Pacific West Health Medical Center Inc. Employees Retirement Trust et al ...ld Greenwich Group et al Doc. 106 Att. 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 12

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In the Supreme Court of Bermuda

CIVIL JURISDICTION 1991 NO. 78

BERMUDA COMMERCIAL BANK LIMITED — Plaintiff

and

THE ESTATE REPRESENTATIVES OF WALTER LEONARD BICKLEY, DECEASED — Defendants

Mr. Mark Ray for the Plaintiff
Mr. Mark Diel for the Defendants

D E C I S I O N

Norma Wade, A.J.

The Defendants, who are the Executors of the Will of Walter Leonard Bickley, seek and order that the Bermuda Commercial Bank, the Plaintiff's originating summons dated 13th March, 1991 be struck out as disclosing no reasonable cause of action and/or is frivolous and vexatious and/or is an abuse of the process of this court, and costs of the application.

The facts can be stated briefly. On the 11th September, 1974, the Plaintiff and the deceased, Walter Leonard Bickley, Lessor, entered into two agreements:

1. A Lease of the property 'Serenade' for a term of 10 years. At any time during the term, the Lessee had the option of extending the term of the Lease for a further period or periods of up to 10 years, but not exceeding a total of 21 years.

For the purposes of this application only, the parties agreed that the matter is to proceed as if the option for a further 10 years was validly exercised and the parties are into the second 10 year term.

2. A Mortgage in the sum of $230,000.00 secured by the property 'Serenade' with the Plaintiff as Mortgagee and the deceased as Mortgagor.

The Plaintiffs held the title and the deceased received $230,000.00. Payments on the Mortgage were to be interest only.

The rent for the premises 'Serenade' was exactly the same as the interest on the Mortgage. The rent was to be applied in payment of the interest on the mortgage. Therefore, the arrangement operated as a complete set-off, and subsequently no monies changed hands save for the $230,000.00 paid to the deceased at the outset.

In effect, the Plaintiff got the use of 'Serenade' and the deceased got a 20-year, interest free loan.

Additionally, at Clause 4(c) of the lease, the Plaintiff was given an option to purchase 'Serenade' - the option price being $230,00.00.

The deceased died on the 4th January, 1990 and it appears that no Letters of Administration or Probate has been granted in respect of the estate.

On or about the 8th November, 1990 the Plaintiff, through it's attorneys, gave notice to the Defendants of its exercise of the option to purchase "Serenade". The Defendants have refused to honour the exercise of the alleged option.

The Plaintiff's originating summons seeks 'inter alia':-

1. a declaration that the option to purchase was valid and effective and capable of exercise on 8th November, 1990;
2. a declaration that the Plaintiff is entitled to a conveyance;
3. an order for specific performance of the contract arising from the exercise of the option contained in the Lease.

Mr. Diel has conceded that the originating summons does disclose a cause of action and decided to abandon this limb of his application. His submission deals only with the question of the option to purchase.

He argues that the pleadings are incomplete in that the originating summons fails to mention the existence of the Mortgage. Order 18 Rule 7 requests that all material issues be pleaded. Given the importance of the linkage of the two documents, it is vital that the Mortgage should have been pleaded. If this was done, the Defendants could have raised the

issue of there being no reasonable cause of action before the court. Be that as it may, the existence of the Mortgage, coupled with the Lease which contains the option to purchase constitutes a clog on the equity of redemption. This option is not valid as there is no valid contract. Since there is no contract, the action is frivolous and vexatious and should be struck out.

Mr. Ray, who appeared for the Plaintiff, submits that it is the substance and not the form of the Mortgage that should be considered. Indeed there is a possibility that the transaction may not be a Mortgage. And if the court finds that the "Mortgage" is not a Mortgage but a sale then the question of a clog on the equity of redemption cannot arise. Due consideration of these issues must be given in the context of all the circumstances. See Kreglinger -v- Patagonia Meat Company H.L. 1911-12 All E.R. Rep. at page 975.

> "The question is one, not of form but of substance, and it can be answered in each case only by looking at all the circumstances and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from judges in other and different cases. Some, at least, of the authorities on the subject disclose an embarrassment which has, in my opinion, arisen from neglect to bear this in mind. In applying a principle, the ambit and validity of which depend on confining it steadily to the end for which it was established, the analogies of previous instances where it has been applied are apt to be misleading. For each case forms a real precedent only in so far as it affirms a principle, the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances."

Mr. Ray continues that it is most inappropriate for the court, on the hearing of an application for striking out, to enter into this forensic exercise. This he says, is essentially a matter for the trial judge who will have regard to all the documents and extrinsic evidence. Additionally, because of the Defendants concession, i.e. that the Statement of Claim does disclose a cause of action, there is still going to be a trial.

Counsel for the Defendants has referred to a number of reported authorities dealing with what constitutes a clog on the equity of redemption.

Reduced to its essential points the Defendant's contention is that a clog has been placed on the equity of redemption; there is no valid contract and if there is no valid contract the action before the court is unsustainable, therefore it is frivolous and vexatious.

The Plaintiff, on the other hand, contends that the Mortgage and the lease, so far as they are material to this application, must be looked at along with all the other circumstances including the available extrinsic evidence to ascertain the true intention of the parties. This forensic exercise must be done at a trial.

Counsel for the Plaintiff has referred the court to a number of authorities which deal with the court's approach to application for striking out pleadings pursuant to Order 18 Rule 19 of the Rules of the Supreme Court. Among them, the Attorney General of the Duchy of Lancaster -v- London and North Western Railway Co. 1982 C.A. page 274; Dyson -v- Attorney General 1910 C.A. page 83; Electrical Development Company of Ontario -v- Attorney General for Ontario et al (1919) A.C. 687-695 P.C.: all supporting the principle that Order 18 Rule 19 relief only applies if it can be shown on the face of the pleading that the action is "...frivolous and vexatious ..." If the applicant has to resort to extrinsic evidence to show the pleading is bad, or if the pleading raises serious question of law or of general importance, then the rule does not apply.

The court's practice in dealing with these matters is succinctly set out in Frogmore Estates Plc -v- Berger [1989] C# NLJ 26th October, 1989 at page 123:

> "In all but the clearest cases the proper occasion for consideration of the merits of a case is at a trial, after discovery and with oral evidence not on interlocutory application when the full facts cannot be known".

In my view, the matters raised by both counsel cannot be resolved on the information before me. The question of whether there is in fact a clog on the equity of redemption requires mature consideration and ought not, indeed with the limited information before the court, cannot be dealt with in this summary fashion.

Additionally, counsel for the Defendant has conceded that this hearing on the merits summons will not dispose of the case completely as there are other issues which will proceed to trial. Since the transactions are related, the interest of justice is better served if all issues are dealt with together.

Accordingly I dismiss the Defendant's application.

Costs reserved for the trial judge.

DATED the 4/2 day of October, 1991.

ACTING PUISNE JUDGE