Acting on my frustrations my Attorneys, Hugh Levy, Jnr, have now cancelled all further transactions and have recalled whatever documents that have been sent to you and your bankers."

On receipt of this I find that she telephoned him to reconsider and to take back the \$2,000.00 deposit, that he refused, that she offered to pay him mortgage interest and he also refused. She then negotiated the cheque and lodged it to her account the day after receiving this letter. She has said that she told him she had no intention of accepting the cancellation of the contract. I do not believe that. If that is what she said and meant, it is only reasonable to believe that she would either have returned his cheque by registered post with such a statement - in spite of his protest - or destroyed the cheque, or put the cheque in some safe place and not negotiated it. I am satisfied that she realized her difficulties and accepted his decision at that point and in lodging the cheque impliedly elected to accept the repudiation of the contract.

The plaintiff now seeks by way of Originating Summons:

- (1) A declaration that she is entitled to be registered as the owner of the premises subject to the payment of the purchase price.
- (2) An order for the executed Transfer to be lodged at the Titles Office and her name recorded on the Title as fee simple owner or
- (3) That the defendant execute a transfer or other documents to enable her to be so registered.

So at the time of the rescission

- (a) The deposit of \$2,000.00 was paid.
- (b) The purchase money plus half cost of transfer had not been fully available or paid.

- 6 -

- (c) A loan of \$14,000 was offered by National Commercial Bank towards the purchase price, and this offer was extended to 9th December, 1981.
- (d) The plaintiff had expressed and shown inability to find the balance of \$4,000.00.
- (e) There was no fixed date of completion.

I have arrived at this last conclusion as the last date which had been set for completion was the 11th August. Subsequent to that date he executed a transfer on the 13th and on the 26th the letter to Jamaica Public Service was written. The clear inference from these facts is that he had adopted the "watch and see" "wait and hope" attitude at the same time doing all he could to see if the sale could be expedited. It follows that the reasonable inference is that the time for completion having passed there was a further extension of time by conduct but without any fixed date.

In William on Title 3rd Edition page 668 - 69 it reads:

"Actual completion consists of the purchaser paying the purchase money or the balance thereof, the vendor executing a proper conveyance of the property and delivering possession to the purchaser. These matters in general all take place on the same day, but they may be separated and it is then a question of fact to be decided on the circumstances when the transaction is finally completed."

The agreement clearly states that for possession there must be payment of the purchase money in full and one half cost of the transfer. In such a case it seems to me that payment of the full purchase price would have to be a condition precedent if not concurrent with the transfer. This is exaggerated by the fact that she is and has been in possession for some time without that condition being fulfilled and added to that he has now executed a proper transfer for the property. In view of the requirement of the agreement for payment of the full purchase price and in the light of these events I hold that there is no completion of the

agreement and there could not be any until the purchase price is paid in full.

It was argued that the presence of the Caveat prevented performance. My view is that the presence of a Caveat in the circumstances as the defendant explained and as I have accepted is in the nature of an error and could not be regarded as a breach, default, delay or non-performance on the part of the vendor as all he is obliged to do at this stage is to tender a transfer or offer to do so, having shown a good Title. There is no complaint that he has not shown a good Title. The presence of a Caveat where the object of it is satisfied and the vendor is entitled to a release at the date of the Sale Agreement, is, I find, no bar to a good Title.

The next question is, inasmuch as there was no completion was he entitled to rescind the contract?

The plaintiff deponed in her affidavit that the time was further extended to the 9th December and he agreed. The defendant in his affidavit or viva voce neither denied or accepted this allegation, but adverted to his letter of November 3 in evidence where he says:

"In September 1981 I again received a copy of a letter from your bankers advising a further extension to December 9, 1981 by which time I was unable to accept any further delays."

The inference to be drawn from this is that he knew nothing of an extension of the mortgage to 9th December, 1981 until September month and he did not agree with it as it meant further delay and that this letter prompted his course of action. It is a question of fact for the court whether he did. If he did then any attempt to rescind the contract prior to that date would be ineffective. To come to a conclusion one has to look at the manner in which the entire sale proceeded. Now these two people without any known knowledge of the law contracted an intricate procedure as a Sale of Land between themselves, he had put her into

- 8 -

possession on the receipt of the down payment of \$2,000.00 only, had facilitated her receiving electricity by writing that she had "purchased" the house at a time when all he had was his down-payment, signed a transfer before any further sum had passed or was known to be available, payed out-goings for fully ten (10) months (up to then without asking her for any such sums) while she enjoyed the facilities of living in his house, almost all of which he was not obliged to do. Then there were oral discussions and transactions on the telephone as to when she would be paying and her ability to pay. I see in these facts a picture of someone who is willingly going along with the transaction but waiting, watching, hoping. I do not believe that he assented to that date, on any request of hers. I find that he did not extend the time to December 9 or to any other day and what she says is not true.

In these circumstances can he rescind without making time the essence of the contract? In Vourmad's The Sale of Land 3rd Edition at page 295, 296 under "Conditions of Sale" the author says:

"Where time is not of the essence of the contract (either because of its not having been made so originally or because, although originally of the essence it has ceased to be so) and default has been made by one party the other party may as we shall see by notice make time of the essence. If he does not do this he will be entitled to rescind the contract on the ground of the other party's delay in performance only if it can be shown that the delay is of so serious a nature as to give rise to an inference that the defaulter is either unable or unwilling to perform the contract."

The defendant said under cross-examination that the plaintiff told him that she was unable to find the money. The plaintiff has said that she has always been able and willing to pay. I do not believe her. She did not impress me as a hard and callous person who with all the concessions made to her by the defendant would have remained in his house for two years without paying one cent or offering

- 9 -

to pay it, had she been able to find the money to expedite the sale. The deposit of \$2,000.00 towards the purchase price was paid in two instalments by her pay cheques, a probable inference that she had no money anywhere else. I find she was unable to perform her part of the contract in that she was not able to find the additional sum. This brought about a delay which created serious hardship on the defendant in that he had to pay all monthly out-goings on the apartment from his own pocket while receiving no revenue from her or contribution though she remained in possession, never being able or willing to produce any portion of the balance of \$4,000.00 in ten months. I regard it as a delay of a serious nature.

I find therefore that the defendant had the right to rescind the contract and that he did it before completion.

The only remaining question is did the negotiation of the cheque which represented the refund of her down payment operate as a discharge of the contract?

By his letter of November 3 the defendant refunded the deposit of \$2,000.00. The plaintiff lodged it to her account. She never sought not to cash it, or to destroy it, or to return it by registered post to show positively her non-acceptance of the recession. It is my view that having kept it, the clear inference is that she acquiesced to the recession of the contract. I reject her evidence where she said that she had no intention of accepting any cancellation of the agreement and find that this was said for the purpose of this case.

I find therefore that the defendant having rescinded, the plaintiff accepted.

The Attorney for the defendant based his address on the nature of the loss suffered by defendant. Such loss as he has suffered and I accept that he has

- 10 -

suffered tremendous loss, he cannot complain of as he possibly could have avoided.

The defendant has not sought any declaration or relief from this Court.

The Declarations and Orders sought by the plaintiff in the Originating Summons will not be granted and are denied.

Costs to be paid to the defendant and to be agreed or taxed.

Stay of execution granted for six weeks.