

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2012/0154

BETWEEN:

GERALD WEINER

1st Claimant

KATHLEEN ANN WEINER

2nd Claimant

And

ADAM BILZERIAN

Defendant

Appearances:-

Ms. Jean Dyer for the Claimants.

Mr. Dennis Merchant with Mr. Jermaine Chiverton for the Defendant.

2017: November 13th

JUDGMENT

- [1] **WARD, J.:** This action arises out of a dispute concerning an unpaid loan in the sum of US\$1,259.712.00.
- [2] The claimants' association with the defendant dates back to November 1992 when the claimants acquired their home in Tampa, Florida. The defendant's parents owned a home in the same community and were the claimants' neighbours. Over time they grew to become very good friends with the defendant and his parents.
- [3] In 2007, the defendant's father, Paul Bilzerian, informed the 1st claimant that an opportunity had arisen for the defendant to acquire a controlling interest in an Australian oil and gas exploration, drilling, distribution, retailing and related

technology company called Carpathian Resources Limited (hereafter "Carpathian"). Carpathian was attempting to raise capital through a share issue. Paul Bilzerien further explained that should the defendant acquire the controlling interest he would be able to leverage that company and accumulate some personal wealth. The difficulty was that the defendant lacked the financial resources to obtain a stake in the company.

- [4] The claimants state that in view of the longstanding and close relationship which the claimants shared with the defendant and the trust which existed between them, they agreed to lend the defendant US\$1,000,000.00 with interest at the rate of 12%. The loan was unsecured. The defendant signed a promissory note dated 14th May, 2007 which provided, *inter alia*, that the entire principal and interest, amounting to \$1,254,000.40, would become due and payable on 14th May, 2009.
- [5] Pursuant to their agreement, on 15th May, 2007 the claimants wired the sum of US\$1,000,000.00 into the defendant's bank account at Bank of Western Australia.
- [6] When the loan and promissory note matured on 14th May, 2009, the defendant did not repay the principal or interest then due despite the claimants making several demands that he do so. The defendant informed the claimants that he was unable to repay the loan.
- [7] The claimants and the defendant engaged in further discussions in an effort to facilitate the defendant. It was agreed that the defendant would be granted an additional three years to repay the loan and that the interest rate would be lowered from 12% to 8%. The re-negotiated loan, inclusive of interest, was in the sum of \$1,259,712.00. The parties further agreed that the renegotiated loan would be secured by another promissory note dated 14th May, 2009 in the sum of \$1,259,712.00 and would become due on 14th May, 2012.
- [8] The 1st claimant testified that he was alarmed when he received an email dated 12th July 2009 from the defendant indicating that he was broke; that he had only \$60,000.00, of which he needed \$10,000.00 to complete a Master's degree he

was pursuing; and offering the claimants \$50,000.00 to release the 2009 promissory note.

- [9] In his witness statement, the 1st claimant states that having reflected on the reason for the defendant's default on the first promissory note, he grew concerned that the 2009 promissory note was unsecured. He was aware that the defendant owned a condominium at the St. Christopher Club in Frigate Bay, St. Kitts. He therefore initiated further discussions with the defendant who eventually agreed for the loan to be secured by a non-recourse mortgage against the condominium.
- [10] By an agreement dated 8th April, 2010 made between the claimants and the defendant, the claimants agreed to discharge the 2009 promissory note in exchange for a non-recourse mortgage against the property for US\$1,100,000.00, to be satisfied on May 14th, 2012. This reduced figure is attributable to the claimants' decision to waive a portion of the interest on the loan.
- [11] The claimants made attempts on 9th June, 2010, and again on 19th July, 2010, to record the said mortgage by submitting it to the Registry of Titles. Stamp duty in the sum of EC\$29, 577.40 was paid into the Treasury on behalf of the claimants. These attempts at registration failed owing to non-compliance with certain statutory requirements, including the fact that the duplicate Certificate of Title to the subject property had not been surrendered by the defendant to facilitate the process.
- [12] The claimants engaged a local law firm to draft a memorandum of mortgage that complied with the statutory requirements. The firm prepared a Memorandum of Mortgage and Notarial Certificate and forwarded them to the claimants via FedEx for execution by the defendant.
- [13] Despite repeated requests by the claimants to the defendant, he has neglected and or refused to execute a revised Memorandum of Non-recourse Mortgage that is compliant with the statutory requirements in order that the claimants can register their interest in the property.

[14] The maturity and payment due date of 14th May, 2012 elapsed without the defendant repaying the loan or any part thereof.

[15] The claimants seek an order for specific performance of the agreement dated 8th April, 2010; an order directing the defendant to execute and convey to the claimants a Memorandum of Mortgage capable of recordation in Saint Christopher under the Title by Registration Act, Cap 10.19; 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.

The Defence

[16] In its filed defence, the defendant asserts that the US\$1,000,000.00 advanced to the claimants to him was not a loan but an investment in Carpathian and challenges the validity and enforceability of the 2010 agreement on the basis that he was fraudulently induced to enter into it.

[17] The defendant also filed a counter-claim in which he alleges breach of contract i.e., breach of the confidentiality clause (4) of the 2010 agreement and fraud. However, pursuant to an order of the learned judge who had prior conduct of the matter, the defendant was prevented from filing witness statements and calling witnesses at the trial. The defendant himself was absent from the trial. Accordingly, the counter-claim was dismissed.

Issues

[18] The issues that fall for resolution are:

- (i) Issue No. 1 – Whether the US\$1,000,000.00 advanced by the claimants to the defendant in May 2007 was a loan or an investment in Carpathian Resources;
- (ii) Issue No. 2 – Whether the claimants' are entitled to specific performance of the agreement dated 8th April, 2010; or alternatively, the sum of US\$1,259,712.00 being the amount due and owing under the 2009 promissory note.

- (iii) Issue No. 3 – Whether the claimants can recover the sum of US\$1,259,712.00 being the amount due and owing under the 2009 promissory note.

Issue No.1 – Whether the US\$1,000,000.00 advanced by the claimants to the defendant is a loan or an investment in Carpathian.

[19] In determining this issue, the court need go no further than the documents embodying the agreements between the parties dating from 2007 to 2010. Hereafter these documents may for convenience be referred to as “2007 promissory note”, “2009 promissory note” and “the 2010 Agreement”. The material parts of each agreement are set out hereunder:

[20] The 2007 promissory note is captioned “Promissory Note” and provides so far as material:

“FOR VALUE RECEIVED, the undersigned hereby promises to pay to the order of Gerald Lou Weiner and Kathleen Ann Weiner, as tenants by the entireties, the sum of One Million Dollars (\$1,000,000), together with interest thereon at the rate of 12% per annum on the unpaid balance. The entire principal and interest in the amount of \$1,254,400 shall be due on May 14, 2009.

All payments shall be first applied to interest and the balance to principal. This Promissory Note may be prepaid, at any time, in whole or part, without penalty.

In the event this Promissory Note shall be in default, and placed with an attorney for collection, then the undersigned agree to pay all reasonable attorney fees and costs of collection. All payments hereunder shall be made to 16105 Sonsoles de Avila, Tamp, Florida 33613, or such address as may from time to time be designated by any holder hereof.

The undersigned agrees to remain fully bound hereunder until this Promissory Note is fully paid and waives demand, presentment and protest and all notices thereto and further agrees to remain bound, notwithstanding any extension, modification, waiver, or other indulgence by any holder. No modification or indulgence by any holder hereof, shall be valid and binding upon the undersigned. Any modification or change of terms, hereunder granted by any holder hereof, shall be valid and binding upon the undersigned. The rights of any holder hereof shall be cumulative and not necessarily successive. This Promissory Note shall take effect as

a sealed instrument and shall be construed, governed and enforced in accordance with the laws of the State of Florida.

Adam J. Bilzerian.”

- [21] But for the substitution of the sum of \$1,259,712, and the due date being altered to 14th May 2012, the 2009 promissory note is in identical terms as the 2007 promissory note.
- [22] The 2010 agreement provides as follows:

“AGREEMENT

This agreement (the “Agreement”), by and among ADAM BILZERIAN, St. Christopher Club, Unit 631, Frigate Bay, St. Kitts (“Bilzerian”) and GERALD LOU WEINER and KATHLEEN ANN WEINER, 16105 Sonsoles de Avila, Tampa, FL 33613 (“Weiners”), is hereby entered into this 8th day of April, 2010.

WHEREAS, Bilzerian has signed a Promissory Note in favour of the Weiners executed on May 14, 2007, as amended on May 14, 2009 (the “Note”):

WHEREAS, Bilzerian is the registered owner of a condominium at Saint Christopher Club, Unit 631 A & B, Frigate Bay, Saint Kitts (the “Property”):

WHEREAS, Weiners desire to release Bilzerian from any and all claims, obligations or otherwise, including the Note, in exchange for a nonrecourse mortgage against the Property for US\$1,100,000.00 to be satisfied on May 14, 2012.

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

1. Nonrecourse Mortgage. Bilzerian agrees to convey a nonrecourse mortgage against the aforesaid property to Weiners by a Memorandum of Nonrecourse Mortgage, the form of which is attached hereto as Exhibit A (the “Sum”), shall be solely secured by the Nonrecourse Mortgage. The sum is due on May 14, 2012, and may be prepaid at any time prior to May 14, 2012. UPON DEFAULT, WEINERS MAY NOT SEEK RECOURSE TO THE PERSONAL ASSETS OF BILZERIAN. WEINERS EXPRESSLY RELEASE BILZERIAN AND BILZERIAN DOES NOT AGREE TO SUBJECT ANY OF HIS PERSONAL OR REAL ASSETS TO THE PAYMENT OF THIS SUM, other than the real property encumbered by the Nonrecourse Mortgage. However, in the event of a default, Weiners may seek to subject the property to foreclosure. However, no

deficiency shall be a personal obligation of Bilzerian. In the event of a default, Weiners shall be entitled to receive attorneys' fees and other costs of collection, provided that same shall only be collected from proceeds from foreclosure upon the Property, and such attorneys' fees and collection costs shall not be a personal obligation of Bilzerian and Bilzerian's personal and real assets shall not be subject to the payment of these sums.

2. Weiners may record the Memorandum of Nonrecourse Mortgage in the Registry of Titles of Saint Christopher, and shall bear all costs of recording same, including but not limited to any Stamp Taxes due.
3. Assignment. This agreement shall not be assigned by either party without the prior written consent of the other party.
4. Confidentiality. Bilzerian and Weiners covenant not to disclose the Note, or existence or the terms of this Agreement, or any of the facts or circumstances surrounding the same, to any third person, except that the Memorandum of Nonrecourse Mortgage may be recorded at any time, or provided to any person anytime after May 14, 2012.
5. Litigation. In any litigation brought to enforce any of the terms of this Agreement, the successful party shall be entitled to recover all attorney's fees and costs incurred in said litigation, including the fees and costs incurred in any appeals. Venue for litigation shall be St. Kitts. This Agreement shall be governed by the laws of St. Kitts.
6. As Is. Weiners hereby acknowledge that the Property is mortgaged absolutely AS IS with no warranty whatsoever as to the condition of the same.
7. Release. Weiners hereby agree to execute, contemporaneously with the execution of this Agreement, a Release and Satisfaction, the form of which is attached hereto as Exhibit B, to fully release and satisfy the Note.
8. Advice of Counsel. Bilzerian and Weiners acknowledge that attorney David Eric Hammer, of the law firm of David E. Hammer, P.A., represent both Bilzerian and Weiners in this transaction, and waive any conflict relating to the dual representation in this transaction. Bilzerian and Weiners each have been advised to obtain the advice of independent counsel as they each may determine is appropriate.
9. No Representations. Bilzerian and Weiners expressly acknowledge that neither has relied on any representations by the other party to induce them to enter into this Agreement. Bilzerian and Weiners have each conducted independent due diligence into all facts necessary to determine the propriety of entering into this Agreement.
10. Entire Agreement. No agreements unless incorporated in this Agreement shall be binding upon Bilzerian or Weiners. Any modification to this Agreement must be made by a writing signed by Bilzerian and Weiners."

- [23] On a plain reading of all of these documents, it is clear that at all material times the defendant acknowledged himself to be indebted to the claimants. Additionally, he has admitted at paragraph 5 of his defence that the mortgage was to be the sole security for the sum of US\$1,100,000.
- [24] Putting the matter beyond any doubt, however, is a letter from the defendant to the claimants dated 12th July, 2009. It states:

“Re: Promissory Note dated May 14, 2007

Dear Mr. and Mrs. Weiner:

I understand that you have made several demands that I repay the above referenced promissory note, which came due on May 14, 2009. However, as I have explained, the collapse of the financial markets last year devastated my investment portfolio leaving me with obligations that I cannot repay, including yours. I know you threatened litigation but, as I advised, all that would accomplish is to consume my resources in litigation costs and leave you with nothing to collect. I have approximately \$60,000 available in my accounts, \$10,000 of which I need for repay[ing] federal student loans. Therefore, as we agreed, I will wire you \$50,000 in exchange for a release and satisfaction on the above referenced Promissory Note. Please send me your wire instructions and sign and scan this letter and forward it to me and I will promptly wire the \$50,000 to your account. Thank you.”

- [25] There can be no other reasonable construction placed upon this letter but that the defendant is acknowledging himself indebted to the claimants and proposing a settlement.
- [26] The court is therefore sure that the US\$1,000,000 originally advanced by the claimants to the defendant was a loan and not an investment in Carpathian.

Issue No.2 – Whether the claimants’ are entitled to specific performance of the agreement dated 8th April, 2010.

- [27] The court’s jurisdiction to order specific performance must be based on the existence of a valid, enforceable contract. If this threshold is met, the question that

must be asked is whether it is just in all the circumstances that the claimant should be confined to his remedy in damages¹.

[28] The court is satisfied that the parties did enter into valid, enforceable contracts during their course of dealings between 2007 and 2010. However, it necessary to determine which, if any, of the agreements entered into is valid and subsisting.

[29] The 2007 promissory note was amended and superseded by the 2009 promissory note. In turn, the 2009 promissory note was discharged and replaced by the 2010 agreement which provided that, contemporaneous with the 2010 agreement, the claimants would, execute a release and satisfaction to fully release and satisfy the 2009 promissory note in exchange for a non-recourse mortgage on the defendant's condominium as sole security for a renegotiated loan of \$1,100,000.00.

[30] The claimants did in fact execute that document captioned "Release and Satisfaction." It provides:

"The undersigned GERALD LOU WEINER and KATHLEEN ANN WEINER, who reside at 16105 Sonsoles de Avila, Tampa, Florida 33613 (the "Releasers"), acknowledge receipt of the transfer of Unit 631 A&B, Saint Christopher Club, Frigate Bay, Saint Kitts, effective March 22, 2012, the sufficiency of which is hereby acknowledged, hereby unconditionally release and forever discharge Adam Bilzerian from each and all actions, causes of action, suits, debts, obligations, or other claims of any kind whatsoever, in law or in equity, whether real or imagined, known or unknown, asserted or unasserted, fixed or contingent, liquidated or unliquidated, arising from the beginning of time through the date of this Release, as well as any claim, arising in the past, in the future, relating to that Promissory Note dated May 14, 2007, as amended May 14, 2009 (the "Note"), except for any claim relating to that agreement date March _____, 2010, to which a form of this Release and Satisfaction has been attached. The Releasers hereby acknowledge and agree that the Note is hereby satisfied in full."

[31] Based on the foregoing, this Court finds that upon the execution of this document, the 2009 promissory note was immediately discharged. Accordingly, the only valid

¹ See *Evans Marshall & Co. Ltd. V Bertola S.A.* [1973] 1 W.L.R. 349, 379; *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443

contract in respect of which specific performance may be sought is the 2010 Agreement. It is also clear that the defendant is in breach of the contract not having repaid the loan or executed the memorandum of non-recourse mortgage to date.

- [32] That said, it seems to the court that the nub of the claimant's complaint is that the defendant has failed or refused to repay the debt due and owing to the claimants. The execution of a non-recourse mortgage was the mechanism by which the loan of \$1,100,000.00 was to be secured. The defendant has failed to execute same.
- [33] The question remains: is it just in all the circumstances that the claimants should be confined to their remedy in damages or whether they should be entitled to the perfection of their security interests in the said property?
- [34] The circumstances of this case are that the claimants have since 2009 unsuccessfully attempted to have the defendant repay the outstanding loan. He has declared to them that he is broke and that litigation would serve only to consume his resources in litigation and leave them with nothing to collect.
- [35] He, however, has assets in St. Kitts in the form of the condominium at St Christopher Club. Whether or not the defendant is in funds to repay the debt, he is capable of executing a proper mortgage to secure the claimants' interest in the property.
- [36] In the court's view, these circumstances make it meet that the claimants should be entitled to a decree of specific performance.

Issue No. 3 – Whether the claimants can recover the sum of US\$1,259,712.00 being the amount due and owing under the 2009 promissory note.

- [37] For the reasons set out at paragraphs 28 - 31 above, this claim must fail. The 2009 promissory note was discharged upon the contemporaneous execution of a "Release and Satisfaction with the 2010 Agreement. Accordingly, the renegotiated debt, secured by the non-recourse mortgage, is in the sum of US\$1,100,000 per the 2010 Agreement and not US\$ 1,259,712.00.

[38] In light of the conclusions to which I have come, I make the following orders:

IT IS HEREBY ORDERED:

1. The defendant shall, within 30 days of this order, execute and convey to the claimants in a form capable of recordation in St. Christopher under the Title by Registration Act , Cap 10:19, a Memorandum of Mortgage in relation to St. Christopher Club, Unit 631 A & B as described in Certificate of Title registered in the Register of Titles of the island of St. Christopher, Register Book 8, Folio 25;
2. The defendant shall pay the claimants' costs to be assessed if not agreed within 21 days of today's date.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar