

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2012/0154

BETWEEN:

- 1. GERALD LOU WEINER**
- 2. KATHLEEN ANN WEINER**

Claimants

and

ADAM BILZERIAN

Defendant

Appearances:

Ms. Jean Dyer for the Claimants

Parties

Mr. Adam Bilzerian holding a power of attorney for the Defendant

2019: February 28
October 14

JUDGMENT

- [1] **VENTOSE, J.:** On 28 February 2019, the court gave the parties directions to file submissions and authorities, and evidence on four applications: (1) the application filed by the Defendant on 27 November 2017 with supporting affidavit to set aside a judgment given in a party's absence; (2) the application filed by the Defendant on 5 December 2017 with supporting affidavit to stay the execution of the judgment of the court pending the decision on the application to set aside the judgment given in a party's absence; (3) the application filed by the Claimants on

16 January 2018 with supporting affidavit in relation to the memorandum of mortgage; and (4) the application for an unless order filed by the Claimants with supporting affidavit on 29 June 2018. The court also ordered that, first, the Defendant's applications will be decided on submissions and authorities received by the court by 28 March 2019; and, second, the Claimants' applications will also be decided on the evidence before the court on 21 March 2019 if the Defendant fails to file its affidavit in response by the deadline given by the court. The determination of the four application was to be done on the papers.

Background

- [2] The Claimants filed a claim in 2012 against the Defendant seeking specific performance of an agreement dated 8 April 2010 by which the Defendant agreed to discharge a promissory note entered previously between the parties in 2009 in exchange for a non-recourse mortgage against a condominium owned by the Defendant for US\$1,100,000.00, an order directing the Defendant to execute and convey to the Claimants a memorandum of Mortgage capable of recordation under the Title by Registration Act CAP 10:19 of the Revised Laws of Saint Christopher and Nevis, or alternatively the sum of US\$1, 259, 712,00 being the amount due and owing under the 2009 promissory note, and damages for breach of contract. At trial held on 13 November 2017, the trial judge found in favour of the Claimants and ordered the Defendant, within 30 days of the judgment of the court, to execute and convey to the Claimants a memorandum of Mortgage capable of recordation under the Title by Registration Act and ordered costs in favour of the Claimants.

The Defendant's Applications

- [3] The Defendant filed an application pursuant to CPR 39.5 to set aside the judgment of the court. CPR 39.5 provides as follows:

Applications to set aside judgment given in party's absence

39.5 (1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended, some other judgment or order might have been given or made.

- [4] At the trial of the claim, the Defendant was absent from the trial, and based on an earlier order of the court was prevented from filing witness statements and calling witnesses at the trial. The trial judge dismissed the counterclaim of the Defendant. In the affidavit in support of the application, the applicant, Mr. Paul Bilzerian, who is not the Defendant, Mr. Adam Bilzerian, states that he (Mr. Paul Bilzerian) was not present at the trial on 6 December 2016 and that judgment was entered on 13 November 2017. The application must fail because, first, the application was not made by the party to the proceedings, the Defendant, Mr. Adam Bilzerian, but made by Mr. Paul Bilzerian; and second, the affidavit sworn was not by the party, the Defendant, Mr. Adam Bilzerian but sworn by Mr. Paul Bilzerian. The application to set aside the judgment given in a party's absence is hereby dismissed. It follows, therefore, that the application filed on 5 December 2017 to stay execution of the judgment of the court must also be dismissed.

The Claimants' Applications

- [5] The Claimants' application filed on 16 January 2018 seeks an order directing the Registrar of the Supreme Court or other such person as the court may nominate to forthwith execute and deliver on behalf of the Defendant a Memorandum of Mortgage capable of recordation in Saint Christopher under the Title by Registration Act CAP 10:19, as supplied by the Claimants, in accordance with the judgment of the court dated 13 November 2017. I have no doubt that the Claimants are entitled to the order that they seek. The Defendant has not complied with the clear order of the court, within 30 days of the judgment of the court, to execute and convey to the Claimants a memorandum of Mortgage capable of recordation under the Title by Registration Act. The order of the court was given approximately two years ago.

- [6] The Claimants also filed an application for an unless order directing that unless the Defendant complies with the cost orders of the court dated 17 June 2014, 17 April 2014, 12 June 2015 and 7 November 2017 within 7 days that he be debarred from taking any further steps in these proceedings. The Defendant's appeal against the 12 June 2015 order was dismissed by the Court of Appeal on 27 January 2016. In his notice for enlargement of time for file submissions, the Defendant states that the application for the unless order was rendered moot long before the hearing so there was nothing substantive scheduled to be heard. However, the Defendant has provided no evidence of compliance with these costs orders. In light of the repeated non-compliance by the Defendant with the orders of the court, the Claimants are entitled to the order that they seek.

The Other Applications

- [7] The submissions and authorities and evidence on the applications were to be filed and served by 28 March 2019 after which the matter would be decided on the papers. In the intervening period, the Defendant filed an application for recusal on 13 March 2019 and again on 21 May 2019. The court could not deal with any of these applications until the recusal application had been decided. The court gave directions on the recusal application and in respect of whether Mr. Paul Bilzerian can represent Mr. Adam Bilzerian as a litigant in person in proceedings before the court on 9 May 2019 with a hearing date set for 25 July 2019.
- [8] The Defendant applied on 14 March 2019 for an enlargement of time to file submissions in support of his applications in this matter. However, the Defendant did not provide any good reason for the court to accede to the application which is hereby dismissed. The matter has been decided on the evidence, and submissions and authorities before the court.
- [9] The court gave its decision on the recusal application on 25 July 2019 with detailed reasons to follow. The court provided those reasons on 14 October 2019. This explains why the court is today, 14 October 2019, providing its decision in relation to the applications for which directions were given at the hearing on 28 February 2019.

Disposition

[10] For the reasons explained above, I make the following orders:

- (1) The application filed by the Defendant on 27 November 2017 to set aside the judgment given in a party's absence is hereby refused.
- (2) The application filed by the Defendant on 5 December 2017 to stay execution of the judgment of the court pending the decision on the application to set aside the judgment given in party's absence is hereby refused.
- (3) An order is granted directing the Registrar of Lands to execute and deliver on behalf of the Defendant a Memorandum of Mortgage capable of recordation in Saint Christopher under the Title by Registration Act CAP 10:19, as supplied by the Claimants, in accordance with the judgment of the court dated 13 November 2017 within 7 days of today's date.
- (4) Unless the Defendant files and serves evidence that he has complied with the cost orders of the court dated 17 June 2014, 17 April 2014, 12 June 2015 and 7 November 2017 within 7 days of today's date, the Defendant shall not make any application or take any steps in these proceedings without first obtaining the permission of the court.
- (5) No order as to costs.

Eddy D. Ventose
High Court Judge

By the Court

Registrar