IN THE SUPREME COURT OF BELIZE A.D. 2015
(CIVIL)

CLAIM NO. 405 of 2015

BETWEEN

Alfredo Acosta
Angelique Acosta **Claimants**

AND

Marco Caruso
Placencia Land and Development Company Ltd. **Defendants**

Before: **The Honourable Madame Justice Griffith**

Date of hearing: **27th November, 2015**

Appearances: **Mr. Andrew Marshallek, S.C. of Barrow & Co. for the Claimants and Mr. Yohhanseh Cave, Young's Law Firm for the Defendants.**

DECISION

Introduction

1. The Claimants Alfredo Acosta and Angelique Acosta claim the sum of $700,000.00.00 being a debt owed to them by the Defendants, Marco Caruso and Placencia Land Development Co. Ltd. The Defendants do not deny the existence of the debt, but argue that the debt is not yet payable by virtue of the terms of an agreement entered into amongst the parties. The Defendants asserted in their defence that the terms of the agreement provide for a condition precedent to be exercised in order for the debt to become payable.

The Claimants applied to strike out the defence on the ground that the defence was an abuse of the Court's process, in that it sought to rely on a clause of the agreement which had already been adjudicated upon by the Court and found to be void. After consideration of oral arguments the Court granted the Claimant's application to strike out the defence and awarded judgment for the debt claimed in the sum of $700,000.00.00.

Issues

2. The sole issue in this case is as follows:-

(i) Having regard to the terms of the parties' agreement, was the debt of $700,000.00 due and owing to the Claimants?

Background

3. In December, 2014, the Defendants brought an action against the Claimants[1], in which they sought to restrain the Claimants from carrying out an auction of property owned by the 2nd Defendant herein. The 1st Defendant is the director of the 2nd Defendant. The property was being auctioned to satisfy a debt of $700,000.00 owed by the Defendants to the Claimants. It was at all material times, admitted by the Defendants that the debt was owed to the Claimants. Instead, the Defendants (in that action as claimants) sought the injunction to restrain the sale, based upon the agreement between the two sets of parties, which provided inter alia, that in the event of the Defendants' default in payment of the debt to the Claimants, the latter would be entitled to sell the 2nd Defendant's property for not less than a certain value.

[1] 729 of 2014 Marco Caruso & The Placencia Land Development Co. Ltd v Alfredo Acosta et anor.

4. It was also been a term of the agreement, that for the period of one year from the date of the agreement, both parties were to use their best endeavours to obtain a sale of the property, by marketing and listing the property for sale. Upon the expiration of that year, if the property was not sold, it was at that point the Claimants would have been entitled to sell the property by auction. In that prior action, the Court found that the agreement failed as a matter of law to clothe the Claimants with any authority to cause or effect a sale of the property, but that the agreement remained valid with respect to any remaining rights and obligations of the parties.

Issue (i) – the Court's consideration

Is the debt of $700,000.00 due and owing to the Claimants?

5. The determination of this issue rests solely upon the construction of the Agreement between the parties. In this regard the relevant terms of the Agreement are extracted below. The parties to the Agreement are Marco Caruso and The Placencia Land and Development Corporation of the one part (referred to as MC and TPLD) and Alfredo Acosta and Angelique Acosta (referred to as FA and AA) of the other part.

Clause 2

" Upon execution of this Agreement and delivery of the original title over Parcel 274 H22 to MC, MC and TPLD hereby agree to list for sale Parcel 3311 (H11) situate in Block 36 of the Placencia North Registration Section; and upon a successful sale, FA shall receive the first US$350,000.00 from the proceeds of sale."

Clause 4

" It is further agreed that both FA and MC are hereby authorized to actively list, market and sell Parcel 3311 (H11)."

Clause 6

"The parties hereby agree that the said Parcel 3311 (H11) must be sold at a minimum purchase price of US $900,000.00."

Clause 7

"In the event Parcel 3311 (H11) is not sold within twelve (12) months from the date of this agreement, MC hereby agrees to pay to FA the sum of US$350,000.00"

Clause 8

"In the event MC defaults in the payment of US$350,000 within 12 months from the date of this agreement, it is hereby agreed that FA shall be allowed to and shall proceed with an auction of Parcell 3311 (H11) at a reasonable market value to recover the sum of US$350,000.00 with the excess in the proceeds of sale going to MC."

6. With respect to the agreement, in the prior action brought by the Defendants to restrain the Claimants from taking action under clause 8 as set out above, the Court ruled that clauses 8 and 4 were void to the extent that they sought to authorize the Claimants to carry out a sale of the property. The Defendants' argument in answer to the present claim for payment of the debt was that the Court's ruling was to the effect that the sale of the property was a condition precedent to the payment of the debt to the Claimants. More particularly, that at all times, the payment of the debt was bound to the sale of the property, thus in the absence of such a sale, the Defendants are not required to pay the debt.

7. Learned senior counsel on behalf of the Claimants directed the Court's attention to clause 7of the Agreement, as the basis upon which the debt is now due. As stated therein, the debt becomes due in the event that the property is not sold within a year of the date of the Agreement. Thereafter, it was submitted, clause 8 provided merely a mechanism by which to obtain payment. That mechanism having been invalidated by the Court, the obligation created by clause 7 nonetheless remained so that 12 months from the date of the agreement having elapsed, the Defendants were liable to pay the $700,000.00 debt.
8. The Court entirely agrees with the submission of learned senior counsel for the Claimants. The Court's prior ruling declared the agreement valid short of clause 4 in part and clause 8 insofar as they purported to establish a power of sale of the property in favour of the Claimants. In examining the relevant clauses of the agreement, it is seen that clause 2 first establishes the issue of the debt being satisfied from the proceeds of sale of the property. Clause 4 then authorized both parties to market and list the property for sale and clause 6 stipulated a minimum price for sale of the property. With respect to these 3 clauses however, the provisions with respect to sale of the property are then limited in time by the provisions of clause 7. In the event that the property was not sold within 12 months of the date of the agreement, the debt of $700,000.00 became payable.
9. There is no qualification on this position. Clause 8 as correctly submitted by learned senior counsel for the Claimants, provided a means by which the debt was to be satisfied after the expiration of a year from the date of the Agreement.

This mechanism was struck down by the Court, but clause 7 remained valid and enforceable. If there was a condition precedent created in the agreement it was for the lapse of 12 months from the date of the agreement as the event which was required to render the Defendant's debt to the Claimant's due and payable. Having admitted to owing the debt and there being no other defence to the claim, the Claimants' application to strike out the defence is granted with the result that judgment is awarded to the Claimants for the sum claimed with costs.

Final Disposition

10. The Court's order is as follows:-

(i) The defence herein is struck out and judgment for the sum claimed of $700,000.00.00 is awarded to the Claimants;

(ii) Post judgment interest on the sum of $700,000.00 at the statutory rate of 6% per annum;

(iii) Costs to the Claimants to be assessed if not agreed.

Dated this 1st Day of December, 2015

Shona O. Griffith
Supreme Court Judge