

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2018/0099**

Between

Eustace Nisbett

Claimant

-and-

Nevis Housing and Land Development Corporation

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. Patrice Nisbett of counsel for the claimant
Mr. Terrence Byron of counsel for the defendant

2019: October, 30th and 31st
2020: January, 3rd (Written Submissions)
February, 27th

JUDGMENT

[1] **Moise, J:** The claimant claims that he is the owner of a parcel of land which was sold to the defendant sometime during the course of 2012. Although various sums were paid in furtherance of the agreement, he claims that there is an outstanding balance of \$61,912.14 owed to him which the defendant refuses to pay. The defendant filed a defence and counterclaim in which it sought to avoid the contract on a number of grounds and recover the sums already paid to the claimant. At the trial, counsel for the defendant effectively abandoned the grounds of defence and withdrew the counterclaim. He however argues that the claimant has not proven his case as he is not the owner of the property. After hearing the evidence and considering the submissions of counsel for both parties I have determined that the case should be dismissed with costs to the defendant. These are my reasons for so deciding.

The Facts

- [2] The claimant states, in his pleadings and his witness statement, that he is “the owner of the property by way of certificate of title registered in the register of titles in book 41 folio 525.” On that parcel of land a studio apartment had been constructed in or about 2005. He states that in 2011 he was approached by the defendant, the Nevis Housing and Land Development Corporation (NHLDC), with an offer to purchase the property. Mr. E. Robelto Hector, who was then chairman of the board, gave evidence in court and noted that the NHLDC was at the time acquiring property for the purpose of a particular housing development. The corporation therefore approached the defendant as it was of the view that the property in question would assist in fulfilling the NHLDC’s purposes.
- [3] The claimant obtained a valuation on the basis of which he made an offer to the defendant for the sum of \$187,000.00 for the purchase of the property. At a board meeting of the NHLDC on 7th May, 2012 the purchase of the property was approved. It must be noted that at the time of the agreement the claimant was the general manager of the defendant corporation and ex officio secretary to the board of directors. As I understand it, the discussions at the board meeting during which the purchase was approved were held in the claimant’s absence as he was required to exit the room. He therefore took no part in those discussions.
- [4] The claimant states that subsequent to that meeting, the acting manager/accountant, Mr. Dwayne Warner wrote to him informing him of the board’s decision and that a deposit was prepared for payment to the claimant. He requested that the claimant deliver the certificate of title to the defendant. The claimant duly obliged. Various sums were paid to the claimant and as at December, 2012 he had received a total of \$125,087.86 towards the purchase price. He received no further payments. In January, 2013 there was an election in Nevis and a new minister was appointed to the ministry with responsibility for housing and land development. In keeping with legislation therefore, Minister Hon. Alexis Jeffers became the new chairman of the corporation’s board. A new board was also instituted and Mr. Dexter Boncamper later became the new general manager. Despite repeated requests for the payment of the outstanding balances on the agreement, the defendant has refused to pay.

- [5] As initially pleaded, the defence raised three broad issues. Firstly, it is argued that at the time of the agreement for sale, the claimant was the general manager of the corporation and ex officio secretary to the board. It was claimed that there is an internal policy that employees and directors of the corporation are not to acquire any benefit from their dealings with the corporation. Essentially it is pleaded that this internal policy of the corporation entitles the defendant to rescind the agreement.
- [6] Secondly, the defendant pleads that upon becoming aware of the claimant's assertions regarding the sale of the property, a valuation was ordered in January, 2013. That valuation indicated that the property was valued at \$93,495.50. As such the agreement to purchase the property was valued at substantially more than what the property was worth.
- [7] Thirdly, it was pleaded that the certificate of title handed to the corporation by the claimant indicated that a caveat was lodged prohibiting any dealings with the property. The defendants therefore pleaded that the claimant was unable to give free and clear title to the property and this entitled the corporation to rescind the agreement and demand a repayment of the monies already paid to the claimant. I note however, that the caveat was lodged by the Bank of Nevis as a result of a loan granted to the claimant's father. A letter from the bank had been presented in evidence indicating that the loan had been paid in full. There would have therefore been very little difficulty, if any at all, in having this caveat removed.
- [8] At the trial, Mr. Bryon on behalf of the defendant, quite rightly, conceded that the grounds of defence were unsustainable and the court need not say anything further on this issue. The defence as pleaded was therefore abandoned. However, in cross examination of the claimant and his witness Mr. E. Robelto Hector, it was established that the name Eustace Nisbett which appeared on the certificate of title handed to the defendant was not that of the claimant. The claimant is in fact Eustace Nisbett Jr. His father was the previous owner of the property and it was he who constructed the studio apartment thereon. It is his name which appears on the certificate of title and not that of the claimant. This certificate of title was issued on 17th November, 2003. The claimant's father had died intestate on 21st January, 2008. Thereafter the claimant applied for, and obtained, a grant of letters of administration in his father's estate along with his mother, Mrs. Avril Nisbett. They

are therefore joint administrators. It was also established that when Mr. Eustace Nisbett Sr. died he had a number of children, of whom the claimant was only one.

[9] Mr. Hector, who gave evidence for the claimant, stated that he was fully aware that the claimant's father was deceased. In fact he states that he was present when Mr. Nisbett Sr. held his last breath. He was aware that the property was initially owned by him and that he died with more than one child. He could not speak to whether he had more than one beneficiary but he was aware that when negotiating for the sale of the property he was dealing with Mr. Nisbett Jr. on behalf of himself and his mother, who he states was also an owner of the property. He always understood that the NHLDC was dealing with both the claimant and his mother.

[10] In my view therefore, the sole issue for consideration is whether the claimant has any standing to bring this action in his own name as he has done. The claim is not pleaded as one in which he is acting as administrator in his father's estate. He states in his pleadings and in his witness statement that he was the owner of the land and that the defendant had agreed to purchase it from him and has failed to pay the balance due and owing to him.

The Law and its Application

[11] During the course of the trial, counsel for the claimant, in an objection to a particular line of questioning by counsel for the defendant, raised the issue as to whether the defendant was allowed to go back on its defence at this stage in the proceedings. Mr. Nisbett argued that the defence, as well as the witness statement filed, acknowledged the claimant as the owner and that this was not an issue raised prior to trial. He further crystalized these arguments in his closing written submissions. In his closing submissions however, Mr. Byron for the defence referred the court to the case of **Bergan v. Evans**¹ in which the Privy Council noted that “... **the general rule is that, leaving aside judgment in default, a claimant faced with a defective or even non-existent defence still has to prove her case, even though that may typically be achieved in a relatively summary way.**”

[12] Counsel for the defendant argues therefore, that despite his complete abandonment of his defence, the defendant is entitled to demand of the claimant that he proves his case. It is he who pleaded

¹ (2019) UKPC 33

that he is the owner of the property and entitled to demand payment from the defendant in his own right. It is he who has presented a number of documents which undermines his assertion. If his claim falls short, he can demand nothing further from the defence. I agree with that submission. The case is not one which has been pleaded as the claimant acting in a representative capacity. He asserts quite clearly that he is the owner of the property and is owed a balance on the sale of the property which the defendant refuses to pay. Any order from this court on the basis of the pleadings would demand of the defendant that funds be paid over to the claimant which in effect belongs to the estate of the late Eustace Nisbett Sr. It is doubtful that the claimant can cure this defect in his pleadings at this stage in the proceedings.

[13] Counsel for the defence goes on to refer the court to *The Digest*² where it states that ***“if A contracts for the purchase of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offers to make the seller a title, yet equity will not force the buyer to take it, for every seller that will have such a bargain executed must be bona fide a contractor.”*** Counsel for the defendant also refers the court to *Chitty on Contracts*³ where the following was noted at paragraph 6.164:

“Contracts for the sale of land are not uberrimae fidei in the sense that the vendor has to make to the purchaser a full disclosure of all material facts. In the absence of actual misrepresentation the general rule is caveat emptor. But certain qualifications must be made because the vendor is under a duty to disclose defects relating to title. Every material defect in the vendor’s title must be disclosed, because if the title is in fact defective the vendor will be unable to perform his contract in the absence of a condition that the purchaser should accept a defective title. In consequence, if any such defect is not disclosed the purchaser may rescind the contract or resist a suit for specific performance.”

[14] Mr. Byron went on to refer to paragraph 6.165 of *Chitty on Contracts* where it states that ***“... any fact which will prevent the purchaser from obtaining such a title as he was led to expect may***

² (1984 Reissue) Volume 40

³ 31st Edition (2012)

constitute a defect in title.” In reliance on these authorities the defence puts forward the following 5 propositions:

- (a) That the claimant cannot enforce the contract he purported to make because he is not the legal owner of the property;
- (b) The defendant, though now differently constituted at the level of the board of directors, was entitled to repudiate the contract as it did. The reason given for the repudiation cannot be material, the fact remains that the claimant has no title to the property and as a result the purchase can be avoided;
- (c) No one else has come forward to establish title to the property;
- (d) The defendant, as purchaser cannot obtain title as it was led to expect, which is title from the claimant as the owner;
- (e) The claimant was under a duty to disclose to the defendant that in finalizing the contract with him as owner, he had a defect of title. He failed in that duty and the defendant therefore repudiated the contract.

[15] From the onset I must say that the only one of these propositions which is applicable to the present case is the first. The defendant seeks to rely on the notion that the contract has been repudiated when the entire defence has been abandoned. If Mr. Byron is correct in his assertion that the claimant must prove his case, notwithstanding the fact that the defence is no longer relying on what the corporation has pleaded, then it is difficult to see the circumstances under which counsel can correctly argue that there has been a repudiation of the contract or even a right to do so. That is a matter which would have had to have been pleaded. Having abandoned the pleadings, it is no longer an issue for the court to consider. To my mind, the narrow issue left for determination is really one of standing. The question is whether the claimant can in fact bring this action for payment of the balance on the sale of the property when the evidence establishes that he is not the owner.

[16] In my view, the question of whether there is a defect in title is difficult for this court to reconcile on the state of the evidence and the development of this case. There was no actual sale and purchase

agreement signed and the court would have had to decipher the terms of the agreement and the parties to it by taking all of the facts into consideration. Mr. E. Robelto Hector, who was then chairman of the NHLDC indicates that he was fully aware that he was dealing with the claimant and his mother as owners of the property. He was aware that the property was owned by the claimant's deceased father. Although he was of the view that the claimant and his mother were the owners of the property that would not detract from the right they would have acquired to dispose of the property as joint administrators. Whether this contract can now be enforced by the representatives of the estate of the late Eustace Nisbett Sr. is an open issue which the court expresses some difficulty in reconciling in the absence of a defence to that effect and a claim which has not been brought by the administrators of the estate. What I do accept is that the evidence as presented by the claimant and his own witnesses, as well as the documentation which forms part of this case, establishes that he is not the owner of the property in his own right and I am of the view that he is not entitled to bring a claim for the enforcement of the contract in the manner in which he has. This is not the same as saying that a contract did not exist.

[17] Counsel for the claimant argues that ***“as a personal representative the claimant possesses and can exercise the same rights as his deceased father if he had still been living.”*** No issue can be taken with the correctness of that submission in a broad sense. However, I am afraid that counsel may have oversimplified the issue as it relates to the specific circumstances of this case. Whilst it is true that an administrator does have the power to dispose of property in the estate, he must also observe the fact that he is acting in the position of a trustee and not as if the property were his own and for his own benefit. Section 3(1) of the **Real Representative Act**⁴ states that ***“...the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto...”*** Insofar as that is the case it is important to observe that Viscount Radcliff noted the following in the case of ***Commissioner of Stamp Duties v. Livingston***⁵:

“...whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not

⁴ CAP10.16

⁵ [1964] 2 All ER 692

for his own benefit; and these duties would be enforced on him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee.”

[18] This observation of Lord Ratcliff highlighted the approach taken by the courts of equity as it relates to holding an administrator accountable for his dealings with the estate. However, I observe that this equitable doctrine has been enshrined in legislation by section 3 of the **Real Representative Act**; at least insofar as it relates to real property. In the case of ***Clifton St. Hill v. Augustine St. Hill***⁶ Mitchell J, whilst clearly acknowledging the powers of an administrator to unilaterally dispose of an asset in the estate, went on to issue a warning as to how such powers ought to be exercised. He noted the following:

“An Administrator of an intestate’s estate is a trustee. It is always the duty of an Administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at a higher level even than he would in protecting his own interests. He must report and account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the approval and consent of a particular beneficiary, he is opening himself up to a law suit. He is not well advised if he then relies on the statutory powers given to him by the Act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a law-suit being brought by a discontented beneficiary... For these reasons, among others, an Administrator should never proceed to act unilaterally in administering the estate. He should always consult with the beneficiaries and attempt to secure their consent to what he is proposing.”

[19] This is the extent to which an administrator should go in ensuring that he is properly exercising the powers conferred upon him by law in his dealings with an estate. It is not that he does not have the power to act unilaterally, but he must observe that he is a trustee and not the owner of the property

⁶ CIVIL SUIT NO. 402 OF 1996

as of personal right. However, the court acknowledges that it would be for a beneficiary or a group of beneficiaries to commence an action to hold the administrator to account. If the defendant properly engaged the administrator in an agreement for sale he would be bound by it. Nonetheless, it is important to have established the context of the administrator's duty in the circumstances of the present case, given the express submissions of counsel for the claimant. This is because I am of the view that the court ought not to entertain a claim lodged by the administrator in his personal capacity as it relates to his dealings with the estate in this manner. He pleads that he is the owner of the property when he is not. He claims an entitlement to personally recover sums which are not owed to him, but possibly to the estate. In addition to all of that, he is only one of two administrators jointly appointed to act as a trustee for the interest of the beneficiaries of the estate as a whole; and yet he claims in his pleadings and witness statement to be the sole owner of the property.

[20] In my view therefore, where an administrator engages the court process for an order in any of his dealings with an estate, whether it is for the enforcement of a contract or otherwise, he must do so in his capacity as the administrator. This must be fully disclosed and pleaded. He cannot bring an action in his own name and plead that he is the owner of the property in question. An order as prayed for by the claimant would demand of the defendant to pay monies personally over to the claimant. Further to that, it would demand of the claimant that he gives full title to the property to the defendant when he is not the owner of the property in his own right but merely one of two administrators duly appointed to administer the estate. Even if there has been no action brought here by the remaining beneficiaries, to allow this claim would be an overt defiance of the claimant's duties to the estate as trustee and the court ought not to accept this as a proper manner in which to proceed. His failure to plead this case as one in which he is acting as the administrator of the estate voids his standing to bring this action. He cannot do so in his own name; especially when one considers the fact that there was no disclosure on the face of the pleadings that he is only one of two administrators appointed jointly by the court.

[21] In these circumstances the case is dismissed with prescribed costs to the defendant in the sum of \$9,286.81.

**Ermin Moise
High Court Judge**

By the Court

Registrar