SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

(Civil)
A.D. 1998

SUIT NO: 1901 of 1996

Between:

(1) ANGELA JAMES
(2) FELIX JAMES qua Administrator of the Estate of **AUGUSTE JAMES**
(3) THE HEIRS OF AUGUSTE JAMES

PLAINTIFFS

AND

WINDJAMMER LANDING COMPANY LIMITED

DEFENDANT

1998: MAY 15,18 AND JUNE 10

Appearances:

Petra Nelson for the Plaintiffs
Brenda Floissac-Flemming and Anthony Bristol for the Defendant

JUDGMENT

PHILLIPS J. (Ag.) In Chambers

This is an application made by Summons dated the 2nd April, 1998 to set aside or strike out or cancel a judgment entered by the plaintiffs in default of defence and dated the 2nd June, 1997 for damages to be assessed, interest and costs.

HISTORY

The Writ was issued on the 12th December, 1996 indorsed with the following claims:-

1. An Order of the removal of the container, the wooden shed, and concrete shed.

2. A mandatory injunction restraining the Defendant from any further use of the Helicopter pad.

3. Damages for trespass.

4. Damages for loss of use and occupation.

5. Further or other relief.

6. The costs hereof.

A Statement of Claim was served with the writ and on the 9th January, 1997, the defendant entered an appearance. The defendant did not file a defence and on the 2nd June, 1997 the plaintiff entered judgment in default as herein before mentioned. A copy of this judgment was served upon this defendant on the 16th October, 1997. Nothing further happened until the 19th March, 1998 when the plaintiff applied for assessment of damages by which time the defendant was in Receivership. This application was served upon the defendant on the 31st March, 1998. It is at this point that the defendant bestirred itself and filed its summons dated 2nd April, 1998 on the same day. On the 6th April, 1998 an identical summons dated 3rd April, 1998 was filed and I could only conjecture that this was by inadevertence as no explanation was given at the hearing.

THE SUBMISSIONS

The summons of the 2nd April is supported by an affidavit of Donald Richard Smith who deposed that at all material times he was a director

the defendant. By paragraphs 2-10, 13-14 and 16-17 the deponent stated:-

"2. In the month of January 1991, myself and Mr. David Cram (the Managing Director of the Defendant Company at the time) arranged to meet and did meet an elderly gentleman who introduced himself to us as Mr. Ambroise James, one of the heirs of Auguste James. I met Mr. Ambroise James on the site in question namely Block 1054B 116 measuring 3.21 acres.

3. At the time of the meeting referred to in paragraph (2) above, the construction team on the Windjammer site was in the process of building the island condominiums and required access to the site. At the said meeting Mr. James, myself and Mr. Cram agreed that in exchange for the Defendant Company clearing the bush on the site (Block 1054B 116) levelling off the slope of the land and back filling the site, Mr. James would give the Defendant Company at no costs to the Defendant Company, the use of the site: (i) as an access road during the construction phase, (ii) for storage and (iii) other purposes. Mr. James intimated that his family had no use for the site and accordingly that the Defendant Company could use the side as aforementioned.

4. In pursuance of the said agreement the Defendant Company engaged its workmen to clear the bush and undergrowth on the site, engaged its excavators and backhoes, to grade the site, to back fill, compact the soil to level off the site. This exercise cost the Defendant Company approximately $4550.00 E.C.C. in clearing, $7227.00 E.C.C. in excavation works for the removal of the top soil and $57,776.00 E.C.C. in cutting, filling and compacting the site.

5. As a result of the works carried out by the Defendant Company on the Plaintiffs' site, the Plaintiffs's site was rendered more suitable for construction, planting and for development in general.

6. In pursuance to the agreement, the Defendant Company placed a storage shed on the property and constructed a helicopter pad thereon. At no time did Mr. James or the other Plaintiffs object to this use.

7. The Defendant Company continued to use the said land without interruption or complaint by the Plaintiffs their servants or agents for 5 years from 1991 to 1996.

8. I further state that no notice of trespass or otherwise has ever been served by the Plaintiffs on the Defendant.

9. I further deny that the Defendant Company ever received any letter dated the 17th October 1994 and put the Plaintiffs to proof thereof.

10. It was not until January 1997 when the Plaintiffs served on the Defendant Company the Writ and Statement of Claim in this matter was the Defendant Company aware of any objection by the Plaintiffs of the use and occupation of these lands by the Defendant Company.

13. On or about the 1st day of October 1997 the Defendant Company defaulted on its commitments to Smith Windjammer Holdings Ltd and Windjammer Bahamas Ltd the holder of the debenture

appointed a receiver to carry out the obligations of the Defendant Company. To date the defendant Company is still under receivership.

14. At present the Defendant Company has ceased to use the Plaintiffs' land for any purpose whatsoever.

16. In the light of the Plaintiffs' acquiescence in the use of these lands by the Defendant Company and as a result of the agreement between the Plaintiffs and the Defendant Company wherein the Plaintiffs specifically granted the Defendant Company the use of the land, the Defendant Company denies that it has trespassed on the said land.

17. In the circumstances, I verily believe that the Defendant Company has an arguable defence in this matter. The Defendant Company is desirous of pursuing its defence in this matter and I respectfully urge this Honourable Court, to set aside the judgment entered herein to grant the Defendant leave to file and serve its defence herein which is attached hereto as exhibit D.R.S.I."

On the 16th April, 1998 the said Donald Richard Smith filed a supplimental affidavit in which he deposed that the date of the meeting with Ambroise James was the autumn of 1989 and not January, 1991 and that Ambroise James had agreed that some of the excavation materials and debris from the defendant's lands could be used in the levelling process on the lands of the plaintiffs and that this work would be completed in a time frame convenient to the defendant.

The summons came on for hearing on the 15th May, 1998 and the first point taken by Counsel for the defendant was that the judgment was irregularly entered as the plaintiffs' claim fell within that described in Order 19 rule 7 of the Rules of Court and accordingly an application to the court for judgment was necessary. Counsel for the plaintiffs contended that the plaintiffs have the right to elect by entering judgment only for such claims as fall outside of rule 7 and abandoning those which do not. It was pointed out to the defendant's Counsel that the rubric to the Order 19 rule 7 in the White Book supported the contention of Counsel for the plaintiffs and the objection was withdrawn.

Counsel for the defendant next proceeded to contend that the judgment though regular should nevertheless be set aside and the defendant granted liberty to defend on the merits. Counsel relied upon paragraphs 3-8 of the affidavit in support of summons and made the following submissions:-

1. That the defendant's case is based upon the fact that Ambroise James did give permission for the defendant to occupy the land and carry out works thereon. Whether Ambroise had authority to grant such permission was not decisive. The defendant assumed that Ambroise had authority and the plaintiffs by their inaction and non-objection from 1989 to 1996 encouraged the defendant in that assumption and belief. The defendant used the land openly and had helicopters landing and taking off constantly.

2. That by virtue of Articles 1515-6 and Article 1560 of the Civil Code the defendant became a tenant by sufferance of the owner. The annual value is not payable by defendant as the plaintiffs and the defendant contracted out of this rental value by agreeing to a different consideration, namely, levelling of slope of land, backfilling site, contracting backhoes and excavators to level and compact soil, building a helicopter pad and other works.

3. The lease expired on the 1st May of each year and a new tenancy commenced eight (8) days later in accordance with Article 1516 of the Civil Code. Due notice is required to terminate this lease in accordance with Article 1560 of the Civil Code and no such notice has been given.

4. That by Article 1163(3) of the Civil Code oral testimony is admissible to prove lease and that the facts deposed to in paragraphs 3-8 of the affidavit in support constitute such evidence and, in particular, the assertion that the land was used without objection by the plaintiffs until filing of the writ.

5. That the plaintiffs created or encouraged the defendant's belief that defendant had the right to use the land and are estopped from disappointing the defendant's said belief or expectation. It would be unconscionable to allow the plaintiffs to deny this acquiescence.

In support of these submissions Counsel referred to the following cases:-

Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd. (1981) 1A11ER 897.
Linm v Ang (1992) 1WLR 113

Evans v Bartlam (1937) 2 ALL ER 646
The Saudi Eagle (1986) 2 Lloyd LR 221
Judgment of Matthew J. in Suit No. 143/95
Royal Bank of Canada v Benetton (St. Lucia) Ltd. and Ass.

Counsel for the Plaintiffs made the following submissions:-

1. The Court does not automatically set aside a judgment in default which is regularly obtained. The Court has a discretion and this places the application in the realm of equity and therefore the court must look at what the justice of the case requires. The applicant must show in the affidavit that he has a proper defence otherwise the judgment will be allowed to stand.

2. The defendant's affidavit does not show any merit which has a real prospect of success. In fact the affidavit of Angela James, the first plaintiff with the exhibits thereto in reply to the affidavit of the defendant shows that the assertions upon which the defendant relies are untrue.

3. The defendant comes to the court with unclean hands. The defendant knew that Ambroise James was one of several owners and must be taken to know that James could not validly grant the permission claimed. All the owners must consent and there is no evidence of such consent. The defendant dealt with an elderly man whom Angella James deposed was simple, unable to speak english properly and if there was any such agreement as claimed the defendant will have to show that it was not improperly procured.

Counsel for plaintiffs relied on the following authorities:-

Bank of Nova Scotia v Emile Elias & Co. Ltd. (1992) 46 WIR 33
Hayden on Equity and Trusts pg. 239-241
White Book O. 13 r. 9 and the rubric thereto.

FINDINGS

Auguste James died on the 23rd January, 1948 intestate leaving as his heirs at law and legal representatives -

1. Marguerite Angela James
2. Phillipia James aka Florence James
3. Ambroise James
4. Guardian Hilda James
5. Emmanuel James
6. Abraham James

The property of the deceased comprised, inter alia, the parcel of land the subject of these proceedings which he held by Deed of Sale registered on the 6th December, 1929 in Vol. 79 No. 46252. On first registration under the Land Registration Act 1984 on the 29th October, 1986 this land was

registered as Registration Quarter Gros-Islet Parcel No. 1054 B 116.

The law of succession was changed in 1952 to provide for the devolution of estates of deceased persons to the personal representative. Vide Sections 584 and 586 of the Civil Code. Prior thereto the estate of the deceased devolved directly to the heirs. Vide Sections 539 et seq.

Marler writing on the Law of Real Property, Quebec says at page 46 that a person's property is held by his heirs in indivision, that is what the French call "L'indivision heréditaire." Under this system, the heirs are co-owners and at page 47 he says:-

> *"a co-owner cannot alone validly lease the property or perform other acts of administration with respect to it, for in simple indivision there is no presumed mandate as in partnership. See* ***Starnes and Ross*** *MLR 2 Q B 379."*

In order to create a lease under Section 1515 of the Civil Code the defendant must have held the property by sufferance of the owner. According to Section 34 (2)(a) of the Interpretation Act 1968, the word "owner" means one or more than one according to the circumstances. I accept the submission of Counsel for the plaintiffs that the defendant knew that it did not have the consent of the owners to take possession of the land. In paragraph 2 of the affidavit filed on behalf of the defendant, the deponent stated that he and the Managing Director "did meet an elderly gentleman who introduced himself to us as Mr. Ambroise James, one of the heirs of Auguste James." In paragraph 3 of the said affidavit it is stated that "Mr. James intimated that his family had no use for the site and accordingly that the Defendant Company could use the site as aforementioned."

I find that the defendant knew or had the means of knowing that Ambroise James did not have the authority to put it in possession of the lands. Counsel for the defendant however submitted that the plaintiffs had acquiesced in the defendant's possession and are accordingly estopped from denying that the defendant is a lessee by sufferance.

In a case like this, for the defendant to succeed on the question of acquiescence, it must show that:-

1. it had a mistaken belief which led it to take possession and perform the works; and

2. all the plaintiffs knew of the mistaken belief; and

3. each of the plaintiffs knowing of his right to prevent the defendant continuing in possession stood by and said nothing while the defendant expended money on the works; and

4. it is not a volunteer.

Vide 16 Halsbury 4th Edition paragraphs 1473-4. The defendant has failed to show any of the above requirements and the submission similarly fails.

When the plaintiffs got word of what was afoot on their land, they engaged a surveyor to establish the extent of the activity on the land which by admeasurement comprises 3.21 acres. The survey commenced on the 30th October, 1992, that is, between one to three (3) years after the defendant spoke with Ambroise James. The surveyor reported in or about August, 1993 that the defendant was in possession of 1.5 acres. By letter dated 17th October, 1994 the plaintiffs through their solicitors wrote to the defendant as follows:-

"We act herein on behalf of **AUGUSTE JAMES**, acting herein and represented by his duly constituted attorney **FELIX JAMES**.

Our client informs us that he is the owner of land registered at the Land Registry as Block 1054 B 116 comprising of three point two acres (3.2 acres) at Bois d'Orange.

On or about the 12th June 1993 our client caused the land aforementioned to be surveyed and in accordance with Drawing No. G1 3114 B dated 24th June 1993 by Licensed Land Surveyor Dunstan Joseph lodged 7th July 1993, Record No. 383/93 it was discovered that your company encroached on the said portion lf land with a container, a helicopter pad, a concrete shed and a wooden shed.

We are therefore proposing either:

(1) The removal of the structure on our client's property or;
(2) The purchase of the property from our client.

We look forward to your kind co-operation and await a response within seven (7) days, failing which we will take the necessary action."

This is a clear allegation of trespass. The defendant replied through its solicitors on the 20th October, 1994 as follows:-

"We acknowledge receipt of your letter of the 17th October 1994 and have been instructed to reply that our client had been informed by your client that there was a problem with the title to the said land and that accordingly your client ws not in a position to sell the said land to your client.

Could you possibly provide me with information of the title to the property in question at your earliest convenience."

It would be observed that there is no mention of any claim by the defendant that it was a lessee. Negotiations continued for sale of the land and correspondence passed between the parties down to the 12th January, 1998. Nowhere is there a claim that defendant was a tenant.

The negotiations proved protracted and in the end, abortive. On the 19th June, 1996 the plaintiffs' solicitors wrote the defendant with a copy to its solicitors as follows:-

"We act herein on behalf of **MR. FELIX JAMES**, who is the Administrator for the Estate of **AMBROISE JAMES**.

> Our client is the owner of land registered as Block 1054 B Parcel 116, at Trouya Our client states that despite the fact that your Company was warned about the unlawful use of their land where you have a helicipter pad, you have continued to wrongfully occupy the said lands.
>
> At this state, our client has instructed us to advise you that there should be o further activities in any form or fashion, on the land until the situation is finally resolved.
>
> We look forward to you kind co-operation."

In view of the above correspondence paragraphs 8 and 9 of the affidavit filed on behalf of the defendant (which forms part of the material facts on which the defendant is relying) are patently untrue.

The plaintiff, Angella James, in paragraph 17 of her affidavit asks the Court to find that - "the Defence is a sham Defence, with no merit and no likelihood of success." I so find.

CONDUCT OF DEFENDANT

The defendant is a commercial company trading for profit. It persuaded an elderly man who is obviously at a bargaining disadvantage to allow it to use his family land free of cost to conduct a commercial operation and to build works thereon which are of no commercial use to the owners. However, on cessation of the defendant's operations the plaintiffs by virtue of Article 1544 are liable to compensate the defendant for improvements. Ambroise even said that his family had no use for the land which has been valued by a professional valuator at $978,793.20 as at the 15th October, 1996.

The defendant went into Receivership on the 1st October, 1997 by which time the plaintiffs have had their judgment registered in the Registry of Deeds and Mortgages in Vol. 150 a No. 176309. The plaintiffs therefore

have some priority for payment of the judgment debt which would be lost if the judgment is set aside. It is a fair inference that this is one of the objectives of the defendant and more especially, the Receiver.

I accept the submission of Counsel for the plaintiffs that the defendant comes to the Court with unclean hands.

CONCLUSION

In the premises the defendant's application is refused with costs to the plaintiffs to be taxed.

Certified fit for Counsel.

COSMAS PHILLIPS, Q.C.
PUISNE JUDGE (AG.)