

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2006/CLE/gen/FP/00218**

BETWEEN

LINDA MARIA ALBURY

Plaintiff

AND

PHILLIPA ROLLE JAMES CURRY

Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray-Evans

APPEARANCES: Ms Tiffany C. Dennison for the plaintiff

Mrs Phillipa Rolle James Curry, pro se

2011: 12 September; 23 November (written submissions
from plaintiff's counsel)

JUDGMENT

Gray Evans, J

1. This action commenced by a generally endorsed writ of summons on 24 October 2006 in which the plaintiff, Linda Albury claimed against the defendant damages for breach of a written agreement to deed dated 18 June 1998 for property situated at Lot 58 Sunrise Park Subdivision, Freeport, Grand Bahama and recorded in the Registry of Records in volume 7398 at pages 339 to 345.

2. In her statement of claim filed 11 December 2006 the plaintiff alleges as follows:

- (1) The plaintiff is and was at all material times a resident of Fifty Eight (58), Sunrise Park Subdivision, City of Freeport, on the island of Grand Bahama, one of the islands within the Commonwealth of the Bahamas ("the property").
- (2) The defendant is and was at all material times the owner in fee simple of the property and resident within the Commonwealth aforesaid.
- (3) That on June 18th, 1998 an Agreement to Deed was executed by the parties herein for the plaintiff to purchase from the defendant the said property for the amount of one hundred and ten thousand Bahamian dollars (B\$110,000.00). The Agreement to Deed has been filed in the Registry of Records in the City of Nassau on the island of New Providence within the said Commonwealth recorded as volume 7398 at pages 339-345.
- (4) That per clause fifteen (15) of the said agreement the mortgage on the property was to be paid in full upon receipt of all funds and the property deeded to the plaintiff herein.
- (5) That in 2004 due to the financial strain of the island of Grand Bahama due to the devastation of hurricanes sustained by Grand Bahama and subsequent economic losses, the defendant offered to lower the monthly agreed payment schedule under the Agreement to deed from Seven Hundred and Fifty Dollars (\$750.00) per month to Four Hundred Dollars (\$400.00) per month. The plaintiff agreed to the same, although it was not requested.
- (6) That on June 18th, 2006 the plaintiff rendered full and final payment of the Agreement to deed and requested the property be deeded as agreed, the defendant having refused two previous offers from the plaintiff to render full payment of the agreement to deed.
- (7) That in breach of the agreement to deed aforementioned, the defendant has failed and or refused to deed the property to the plaintiff per the agreement to deed, citing outstanding mortgage matters for the same.
- (8) That in further breach of the agreement to deed the defendant took out a second mortgage with her banking facility over the property, using the same as collateral.

- (9) As a result of the aforesaid the plaintiff has suffered loss and damage.

And the plaintiffs claims:

- (1) Specific performance of the agreement to deed, funds had and received
- (2) Damages for Breach of Agreement
- (3) Interest in accordance with the Awards of Interest Act
- (4) Such further or other relief as to the court may seem fit.

3. In her defence filed 3 April 2007, the defendant admits paragraphs 1 through 5 of the statement of claim and avers as follows:

- 1) The parties agreed to a reduction in the monthly installment payment at the plaintiff's request.
- 2) Additionally, the parties agreed that as a result of the reduction of the monthly installment payment, the payment schedule originally agreed under the Agreement of Deed would be extended because the plaintiff's monthly payments to the defendant under the agreement of deed were being used by the defendant to pay the mortgage on the subject property.
- 3) Despite the reduction of the monthly installments the plaintiff on numerous occasions failed to make the monthly payments in a timely manner and in accordance with the terms of the agreement of deed.
- 4) Therefore, the defendant incurred additional interest and late fees in connection with the mortgage over the subject property and the defendant has been unable to obtain a satisfaction of mortgage in order to complete the sale for the property to the plaintiff.

4. At the time she filed her defence the defendant was represented by counsel. In fact the defendant was represented by counsel up to 26 October 2010 when counsel with the leave of this court withdrew, although the trial date had been set for 18 and 19 April 2011.

5. On 18 April 2011 the defendant appeared without counsel and was given 14 days to instruct counsel and 21 days within which to provide the other side with a witness statement. The trial was then adjourned to 12 September 2011 at 10:00 a.m.

6. On 12 September 2011 the defendant had still not engaged counsel. She said she did not have the means to do so. The trial proceeded.

7. The facts leading up to the commencement of this action are simple.

8. The plaintiff and the defendant entered into an agreement for the sale and purchase of Lot 58 Sunrise Park Subdivision, Freeport, Grand Bahama, under what is commonly referred to as an "agreement to deed".

9. The agreement, which is recorded in the Registry of Records of the Bahamas in Volume 7398 at pages 339 to 345, provided for the payment of the sale price of \$110,000.00 by a deposit of \$45,000.00 and the balance of \$65,000.00 payable by 86

monthly payments of \$750.00 and an 87th payment of \$500.00 to be paid in October 2005.

10. The purchaser/plaintiff paid the deposit and was allowed into possession. She commenced making the monthly installments.

11. By clause 15 of the agreement it was mutually agreed and understood that the property was, at the time mortgaged to "a bank" but the vendor covenanted with the purchaser to pay off that mortgage from the proceeds of the deposit and provide the purchaser with evidence thereof.

12. That was not done.

13. The agreement also called for the vendor/defendant, simultaneously with the execution thereof, to execute a conveyance of the property in favour of the purchaser/plaintiff, which conveyance was to be kept by the vendor/defendant during the term of the agreement to be delivered to the purchaser/plaintiff at completion that is on payment of the final payment. The purchaser/plaintiff was to be provided with a copy of the executed conveyance.

14. That was also not done.

15. Following hurricanes Frances and Jeanne in 2004, the parties agreed to reduce the monthly payments from \$750.00 per month to \$400.00 per month. It is unclear how that agreement came about. The plaintiff says it was at the request of the defendant who says it was the request of the plaintiff.

16. Nevertheless, the plaintiff paid and the defendant accepted the reduced payments of \$400.00 per month and on 18 June 2006 the plaintiff paid the sum of \$350.00 to the defendant who issued a receipt acknowledging payment thereof and indicating that the principal account balance was "nil".

17. Further by a letter dated 17 June 2006, from the defendant to the plaintiff the defendant confirmed that "today is your last payment of \$350.00 to principal account with me". However, she indicated in that letter that the plaintiff owed a balance of \$10,200.00 "because of the 21 months of cut in payment of \$350.00 and the interest."

18. The plaintiff says there was no agreement between the parties for the payment of interest and having paid the purchase price in full she is entitled to a conveyance of the said property, which the defendant has failed to declare.

19. The plaintiff, therefore, asks for an order for specific performance and for damages for breach of contract.

20. The defendant really has no defence to the plaintiff's claim. She admits the terms of the agreement. She admits that she has been paid \$110,000.00 by the plaintiff, although she claims to be owed interest. However, she has produced no evidence of an agreement between the parties for the payment of interest and the plaintiff denies such an agreement. He who alleges must prove.

21. In the circumstances it is clear that the plaintiff is entitled to have the agreement specifically performed.

22. The problem however is that not only did the defendant not pay off the mortgage which was outstanding at the date of the agreement, but it appears from the evidence that she has since further encumbered the property so that at the date of the trial the outstanding sum due thereunder was \$85,163.74 which the defendant says she does not have the means to pay.

23. In light of that information, I asked counsel for the plaintiff's assistance as to what order this court could make in the circumstances.

24. In response, counsel for the plaintiff says that the defendant should be ordered to mortgage/encumber other property owned by her for a sum equal to (i) the mortgage debt currently outstanding on the said property, (ii) the costs of this action with interest and (iii) damages, and further that the defendant should be ordered to execute a conveyance of the said property in favour of the plaintiff free from any encumbrances.

25. For that proposal, counsel for the plaintiff relies on section 5 of the Conveyancing and Law of Property Act which provides as follows:

5. (1) Where land subject to any incumbrance, whether immediately payable or not, **is sold** by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such mount as, when invested in securities of the Government of The Bahamas, or of the United Kingdom, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

26. However, on a reading of that section it seems to me that I can only make an order declaring the said property free from the mortgage if this were a case of a sale and moneys were available to discharge the debt.

27. In the circumstances I find for the plaintiff and would give judgment for specific performance of the agreement within 90 days of the date hereof, failing which the defendant is to refund to the plaintiff all moneys paid under the said agreement, to be

assessed by the Registrar, together with interest from the date hereof and costs, which are to be taxed if not agreed.

Delivered this 7th day of March 2012

Estelle Gray Evans
Justice