

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 1990/R073

BETWEEN ERROL ROBINSON PLAINTIFF
AND LAURISTON STEWART DEFENDANT

Mr. Burnham Scott and Mr. Norman Harrison for Plaintiff.

Mrs. Pamela Benka-Coker instructed by ~~Jennifer Messado & Company~~ for Defendant.

HEARD ON 11TH OCTOBER, 1990 AND 8TH NOVEMBER, 1990

CORAM: PITTER, J.

By Writ of Summons dated 25th May, 1990, the plaintiff sues the defendant to recover the amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00) payable on a demand note. The defendant enters appearance and files defence and counterclaim. By way of summons dated 19th June, 1990, the plaintiff applies for the defence and counterclaim to be struck out on the grounds that:-

- (a) it discloses no reasonable defence to the action;
- (b) it is frivolous or vexacious; or,
- (c) it is an abuse of the process of the court; or,
- (d) it prejudices, embarrasses and delays the fair trial of the action; or
- (e) it is otherwise an abuse of the process of the court.

He also seeks an Order to enter judgment.

It is the plaintiff's evidence by affidavit, that on the 25th April, 1990, he loaned the defendant the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) by cheque drawn on Mutual Security Bank Limited and which the defendant encashed the same day. That the defendant in keeping with his obligation to the plaintiff, gave him that same day a promissory note in respect of the said loan.

The defendant contends that the document sued on by the plaintiff is not a promissory note within the meaning of Section 83 of the Bills of Exchange Act and by reason hereof denies that he is liable thereon. Further, that by an oral agreement made on the 25th April, 1990 and evidenced by memorandum in writing of the said date the plaintiff agreed to buy and the defendant acting as agent or servant of Citi Car Sales Limited, agreed to sell premises known as 27½ Half Way Tree Road for a total purchase price of Two Million Dollars (\$2,000,000.00). That by the said oral agreement, it was provided inter alia that the plaintiff should pay on the signing of the memorandum in writing, evidencing the said agreement, the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) as deposit on the purchase price of Two Million Dollars (\$2,000,000.00) and that the plaintiff duly paid the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) by way of deposit to the defendant.

The defendant claims by way of counterclaim:-

- (a) Specific performance of the said agreement.
- (b) All necessary and consequential accounts and enquiries,
- (c) Damages for breach of contract in lieu of or in addition to specific performance.
- (d) Further or other relief.

The plaintiff in support of his claim tenders in evidence as Exhibits the following documents:-

Exhibit 1. The promissory note upon which he sues reads

" April 25, 1990

For Valuable Consideration, the receipt of which is hereby acknowledge, I promise to pay to Errol Robinson of 1 Brompton Road, Kingston 5, the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) on Demand.

/Sgd./
 LAURISTON H. STEWART
 1 Spring Park Drive
 Kingston 8

Witness ?

"

Exhibit 2. Cheque payment voucher which reads

" CHEQUE PAYMENT VOUCHER

PAYABLE TO: Mr L. H. Stewart	25/4/ 1990
OF 1 Spring Park Dr. Kgn 8.	AMOUNT
IN SETTLEMENT OF:- Loan	ACCOUNT ALLOCATION

PREPARED BY _____	AMOUNT	ACCOUNT
CHECKED BY _____		ALLOCATION
APPROVED FOR PAYMENT _____		
CHEQUE SIGNED BY _____		
CHEQUE RECEIVED BY _____ ?	\$350,000.00	
	CHEQUE NO. MSB # 001	

Exhibit 3. Letter from plaintiff's attorney dated 16th May, 1990 which reads -

"BJS

16th May, 1990

Laurie Stewart Esq.
Manager,
Mutual Security Bank,
21 Constant Spring Road,
Kingston 10,
St. Andrew.

Dear Sir:

We act for and are instructed by Mr. Errol Robinson of 1 Brompton Road, Kingston 5.

We are holding a demand note for Three Hundred and Fifty Thousand Dollars (\$350,000.00) in favour of Mr. Robinson, a copy of which is enclosed for ease of reference.

To date interest of Seven Thousand Five Hundred and Ninety-four Dollars and Fifty-two Cents (\$7,594.52) has accrued on this loan.

Our instructions are that unless the full amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00) together with interest thereon at the rate of Three Hundred and Forty-five Dollars and Twenty-one Cents (\$345.21) per day from the 25th April, 1990 is paid upon the receipt of this letter, which is being hand-delivered to you today, we will take all measures to enforce payment and to fully disclose all the circumstances surrounding this transaction.

Yours faithfully,
BURNHAM SCOTT & COMPANY

/Sgd./ per.....
BURNHAM J. SCOTT Q.C.

"

Exhibit 4. Letter from defendant's attorney dated 17th May, 1990

"17th May 1990

Messrs. Burnham Scott & Company
Attorneys-at-Law
17A Duke Street
Kingston

Attention. Mr. Burnham Scott

Dear Sirs:

Re: Premises No. 27½ Half Way Tree Road -
Cross Island Petroleum

We have been handed your letter dated 16th May, 1990 addressed to Mr. Larry Stewart.

Apparently you have received incorrect instructions from your client Mr. Errol Robinson.

We enclose for your perusal copy of the clear offer and acceptance regarding the purchase of the above premises for the sum of \$2,000,000.00.

We are sure that you agree that this document forms sufficient memorandum under the Statute of Frauds Act.

Our client has instructed us to state that they will deliver vacant possession of the premises on or before the 15th July 1990 so we are preparing a Contract of Sale with that completion date.

Please advise over the telephone what other particulars you wish to be inserted in the Agreement of Sale which will be ready for our client's signature by Monday.

Yours faithfully,
JENNIFER MESSADO & CO.

PER: /Sgd./
JENNIFER MESSADO (MRS)

enc.

The defendant does not deny receiving from the plaintiff the cheque for Three Hundred and Fifty Thousand Dollars (\$350,000.00) drawn on Mutual Security Bank. Nor does he deny signing the cheque payment voucher, or delivering to the plaintiff the promissory note which he signed. He maintains however, that these documents relate to the purchase of premises No. 27½ Half Way Tree Road.

Mrs. Benka-Coker submits that the "demand note" on which the plaintiff sues, is not a term known to law, and if it is presented as a promissory note, it must fall within the scope and intent of Section 83 of the Bills of Exchange Act. It is convenient here to determine whether this document satisfies the definition of a promissory note. Section 83 (1) reads:

"Promissory note defined

- A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determined future time, a sum certain in money, to or to the order of a specified person, or to bearer."

Section 88 of the said Act provides as follows:-

"Liability of maker

- The maker of a promissory note by making it-
- (a) engages that he will pay it according to its tenor;
 - (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

The Concise Oxford Dictionary gives the meaning to a "demand note" as -

"request for payment, bill payable on sight; payable etc. on ~, as soon as the demand is made."

The document tendered as a promissory note/demand note satisfies the above definition. The nomenclature "demand note", given its ordinary meaning falls squarely within the ambit of the definition of a promissory note. The use of these terms interchangeably does not affect its validity. I find therefore that the document as presented falls within the scope and intent of Section 83 of the Bills of Exchange Act.

The cheque payment voucher signed by the defendant speaks eloquently to the purpose of the cheque for Three Hundred and Fifty Thousand Dollars (\$350,000.00). It states that this amount is payable to the defendant "in settlement of loan."

To fortify his defence that the amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00) referred to in the promissory note, was paid as deposit on the purchase of land No. 27½ Half Way Tree Road, the defendant maintains that an oral agreement was made between himself and the plaintiff on the 25th April, 1990 and is evidenced by memorandum in writing. He relies on a document which Mrs. Benka-Coker submits as satisfying the Statute of Frauds. It reads:

"Received from Errol Robinson, the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) representing payment towards purchase of 27½ Half Way Tree Road, Kingston. Purchase price of Two Million Dollars (\$2,000,000.00).

Agreement to be drawn up by Attorneys within a week.

Sign

L. H. Stewart
April 25/90

Payment Schedule

\$ 350,000	25/4/90
\$ 500,000	May 31/90
\$ 250,000	July 31/90
\$ 880,000	Oct. 31/90
\$ 70,000	

Deposit to be made on signing Sale Agreement.

Letter of undertaking for at least \$700,000 by June 30/90.

This document is tendered and admitted in evidence as Exhibit 5 in support of the defence and the counterclaim. The plaintiff denies ever having entered into any such agreement with the defendant either orally or in writing and also denies there is any memorandum in writing evidencing any agreement executed by him or on his behalf.

Mr. Scott submits the following:-

1. That the document tendered by the defendant purporting to be an agreement for the sale of lands does not comply with the Statute of Frauds in that there is no sufficient memorandum - the document not being signed by the plaintiff.

Section 4 of the Statute of Frauds reads:-

"No action may be brought upon any contract for sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised."

2. That the defendant cannot rely on an oral agreement for the purchase of land - the defence and counterclaim remains unsupported.
3. That the defendant admits the promissory note but avers that the payment was for a deposit on land - such a plea is inconsistent.
4. That the defendant cannot rely on extrinsic evidence which if accepted would have the effect of adding to, varying or contradicting the terms of the contract i.e. the promissory note.

In the case of Goss v. Lord Nugent (1833) 4B & AD58 Lord Denman formulated the following rule:-

"If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."

In the case of Bank of Australia v. Palmer (1897) A.C. 540 at page 545

Lord Morris in his judgment, regarded as indisputable that:

"Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract."

In the instant case there is no evidence that the plaintiff entered into an oral agreement to purchase 27½ Half Way Tree Road evidenced by memorandum in writing. There is no evidence that the plaintiff signed the purported memorandum. His signature does not appear on this document at all. This document therefore does not satisfy the requirements of Section 4 of the Statute of Frauds. And parol evidence will not be allowed to vary, add to or contradict the promissory note. It is to be observed that the defendant is a bank manager with Mutual Security Bank and cannot be said to be unfamiliar with banking terms such as "demand note" and "payment cheque voucher" and their purport and implications. It is patently clear from the wording of the demand/promissory note Exhibit 1, together with the payment voucher Exhibit 2, that the amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00) was for a loan to the defendant and nothing more. He is estopped from denying that Exhibit 1 is a promissory note. There is nothing in writing to suggest otherwise.

I find as a fact that the amount of Three Hundred and Fifty Thousand Dollars (\$350,000.00) paid to the defendant was for a loan to the defendant for which a promissory note was given. He is therefore bound by its tenor. I reject the defence that this sum represented a deposit on the purchase of lands. It cannot be said that the promissory note was made for the accommodation of the plaintiff and that he always took it and held it without consideration.

Mr. Scott further submits the defendant has no locus standi in this action. That there is nothing in documents, i.e. the exhibits relating to the transaction between the plaintiff and the defendant which makes reference to Citi-Car Sales Limited. The purported agreement, Exhibit 5 upon which the defendant relies, does not suggest that the defendant was acting as agent or on behalf of Citi-Car Sales Limited.

Mrs. Benka-Coker concedes that the defendant has no locus standi in the defence and counterclaim as filed. She makes a formal application under Section 100 of the Civil Procedure Code to join Citi-Car Sales Limited a second defendant. To this Mr. Scott object on the grounds that -

- (1) Citi-Car Sales Limited was never a party to the transaction and there is no written evidence of this and;
- (2) the efficacy of the amendment would only arise if the defence and counterclaim are not struck out. If the defence and counterclaim are struck out, then the amendment would be of no consequence. I uphold the objection and the application for amendment is refused.

Having rejected the defence to the claim, the next step is to determine whether the counterclaim discloses a reasonable cause of action. The defendant relies on an oral agreement which is evidenced in writing. Exhibit 5 purports to be an agreement between the plaintiff and the defendant for the purchase of 27½ Half Way Tree Road. This document written by the defendant admits the receipt of Three Hundred and Fifty Thousand Dollars (\$350,000.00) from the plaintiff, but as a deposit. The plaintiff does not admit it. It is not alleged by the defendant that the plaintiff is a signatory to it. It can only be regarded as self-serving on the part of the defendant. Clearly it does not fall within the provisions of the Statute of Frauds.

I find therefore that this document, Exhibit 5 does not form a sufficient memorandum under the Statute of Frauds.

Mrs. Benka-Coker submits that it is not the courts duty at this stage to hear and determine questions of fact on affidavit evidence but to determine whether there are triable issues raised by the defence.

The plaintiff alleges that the entire statement as set out in paragraphs 1-13 of the defence and paragraphs 14-15 of the counterclaim is false and fraudulent. This is based on a letter from the defendant's attorney-at-law Exhibit 4 as also the purported document Exhibit 5. The plaintiff avers that the defendant knew he never issued Exhibit 5 to him and well knowing that such a document does not form sufficient memorandum under the Statute of Frauds. Further allegations of fraud were made by the plaintiff but the defendant sought to explain these by way of further affidavits.

I do not think that the court at this stage need to trouble itself whether the allegations were fraudulent or not in light of my earlier findings.

Mrs. Benka-Coker further submits that the Statement of Claim and Defence discloses a reasonable cause of action and therefore ought not to be struck out. She relies on the cases of Moore v. Lawson et al T.L.R. (1915) Volume XXXI and Fraser v. Pape T.L.R. 1904 Volume XCL, where in the latter it was held that the statement of claim disclosed a reasonable cause of action, and ought not to be struck out. The defendants in that case relied on Section 4 of the Statute of Frauds stating inter alia that there was nothing in the Statement of Claim or the particulars to indicate the existence of any memorandum or note of agreement in writing to satisfy the requirements of the Statute of Frauds. In his judgment, Collins M R, said:-

"...the objection that the defendant may raise in his defence is one that goes purely to evidence. Though the plaintiff may not have any memorandum or note of the agreement in writing which would satisfy the Statute, yet such memorandum or note may be in existence, and until the plaintiff gets discovery, it is impossible to say whether or not such a memorandum may be brought to light." (emphasis mine).

In the above case, there is no memorandum or note to satisfy the Statute of Frauds, but there is the probability that one may be in existence. However, in the instant case, there is in existence such a memorandum or note and which was tendered in evidence in an attempt to satisfy the requirements of the Statute. This memorandum or note does not comply with the Statute for the reasons already mentioned. It is clear therefore that there is no contract between the plaintiff and the defendant in respect of the defence and counterclaim. See South Helton Coal Company v. Haswell (1898) 1 Ch. 456 I am satisfied on the evidence before me that the defendants' defence and counterclaim discloses no reasonable cause of action. In the circumstances, the defence and counterclaim are struck out.

Mrs. Benka-Coker has argued that if judgment be entered for the plaintiff, the plaintiff should be denied the sum of Nine Thousand Three hundred and Twenty Dollars and Sixty Seven Cents (\$9,320.67) his claim for interest. The basis for this is that the plaintiff in his reply to the defence and counterclaim abandoned the claim for interest. No reason is advanced for this strange course of action. Mr. Scott in an attempt to revive this part

of his claim, asks that the offending paragraph in the plaintiff's affidavit containing the abandonment be struck out. Mrs. Benka-Coker strongly objects to this and I think quite rightly. The application is refused.

Judgment is therefore entered for the plaintiff on the claim in the sum of Three Hundred and Fifty Thousand Dollars (\$350,000.00) with costs to be agreed or taxed. Judgment for the plaintiff on the counterclaim with costs to be agreed or taxed.