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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1988 L. 057

BETWEEN	RUTHERFORD MIGUEL LEIBA	PLAINTIFF
AND	JOHN CARLYLE THOMPSON (Administrator of the Estate of Hubert Leston Thompson, deceased, and in his personal capacity).	DEFENDANT

Messrs D. Morrison and P. Foster instructed by Dunn ~~Cox~~ & Orrett for the Plaintiff.

Mr. Norman Davis instructed by Myers Fletcher & Gordon for the Defendant.

Heard June 22, 23, 24; July 29, 1992.

REASONS FOR JUDGMENT

Harrison J. (Ag.)

On July 29, 1992, Judgment was entered in favour of the Defendant. I indicated then that my reasons would be reduced to writing at a later date. This is a fulfilment of the Court's promise.

FACTS

A contract for the sale of 3/4 acre of land was entered into between the plaintiff and Hubert ^{Leston}/Thompson on the 11th day of September 1968. The land was owned by the said Hubert Leston Thompson and the defendant as tenants in common but the consent of the defendant was not obtained at the time of the contract of sale.

The plaintiff was put into possession in October 1968. He fenced the land and erected a bill board sign advertising a proposed housing development. Sub-division approval for the land was eventually obtained in September, 1975.

Hubert Thompson died in 1973 and in November 1981, the defendant was granted Letters of Administration in his estate.

The defendant as Administrator of the estate of Hubert Thompson failed to complete the contract of sale hence suit was filed by the plaintiff against the defendant personally and as Administrator claiming inter alia:-

- (a) Specific Performance of an agreement for the sale of land.
- (b) Damages for breach of Contract
- (c) A declaration that the plaintiff had acquired title to the land by way of adverse possession.

NO CASE SUBMISSION

At the close of the plaintiff's case the defendant made a no case submission. The gist of this submission was as follows:-

1. The agreement for sale between the plaintiff and Hubert Thompson was not a valid enforceable agreement because the defendant as co-owner of the land was not a party to this contract.

(Refers to Halsbury's Laws of England, 4th Edn Vol. 39 para. 547; Cheshire's Modern Law of Real Property 5th Edn. para 559)
2. If there was a valid agreement a claim for damages for breach would be barred by the Limitation of Actions Act. (Refers to English Empire Digest 1978 Re-issue p. 749; Chitty on Contracts, General Principles 24th Edn. pp 809-810 para. 1702; East Indian Co. v. Oditcharn Paul (1850) 7, 1700 P.C.C. 85).
3. The claim for specific performance was barred by laches and for abandonment of the parties.
(Refers to Stoneham on 'Vendor and Purchaser' p.p. 715 - 718 777 - 779; 783. Levy v. Stogdon (1898) ICLD 478).
4. The claim for adverse possession against the defendant in his personal capacity cannot stand alone. (Refers to Archer v. Georgiana Holdings Ltd; (1974) 21 W.I.R; George Beckford v. Gloria Cumper S.C.C.A 38/86 12. 6. 87).

Mr. Davis concluded that since the claims against the Defendant as Administrator and in his personal capacity, have not been proved, the Defendant in both capacities would be entitled to judgment.

The response by Mr. Morrison to this submission can be summarised as follows:-

- (a) The plaintiff was entitled to an order decreeing specific performance of the agreement for sale against the Administrator of the estate of Hubert Thompson with regard to his undivided share of the property. (Refers to Morrocks v. Rigby (1878) 9 ChD. 180; Basma v. Weekes (1950) 2 All E.R. 146).

- (b) As at date of the contract the plaintiff had become the beneficial owner in equity of the undivided half share of Hubert Thompson with the result that both the plaintiff and defendant became tenants in common.
- (c) From the moment the plaintiff executed the agreement for sale and was put into possession of the property time began to run against the whole world and in particular against the defendant in his personal capacity. Further, that the defendant's right to the property in his personal capacity had been extinguished by adverse possession. (Refers to *Paradise Beach & Transportation Co. Ltd. v. Robinson* [1968] 1 All E.R 530).
- (d) That it was not open to the defendant not having made time of the essence to insert an arbitrary date for completion of the sale. (Refers to "Snell's Principles of Equity" 28th Edn. para. 6.)
- (e) The delay in pursuing its claim will not ordinarily be a bar to one such as the plaintiff who has been let into possession under the contract and has obtained an equitable interest. (Refers to *Williams v. Greatrex* [1956] 3 All E.R. 705 pp 708, 709).

BREACH OF CONTRACT

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In /instant case, Hubert Thompson purported to sell the entire property held in common with the defendant. The issue whether one co-tenant could sell the property as sole owner therefore arose for determination.

Now, the law relating to tenants in common establishes that tenants in common hold property in undivided shares and as such there is unity of possession (see "A Manual of the Law of Real Property" by R.E. Megarry at page 211). It follows Therefore that in order to sell the property in its entirety all tenants in common must join in the sale. Each co-tenant may however, contract to sell his undivided share without the consent of his other co-tenant.

Singh v. Mortimer (1966) 10 W.I.R 65, a Guyanese decision, is of persuasive authority. In that case the appellant entered into a contract with the respondent's husband (now deceased) to purchase an estate which the latter owned together with his sister. The contract made provision for execution by the sister also but at the time of the execution by the respondent's husband, the sister was dead, but neither party

to the contract had knowledge of this. Upon an action by the appellant for specific performance of the contract as regards a portion of the estate the Court of Appeal held:

- i) That it was the intention of the parties that the whole estate should be sold, and as the contract was incomplete in that one co-owner had not signed, the appellant was not entitled to specific performance.
- ii) That the estate was held by the respondent's husband and his sister as tenants in common.

In light of the abovementioned authorities it was my considered view that Hubert Thompson had no power to sell the entire property. At the highest he only had power to sell his undivided share in the property without consulting the defendant.

Mr. Morrison had submitted that the plaintiff at the very least was entitled to an order decreeing specific performance against the Administrator of the estate of Hubert Thompson, with regard to his undivided share. He sought reliance on the decisions of *Horrocks v. Rigby* (1878) 9 ChD 100 and *Basma v. Weekes & Ors.* (1950) 2 All E.R 146. Both cases dealt with agreements for sale of undivided shares in land and specific performance was granted in respect of persons entitled to convey their undivided shares. I find however, that these cases can be distinguished because there was no evidence of any intention on the part of Hubert Thompson to sell his undivided share in the property. The Court could not vary the contract nor construe "3/4 acre" in the agreement as meaning "undivided share."

The claim for breach of contract against the defendant in his capacity as Administrator therefore failed for there was no valid contract between the plaintiff and Hubert Thompson. Furthermore, I was of the view that a claim for damages for breach would be statute barred. The agreement which was executed between Hubert Thompson and the plaintiff did not provide a date for completion. In the absence therefore of a fixed time for completion the Court would have to infer a reasonable time. In my view it was reasonable to infer the time for completion from the date of the sub-division approval in September, 1975. The plaintiff had more than ample time to seek completion of the contract and he failed to show that the cause of action accrued within 6 years of the filing of the Writ of Summons.

SPECIFIC PERFORMANCE

Where the remedy of specific performance is sought, the plaintiff must act promptly as a general rule. (See para. 1483 Vol. 16 Halsbury's Laws of England 4th Edn.) However, where a plaintiff is let into possession under a valid contract so that he has obtained an equitable interest, delay will not prejudice him. (See Williams v. Greatrex (1956) 3 All E.R. 705.

I find that the plaintiff in the instant case did not obtain an equitable interest in the land so the relief of specific performance would not be available to him. Furthermore, because the contract is invalid it is not specifically enforceable.

ADVERSE POSSESSION

In order to establish this claim, the plaintiff must show that the defendant ^{or} has been dispossessed of the land /has discontinued possession of the land in dispute and that he (the plaintiff) has been in adverse possession of the land for at least 12 years (Section 3 of the Limitation of Actions Act).

What amounts to dispossession will vary according to the nature of the land. Fencing has been held to be an equivocal act though it often times provides the most cogent evidence of an intention to exercise dominion over land to the exclusion of others. That act must be accompanied by a clear and unmistakable intention to exercise dominion over the land to the exclusion of the true owner. (See Archer v. Georgiana Holdings Ltd. (1974) 21 W.I.R 431 at 440 E).

Where a purchaser is let into possession in pursuance of a contract of sale of land the title to be conveyed at a subsequent date, he does so under the right of ownership and his possession cannot be considered as consensual. (See Ramlakhan v. Farouk (1974) 21 W.I.R. p 228). Therefore, a purchaser may acquire a title to land by way of adverse possession against a vendor.

However, adverse possession must be established against the true owner of the property and this includes all persons who hold title to the land. Since tenants in common have unity of possession, it was therefore my considered view that adverse possession must be claimed and established against all of them.

In this case the plaintiff did not claim adverse possession against the defendant in his capacity as Administrator of the deceased's estate, but only against him in his personal capacity.

I hold therefore that for the plaintiff's claim in adverse possission to succeed it must be established not only against the defendant in his personal capacity but also against him as Administrator of Hubert Thompson's estate. The plaintiff's claim under this head therefore fails.

It is for the reasons stated that judgment was entered for the defendant with costs to be taxed if not agreed.