THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 285 of 2017

EASTSHORE LIMITED **CLAIMANT**

AND

CARL RANEY **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
25.10.2017
26.10.2017

Written Submissions
16.11.2017 - Claimant
17.11.2017 - Defendant

Decision
6.12.2017

Mr. Edwin Flowers, SC for the Claimant.
Mr. Douglas Carr for the Defendant.

Keywords: Tenancy – Recovery of Possession – Oral Contract – Terms – Whether Occupant is a Trespasser – Sales Commission – Whether due and owing

JUDGMENT

1. Eastshore Limited (Eastshore) is the registered owner of property in Consejo Shores (The Property) which are occupied by Carl Raney. Carl admits being

served with a Notice to Quit on the 20th February, 2017, but he has not vacated the premises. He says Wayne Raney, an owner and director of Eastshore, does not have the requisite authority, from the Claimant, to bring this claim in its name. In any event, Eastshore, through Larry Myers, (then one of its owners and directors, now deceased) made an oral agreement with him, the terms of which allowed him to continue living in the house, while he improved The Property until it could be sold at a profit.

2. On its sale, he would be repaid US$108,000 which he had invested. This sum is comprised of $40,000 which Carl says he paid towards purchase of The Property before he sold his interest in the contract to purchase to persons who eventually (in part) formed Eastshore and $68,000 he invested in improvements. He counterclaims for this sum and a further US$16,200 as the commission on a contract, he secured in 2008 as Eastshore's sales agent, for the sale of The Property and which Eastshore repudiated.

3. The Claimant rejects the counterclaim wholesale. They deny the existence of any such verbal arrangement with Carl and assert that pursuant to a written agreement, Carl and his co-purchaser, Diane Frazier were paid US$5,000 each for the assignment of the purchase agreement. Further, all renovations and improvements which Eastshore requested to be done on The Property, were paid for by Eastshore. They add that at no time was Carl engaged as Eastshore's sales agent, since it was never the company's intention to sell The Property. He is therefore not entitled to any sales commission whatsoever, more so, because The Property has not been sold.

The issues to be determined:

4. 1. Whether the Defendant should be ordered to vacate The Property.

2. Is the Claimant entitled to any damages for trespass:

3. Is the Claimant indebted to the Defendant in the following amounts:

(i)	Payment to the Phipps	-	US$40,000.00
(ii)	Investment in The Property	-	US$68,000.00
(iii)	Commission from Sale	-	US$16,200.00

4. Whether Wayne Raney has authority to bring the claim (for completion only).

Whether the Defendant should be ordered to vacate The Property:

5. This issue revolves around whether or not Carl is a trespasser. There is no doubt that Eastshore is the owner of The Property and that Carl lives there with Eastshore's permission. Eastshore says from the time the interest in the sale contract was purchased Carl became their tenant and paid rent of BZ$650.00 per month. Carl says what is recorded as rent, on the statements presented by Eastshore of accounts, was in fact principal payments under the sale agreement he had with the Phipps (the original sellers) towards the purchase price. There is no written tenancy agreement so we must consider the parole evidence.

The Evidence:

6. Wayne Raney is a director and sole witness for the Claimant. He testified that on the 29th April, 1999 Carl and Diane had contracted for the purchase of The Property. The purchase price was to be paid on terms. They had paid US$8,970 towards same and were having difficulty meeting the, imminent and first, balloon payment of US$23,854. This is when Larry

Myers entered the picture at Carl's behest. Larry apparently contacted Wayne and another friend Douglas John and they agreed to purchase The Property as a winter house. They formed Eastshore to act as purchaser, but the documents for incorporation were not filed until May 2nd, 2000 a day after the deadline for the first balloon payment. Under cross-examination Wayne accepted that a document presented to him by counsel for the defence stated that Eastshore had been incorporated on May, 2nd, 2001. This would be one day after the final balloon payment of US$100,000 was made and one day before The Property was transferred to Eastshore by the Phipps.

7. Carl and Diane executed an Assignment of the Real Estate contract on May 1st 2000 for the stated sum of US $5,000 each. That assignment is made to Larry, Wayne and Douglas and is stated to *"assign, sell transfer and set over all of their right title and interest in and to a certain real estate contract"* (being that relating to The Property). It further specified that Carl and Diane would "*execute any and all deed or other legal documents necessary to convey fee simple title to the subject real estate to Larry L. Myers, Wayne Raney and Douglas D John in such manner, as they shall direct."*

8. Wayne exhibits all of the letters and cheques issued by Larry thereafter, evidencing not only the initial balloon payment but every other payment, totalling US$131,030, until the purchase price had been paid in full in May 2001. He says all these payments had been made by Larry on Eastshore's behalf. On 3rd May, 2001 the Property was duly conveyed from the Phipps to Eastshore. Wayne also exhibits a letter and cheque addressed to Diane in the sum of US$5,000 both dated in August 2000. There is no corresponding letter and/or cheque for Carl.

9. A number of statements of accounts by and between Carl and Eastshore which formed part of Larry's business records are also exhibited. They detail expenditures Carl made on behalf of No. 35 Consejo Beach Trail Partnership's (The Partnership) for renovations and maintenance to The Property and rent payments due from Carl which were deducted from the expenditure. There were also faxes evidencing requests by Carl for prompt deposits of what he was owed for these renovations. These are dated between December 2000 to August 2001.

10. This paper trail is clean and complete and is good strong evidence of the history as outlined by Wayne on Eastshore's behalf. With Larry as promoter, The Partnership became Eastshore with the addition of one other shareholder Robert Glunt Although Carl has refuted none of these documents, things get fairly hazy when he introduces his own version of events.

11. Carl testified that he paid or arranged to have paid a total of US$40,000 in principal payments under the Sale Agreement. He sold the benefit of the Sale Agreement so the balance of US$100,000 could be met. He admits signing the Assignment of Real Estate Contract but denies ever being paid. He has somehow determined that it is no longer binding. Meanwhile the Property is registered in Eastshore's name. Be that as it may, he continues that he and Larry made a verbal agreement that he would be repaid what he had personally invested in The Property in addition to his costs of assignment.

12. He would also be allowed to live in the house until it was sold and from the proceeds of sale he would be repaid US$108,000 while Eastshore would be

repaid its US$100,000 and any profit. During the time he paid *"rent"* they were in fact payments towards the principal under the sale agreement. He does not say how much *"rent"* he actually paid in total. He insists that this arrangement had been made by Larry on behalf and as agent of Eastshore.

Consideration:

13. The court notes that The Property was conveyed to Eastshore in May 2001 and there are recordings for rent through 2001 and into 2002 many months after (by any of the arrangements) The Property had already been paid for. It defies comprehension why Carl, himself, sent accounts which referred to payments as rent when he was well aware that they were in fact instalment payments towards the purchase price.

14. The court also notes that the rental sum is exactly half the Phipps' agreed monthly instalment. For the first time under cross-examination Wayne Raney explained that the rent was really BZ$1,000.00 and he had it discounted to BZ $650.00 as it was his brother. He opted to relinquish his part to facilitate this discount. This affects the issue in no way whatsoever.

15. However, with respect, I state that Carl's version simply makes no business sense. As he stated, he is entitled to the US$5,000 for the assignment (although he does not claim it or any other remedy for breach of that contract), US$40,000 ($31,030.00 of which, Larry paid purportedly on Carl's behalf to the Phipps) and $68,000 for renovations he says he did. Carl would in turn live rent free for as long as The Property remained unsold and (according to him) would repay only $7,800 US to Eastshore or Larry (not clear) while even now owing Larry, personally, $22,854.

16. This court found it difficult to understand any logic, far less, to believe the contents of Carl's version. He had nothing in writing but sort to impugn, with fast rhetoric, what was presented in written form and signed by his own good self. He asked that the court believe that although there was a prior written and duly executed agreement for the assignment of all rights to The Property, the now deceased Larry then found it necessary to enter into an oral agreement with him. The terms of this oral agreement were of great significance as they in fact altered all that had been previously agreed in writing. Larry, who from the exhibits presented by Eastshore, appears to be a meticulous, organized and very deliberate man. He was an attorney. This oral agreement for sums as large as $108,000 just did not seem to be compatible with Larry's personality nor did it make any business sense for Eastshore.

17. The verbal arrangement seemed exponentially more beneficial to Carl overall and Carl was the desperate one even by his own account. I rejected the verbal agreement outright. Especially so because Carl had made no effort over all those years to have Larry make good on the arrangement. Save perhaps in 2010 when he said he asked Larry about his money (again verbally nothing presented in writing). He never agitated for the US$5,000 he says he was owed under the Assignment of real estate contract. Yet, there he is in many of the correspondence sent to Larry agitating for far smaller sums and pleading for prompt payment as he was in dire straits. Imagine if he was really owed US$108,000. There was no way he would simply have patiently waited indefinitely. I cannot even comprehend why he would incur his own renovation expenses after May 2000, (as per counterclaim) when Larry/The Partnership was paying for renovations then.

18. If the situation was as he explains, would it not have been easier to have The Property appraised and sold to Larry, (The Partnership) or Eastshore. He could then pay off the Phipps, reimburse himself for his expenditures and take whatever profit he might get. He would certainly be in no worse position. This is particularly so since Eastshore had The Property transferred directly to it, cutting him out entirely. Why would Larry, The Partnership/Eastshore in these circumstances guarantee Carl a certain sum while they were unsure what it would be sold for.

19. Carl is also a very astute and savvy businessman. In fact, he proclaims himself to be a contractor, real estate appraiser and real estate dealer. Yet, he makes an agreement of this nature orally and does not pursue its conversion into writing, which to my mind would be the proper and professional thing to do. He signs a US$5000 contract but relies on a verbal agreement for US$108,000. This is not simply a matter of trust or judgment. It is a matter of business efficacy.

20. The court also considers a fax sent from Carl to Larry in December 2000. Now, remember by this time Carl would have done all his own renovations at his expense. Any renovations which followed were inevitably at Eastshore's expense. Carl knew the purchase price he had agreed in 1999, yet, by that fax he has convey an offer of US$155,000 to Larry/ The Partnership/Eastshore for consideration.

21. If he is to be paid $108,000 plus $9,300 commission making a total of $117,300, Eastshore would have $37,700 in hand having agreed to expend over $100,000 (the final balloon payment). The court is here using the same

process for calculating as presented by Carl in paragraph 16 of his witness statement.

Finding:

22. This court therefore finds that the oral agreement alleged by Carl is fictitious. There is therefore no legal right in existence for Carl to be on The Property. He has been given valid notice to quit and an order for possession will consequently be made in Eastshore's favour.

Is the Claimant entitled to any damages for Trespass:

23. The Claimant submits that *"the damages payable to the Claimant should be based on the rents which the Defendant failed to pay since March 2002 when he last deducted the cost of renovations for rental payments."*

24. The Claimant seems not to realize that it he offered no evidence whatsoever on when precisely Carl stopped paying rent nor why the Agreement was allowed to lapse for such an extended period of time. Although Eastshore alleges in their Claim Form that Notices to Quit were sent to Carl from as early as 2005, it provided no proof of this. Wayne also urged that Carl could not be found after 2010, this court need say nothing here about substituted service or alternative means of service.

Consideration:

25. Damages must be proven and Eastshore has certainly not proven the precise terms of a lease, far less when Carl is purported to have breached same. They will have no damages from 2002. Especially since in 2008 I see Larry corresponding with Carl about sale of The Property. I therefore take Larry to be well aware that Carl continued to live there, long after 2002 (whether paying rent or not).

26. Eastshore says they served Carl with Notice to Quit on the 20th February, 2017. Carl admits this and that his attorney wrote on his behalf on the 27th March, 2017 indicating his refusal to move. Neither that Notice, the Defendant's letter nor their contents were before the court. Whether Carl was given a grace period in which to move is uncertain. Without more, the court will accept that from the 27th March, 2012, the date of the Defendant's letter, Carl's licence to be on The Property was revoked. He then became a trespasser.

Finding:

27. Eastshore is therefore entitled to damages from that date onward. The court will use the rental figure of BZ$650 per month to assess these damages. Interest will be awarded thereon at the rate of 6%, calculated from the 27th March, 2017.

Is the Claimant indebted to the Defendant in the amount of $108,000:

28. The court's previous finding that no verbal agreement existed between Carl and Eastshore means that his counterclaim for payment of that $108,000 will accordingly fail. Carl has failed to prove on a balance of probability that he is owed this debt. We now move with haste to consider whether he is owed $16,200 as sales commission.

Is the Claimant indebted to the Defendant in the amount of US$16,200 for a Sale Commission:

29. Carl relies on a sale agreement he negotiated with a trust (The Trust) for the sale of The Property and an oral contract he made with Larry where he was engaged as a sales agent for Eastshore. He says Eastshore repudiated the

Sale Agreement which had already been signed by the purchaser (The Trust) in January of 2008. His commission on that Sale Agreement was to be US$16,200 and he was denied same because of Eastshore.

The Evidence:

30. There is no written agreement between Eastshore and Carl. Carl says the terms of their oral agreement was that he would find a purchaser and from the proceeds of sale he would be paid 6% as commission by Eastshore. He presents a document dated January 14th, 2008 addressed to *"Carl Raney, Transaction Agent for the Parties."* It names Eastshore Limited as the seller and references "*Sellers Counteroffer to Buyers* (sic) *offer to Purchase Real Estate Dated January 12, 2008 12:01 pm).* It refers to The Property.

31. Clause 5 of the document reads:

"Closing costs and responsibilities

Sellers will pay a success fee of 6% of the purchase price $16,000.00 to Carl Raney at closing." The closing date is stated at Clause 7 as "*Thirty days (30 days) after deposit of earnest money or any mutually agreed upon extended date."* This document is then signed by Carl Raney as Transaction Agent, the two trustees on behalf of The Trust as purchasers and Larry Myers as a director of the Seller, Eastshore.

32. There is also presented a "*Contract For The Sale And Purchase Of Real Estate"* dated 8th March, 2008 which is signed only by the two trustees and containing a purchase price of US$270,000. It relates to The Property. Paragraph 19 of this document states:

"BROKER OR AGENTS: The parties represent that a transaction agent, Carl Raney, will receive a success fee in connection with the sale of this property, said agent shall be paid a success fee of 6% of the total sales price ($16,200.00USD) from the closing

proceeds at the closing of this agreement. The sellers shall be responsible for the fees due to the agent."

33. Finally, there is another *"Contact For The Sale And Purchase Of Real Estate"* dated 11th March, 2008 signed only by Larry Myers for the Seller, Eastshore. It also relates to The Property but quotes the purchase price of US$300,000. It's paragraph 19 is identical to that stated above, except that it provides $18,000US as commission.

34. Wayne admits under cross-examination that Larry was the one who really took the lead on Eastshore's behalf when it came to The Property. Further, contrary to what he had said in examination-in-chief, that Larry's signature on the aforementioned documents evidenced Larry's interest (Eastshore's interest) in selling The Property. However, he said he was not sure what conversation Larry may have had with Carl as he Wayne did not have knowledge of most of the dealings of Eastshore. It therefore is very believable that Larry may have entered into a sale agreement with Carl.

Consideration:

35. Now, it has never been contended by Carl that the oral Sale Agreement he entered into with Larry on Eastshore's behalf contained any terms other than the payment of 6% of the sale price. I am certain if there were other terms he would not have omitted to recite them. If we dare to include what was stated in the Written Sales Agreement he presented, then the sale takes effect on the closing of the agreement. There was no closing. The payment of this commission was clearly contingent, more specifically, a sale of The Property was a condition precedent. Since there was no sale, there was no contract (oral or otherwise) between Carl and Eastshore for the payment of 6% or

US$16,200 as claimed. The court is certain that Carl understands the concept of a contingent contract as he stated in cross-examination in relation to his alleged arrangements regarding payment for his own investment in The Property: "*The minute I had a sale of the Property my claim would be on.*"

Finding:

36. Eastshore is, therefore, not liable to pay Carl because the condition failed to be satisfied. The reason for this failure is, of no importance because it was not a stated term of the agreement that if the sale failed because of the Seller he would still be entitled to payment.

Whether Wayne Raney has authority to bring the claim:

37. In the Pre-trial Memorandum agreed to by both parties the issue of Wayne's authority was not stated and is accepted as having been waived (if properly made). The court has decided to deal with it only for completion.

38. In his closing submissions, at the 23rd of 25 paragraphs counsel for the Defendant outlined the evidence presented to prove that Wayne was not authorized by Eastshore to bring this matter. He seems to have neglected to consider his own counterclaim made in this matter and served on the same counsel as an agent of Eastshore. Suffice it to say, Eastshore did not make any submissions on this issue and no preliminary application had been made to strike out the claim on this ground, nor was it part of his counterclaim. Be that as it may counsel for the Defendant offered:

At paragraph 23 of the Defendant's witness statement, he stated that he had the company records searched and found no company resolution by the directors to authorize the bringing of the lawsuit. It is submitted Wayne Raney is the only director bringing this suit on behalf of the corporation. <u>Rule 22.3 of the Supreme Court (Civil Procedure) Rules</u> provides for litigation in the company's name to be conducted by a duly authorized director. "Duly authorised" means authorised by the body corporate to conduct the proceedings on its behalf by a resolution passed for that purpose."

39. Not only is this evidence woefully inadequate since it does not speak to precisely how Eastshore authorizes its directors to conduct proceedings on its behalf, that is, whether this resolution had to be recorded at the Company Registry. The fact that Eastshore has retained counsel makes it even more doubtful that Wayne is not authorized. Furthermore, even if Wayne did retain counsel to commence this action without the proper authority an apparent agent binds the corporation. According to the Rule in ***Turquand's*** case the internal affairs of a company cannot be raised as a defence as Carl has done. There is no need for an outsider to consider the inner workings of a company. That is a problem for the company alone. Furthermore, the *"problem"* is not an agreed issue between the parties.

It is Ordered:

1. Judgment for the Claimant.
2. The Defendant is to give vacant possession to the Claimant within one month of the date of this judgment.
3. Damages to the Claimant at the rate of BZ$650 per month from the 28th March, 2017 until vacant possession is delivered up.
4. Interest is awarded on the damages at the rate of 6% per annum from the 28th March until today's date. Thereafter at the statutory rate of 6%.
5. The counterclaim is dismissed.
6. Costs to the Claimant on the claim and the counterclaim in the agreed sum of $15,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT