

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2019/CLE/gen/00127

BETWEEN

OPAC BAHAMAS LTD

Plaintiff

-AND-

DUANE BENNETT PARNHAM

-AND-

LEIGH MAGDALENE PARNHAM

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kevin A.C. Moree of McKinney Bancroft & Hughes for the Plaintiff
Mrs. Lucia E. Broughton-Cartwright of Broughton-Cartwright for the Defendants

Hearing Date: 29 October 2020

Civil - Consent Order – Compromise Agreement – Defendants’ breach of terms of compromise - Irrevocable consent to judgment if default – Plaintiff exercising its right under paragraphs 4 and 6

In November 2019, the parties agreed on a settlement position which was enshrined in terms of compromise which were scheduled to a Consent Order dated 22 November 2019 (“***the Consent Order***”). Pursuant to the Consent Order, all further proceedings in this Action were stayed except for the purpose of carrying into effect the terms of compromise set forth in the Schedule to a Consent Order (“***the Terms of Compromise***”) and for that purpose the parties were granted liberty to apply. The Plaintiff applied by Summons filed on 16 March 2020 to carry into effect the Terms of Compromise.

The Plaintiff alleged that the Defendants had failed to make payment in accordance with the payment schedule detailed in paragraph 2 of the Terms of Compromise. As a result, it relied on paragraph 4 of the Terms of Compromise which states: “*In the event any of the Payments are not made in accordance with the payment schedule detailed in paragraph 2... the Defendants and each of them hereby irrevocably consent to Judgment being immediately entered against them...*”

If it is necessary for the Plaintiff to apply for Judgment under this paragraph ... the Defendants' counsel shall consent to the Judgment." The Plaintiff also submitted that the Defendants should be ordered to pay its [the Plaintiff] costs associated with this action on an indemnity basis pursuant to paragraph 6 of the Terms of Compromise.

The Defendants accepted that payments had not been made in accordance with paragraph 2 of the Terms of Compromise but claimed that the relevant payments had been made, albeit late, and the Plaintiff had forgiven their failure to pay on time. The Defendants also alleged that there were a number of serious deficiencies with the Plaintiff's construction.

HELD: Judgment in the sum of \$356,934.93 entered against the Defendants pursuant to paragraph 4 of the Terms of Compromise and the Defendants ordered to pay the Plaintiff's costs associated with this action on an indemnity basis pursuant to paragraph 6 of the Terms of Compromise.

1. The Terms of Compromise are unequivocal with respect to the consequences associated with the Defendants' failure to make payments in accordance with the agreed payment schedule. The parties agree that the Defendants failed to make payments in accordance with the agreed payment schedule and as such paragraph 4 of the Terms of Compromise become operative.
2. The Defendants' allegations regarding incomplete and improper work does not absolve them from complying with the Terms of Compromise. The Defendants are not without remedy if they wish to pursue those claims.
3. The Terms of Compromise are also unequivocal with respect to the cost consequences associated a party having to apply to the Court to enforce the Terms of Compromise.

RULING

Charles J:

Introduction

- [1] This is an application by the Plaintiff to enforce the terms of a Consent Order dated 22 November 2019 ("the Consent Order") to carry into effect the terms of the compromise set forth in the Schedule to the Consent Order ("the Terms of Compromise").
- [2] The Plaintiff's Summons which was filed on 16 March 2020 is supported by three affidavits of Knijah Knowles filed on 14 October, 28 October and 29 October 2020 respectively.
- [3] The Defendants opposed the application alleging, in the main, that although there were delays on the Defendants' part, the Plaintiff forgave those delays and then

made a volte-face notwithstanding the grave circumstances emanating out of the worldwide pandemic including the loss of the sale of the Defendants' property. The Defendants further say that the Plaintiff remains in breach of the Terms of Compromise in that the works carried out were either incomplete or improper nevertheless, as at 24 September 2020, they made good on all sums that they agreed to pay as of that date. Further, say the Defendants, the Plaintiff has brought this matter prematurely before the Court.

- [4] The Defendants further relied on the affidavit of Erycka Hall, Personal Assistant in the law firm of Broughton-Cartwright, Attorney for the Defendants, filed on 26 October 2020 ("the Hall Affidavit") to supplement their contention that neither party is blameless and that when the Defendants visited the property during the weekend of 10 October 2020, they found a plethora of unfinished works. This is detailed in paragraph 6 of the Hall Affidavit.

Relevant paragraphs of Compromise Agreement

- [5] Under the Terms of Compromise, the parties agreed to settle this dispute on the basis that the Plaintiff would accept a discounted amount owed to it pursuant to a Construction Agreement dated 29 March 2018 and the Defendants would make payments to the Plaintiff in accordance with a payment schedule set out in paragraph 2 of the Terms of Compromise as provided below:
- a. US\$550,000.00 (in respect of a partial payment of the stage 1- 4 payments pursuant to the Construction Agreement) shall be paid on or before 1 December 2019;
 - b. US\$194,975.00 (in respect of the balance of the stage 1- 4 payments pursuant to the Construction Agreement) shall be paid on or before 20 December 2019;
 - c. US\$93,929.00 (US\$64,904.00 of which is in respect of a reduced amount of interest agreed to be paid by the Defendants to the Plaintiff) shall be paid

immediately upon the issuance of the occupancy certificate and electrical permit and completion of the landscaping and HVAC system;

- d. US\$26,875,00 shall be paid immediately upon the completion of the Infinity-edge pool (15' x 30'); and
- e. US\$26,875.00 shall be paid immediately upon the completion of the sea-wall construction on the ancillary lot, including four (4) 'green-hard' poles with copper-top fittings, bumpers, cleats (3) and a marine safety ladder extending into the adjacent water (collectively, "**the Payments**").

[6] Paragraph 4 of the Terms of Compromise provides as follows:

"In the event any of the Payments are not made in accordance with the payment schedule detailed in paragraph 2 above, the Defendants and each of them hereby irrevocably consent to Judgment being immediately entered against them in this Action for i) the Settlement Sum [which is defined in paragraph 1 as US\$892,654.00], ii) any and all interest at the full rate as provided for in the Construction Agreement (being US\$97,356.00 up to 21 November, 2019 and accruing at 1.5% per month from 22 November, 2019 until payment in full has been made including interest and penalties) and iii) penalty fees pursuant to the Construction Agreement (which are to be calculated from 30 October, 2019 at \$500.00 per day until payment in full has been made including interest and penalties) ("the Judgment Amount") PROVIDED THAT the Defendants shall be granted a grace period of two (2) business days to remedy any breach with respect to making the payment due on 20 December, 2019. If it is necessary for the Plaintiff to apply for Judgment under this paragraph, the Plaintiff shall file a Summons in this Action seeking Judgment pursuant to this paragraph and serve it on Broughton Cartwright, the Defendants' Attorneys. At the hearing of the Plaintiff's application for Judgment the Defendants' counsel shall consent to the Judgment. PROVIDED THAT in the event the Defendants or either of them have paid a portion of the Payments then the Judgment Amount shall be reduced by the amount of such payment and Judgment shall be entered by consent against the Defendants for the reduced amount." [Emphasis added]

[7] Paragraph 6 of the Terms of Compromise provides:

"Should either party need to apply to Court for the enforcement of any of the terms herein contained, the defaulting party shall be liable to pay the non-defaulting party's legal costs associated with such an application on an indemnity basis."

[8] Finally, paragraph 9 states:

“This Agreement does not constitute an admission of liability by any of the parties.”

Discussion and disposition

[9] Learned Counsel for the Defendants, Mrs. Broughton-Cartwright submitted that the Plaintiff asserts that it (the Plaintiff) accepted discounted sums which were owed by the Defendants when in fact the Terms of Compromise expressly state at paragraph 9 that the agreement made thereby does not constitute an admission of liability by any of the parties. According to Counsel, it was merely an attempt to come together for the sake of all parties to move forward and on each side the parties conceded certain rights and entitlements.

[10] Learned Counsel relies on the Hall Affidavit. She contends that with respect to the failure of the Defendants to make the payments in accordance with paragraph 2 of the Terms of Compromise, the Defendants acknowledged that there were delays however:

- a. The Plaintiff forgave those delays and went so far as to state in March that the Defendants need not worry until the “*madness*” of COVID 19 was over. Indeed, the Plaintiff itself conceded to the Defendants that the “*madness*” hindered its own ability to continue its work. Having said that, the Plaintiff then made a volte-face, notwithstanding the grave circumstances emanating out of the worldwide pandemic including the loss of sale of the Defendants’ property.
- b. The Defendants did everything in their power to remedy those defaults as is evidenced by the part payment made as soon as there was a period during the pandemic when some of the Defendants’ assets were able to be made fungible (in August) and one day following the closing of the sale of the property which the Defendants had advised the Plaintiff they were awaiting to complete their payments then due.

c. The Plaintiff themselves were and remain in breach of the Terms of Compromise as it was implicit therein that the payment by the Defendants for the stages 1- 4 of the construction works meant that the stages of construction as stated in the Terms of Compromise as were more particularly detailed in the Construction Agreement (“the Works”) were in fact completed and completed to the appropriate standard. Included in the Works for these stages was the completion of the landscaping, proper installation and operation of the HVAC systems, properly functioning electricity and water supplies to the house amongst many other items which were either carried out to a poor standard or only partially carried out at all. Indeed, until now the Plaintiff has expressed no intention or willingness to remedy such gross defaults. In the meantime, as at 24 September 2020, the Defendants made good on all sums they agreed to pay as at that date (the incomplete or improper works of the Plaintiff notwithstanding).

[11] Learned Counsel surmised that neither of the parties is inculpable but it is clear that the Plaintiff has brought this matter prematurely at best and improperly at worst as the Plaintiff remains in breach of the Terms of Compromise as at today even as the Defendants have remedied theirs.

[12] Learned Counsel Mr. Moree, appearing for the Plaintiff submits that the Defendants have failed to make payments in accordance with paragraph 2 of the Terms of Compromise and paragraph 4 expressly provides that “*in the event any of the Payments are not made in accordance with paragraph 2, the Defendants and each of them irrevocably consent to Judgment being immediately entered against them in this Action...*”

[13] He submitted that the Knowles’ Affidavits set out the calculation of the Judgment Debt which stands at \$356,934.93 as at 29 October 2020. Then, in Knowles’ Third Affidavit, she stated, in paragraph 4, that Mr. Raphael Reyes, a Director of the Plaintiff, confirmed that the Defendants have never made a payment in accordance

with the Terms of Compromise and the Plaintiff, waited for approximately three (3) months before filing the present application.

- [14] In addition, on 6 January 2020, the Defendants were provided with a copy of the occupancy certificate in accordance with paragraph 3 of the Terms of Compromise. In addition, the Plaintiff never agreed that the Defendants' payment obligations under the Terms of Compromise were contingent on the sale of any other property.
- [15] The Defendants acknowledged that they have failed to make payments in accordance with the payment schedule set out in paragraph 2 of the Terms of Compromise. Any default in payment brings into play the operation of paragraph 4 which provides that "*In the event any of the Payments are not made in accordance with paragraph 2, the Defendants and each of them hereby irrevocably consent to Judgment being immediately entered against them in this Action...*"
- [16] Paragraph 4 also mandates a procedure that the Plaintiff must follow to seek Judgment against the Defendants. The Plaintiff has followed that procedure and expected the Defendants to consent to judgment. However, the Defendants now allege that, in October 2020, they discovered incomplete and improper work. If that is the case, then they are not without remedy but that does not absolve them from complying with the Terms of Compromise. They are bound by the Terms of Compromise which are unequivocal with respect to the consequences associated with the Defendants' failure to make payments in accordance with the agreed payment schedule as well as cost consequences.
- [17] Pursuant to paragraph 4 of the Terms of Compromise, I will order that Judgment be entered against the Defendants in the sum of \$356,934.93 as at 29 October 2020. The Defendants are also ordered to pay the Plaintiffs' costs associated with this action on an indemnity basis pursuant to paragraph 6 of the Terms of Compromise.

[18] In addition, there will be interest at the statutory rate of 6.25% per annum from the date of Judgment to the date of payment.

Dated this 2nd day of November, A.D., 2020

**Indra H. Charles
Justice**