



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No. 329

BETWEEN:-

FIRST BERMUDA GROUP LTD

Plaintiff

-v-

GREGORY EDWARD TROY BURGESS

Defendant

EX TEMPORE RULING

Date of hearing: 2nd November 2012

Mr Justin Williams, Williams Barristers & Attorneys, for the Plaintiff

Mr Larry Mussenden, Mussenden Subair Limited, for the Defendant

1. This is an application to set aside a default judgment made by the Chief Justice on 17th May 2012, in which he ordered (i) that the Defendant, Gregory Burgess, who was the mortgagor, should pay to the Plaintiff, First Bermuda Group Ltd (“First Bermuda”), which was the mortgagee, the sum of \$2,456,232.50, being the amount of the mortgage debt, together with

interest and administration fees, costs and charges due under the mortgage from 17th May 2012 until payment due to the Plaintiff under the Defendant's covenants in the said mortgage in respect of the mortgaged property, namely 30 Orchard Grove, Pembroke East, HM 16 ("30 Pembroke Grove"); (ii) that the said mortgage might be enforced by sale; (iii) that the Defendant should deliver possession of the mortgaged property to the Plaintiff; and (iv) that the Plaintiff should have its costs pursuant to the mortgage.

2. The mortgage loans fell in various tranches. (i) The original mortgage, dated 7th September 2006, was for \$700,000. There were subsequent loans, each secured by a charge against the property, as follows: (ii) 5th March 2007 in the sum of \$336,750; (iii) 8th June 2007 in the sum of \$120,000; (iv) 31st July 2007 in the sum of \$30,000; (v) 9th October 2007 in the sum of \$40,000; (vi) 8th May 2009 in the sum of \$505,259; and (vii) 14th October 2010 in the sum of \$395,146.
3. I should state at the outset that Mr Burgess disputes at least some of these loans.
4. Mr Burgess makes the preliminary point that although the regularity of the judgment is not impugned, he was not present and was not represented at the hearing on 17th May 2012. Whereas First Bermuda states that Mr Burgess was served with notice of the hearing, Mr Burgess states that he did not appreciate that judgment would be entered against him on that occasion.
5. I accept what Mr Burgess says, and will not hold it against him that he was not present at the hearing and did not make representations. The nature of his case is such that he might have had difficulty in articulating it with the elegance and economy with which Mr Mussenden, who appears for him, has done.
6. Mr Burgess submits that he has a complete defence to the claim, namely that the loan monies were obtained as the result of a fraud perpetrated by a project manager named Nicholas Wallington, whom he says was First Bermuda's agent. As Mr Burgess' case developed, he alleged that the fraud was perpetrated by at least one senior employee of the Bank as well.

7. A stark contrast can be drawn between Mr Burgess' case as it stood up until the luncheon adjournment today and Mr Burgess' case as it appeared after the luncheon adjournment.
8. Before lunch, Mr Burgess' case was this. He did not hire Mr Wallington as a project manager and Mr Wallington was therefore not his agent; what is alleged to be his signature on the project management agreement dated 5th July 2010, ostensibly between him and Mr Wallington, is a forgery; he is therefore not liable for all or any part of the loan monies spent by Mr Wallington; and indeed First Bermuda should repay him. He relied on the old legal maxim: "fraud unravels all".
9. Legal maxims are no substitute for analysis, however, and there were certain difficulties with this case as it then stood. The first such difficulty was that Mr Wallington only appears to have been involved with the project from October 2008 or thereabouts, and not to have been the project manager until May 2009 or thereabouts. If he would only have been the project manager with respect to the last two mortgage loans, which, it will be recalled, were made on 8th May 2009 and 14th October 2010.
10. By that time a substantial portion of the previous loan monies, ie those secured by the original mortgage and the first four subsequent loans, amounting to \$1,226,750 principal, had already been spent. Hence Mr Burgess states at paragraph 5 of his affidavit dated 22nd November 2011:
"In or about early 2009 I discovered that I needed additional funding to complete the renovations to the property".
11. As a substantial portion of the loan monies – precisely how much is not clear – had already been spent before Mr Wallington was appointed project manager, any fraudulent conduct by him would not be relevant to First Bermuda's claim for repayment of the monies spent prior to his appointment.
12. When I put this point to Mr Mussenden this morning he suggested an answer, or at least a partial answer. Namely that Mr Burgess had a claim in

damages against First Bermuda for non-completion of the project by Mr Wallington, as a result of which Mr Burgess had been unable to let out the rental units as originally planned. However this embryonic case was not articulated before me in sufficient detail for me to understand how Mr Wallington was said to be at fault or what was the quantum of damages claimed. As it stands, this case is too vague to provide any realistic prospect of a defence by way of set off to First Bermuda's claim with respect to loan monies spent before Mr Wallington became project manager.

13. There was, prior to lunch at least, a second difficulty in the Defendant's case. That lay in a letter dated 5th May 2009 from First Bermuda to Mr Burgess, which is referred to at paragraph 5 of Mr Burgess' first affidavit and exhibited. The letter reads as follows:

"Dear Mr. Burgess

Ref. Mortgage Increase \$502,259.00.00 (sic) on property at 30 Orchard Grove

I confirm this Company's agreement to an increase in your mortgage of \$502,259.00 (five hundred two thousand two hundred fifty nine dollars Bermuda currency) for the purpose of completing building works on your captioned property. Of this amount you have already received \$262,259.00 through fees, interest etc."

14. I pause to note in parenthesis that if Mr Burgess had already received that amount of this latest instalment, that is cogent evidence that he had already received the balance of the monies lent before the \$505,259. Otherwise he would not have had to draw down on part of that fund to the tune of \$262,259. Be that as it may, the letter continues:

"This takes your mortgage balance to \$1,659,009.00 which will be repaid by sale of all the units upon completion. It is probable that the units will have to be condominiumized in order to obtain the best sales return and in the event there is a shortfall in the sale proceeds as against the remaining balance you will continue to be personally liable for this amount.

The building works will be supervised by Mr. Nicholas Wallington who will issue drawdown statements with a description of the works completed. A separate Project Manager's Agreement will be signed between you and Mr Wallington. Notwithstanding the repayment term the mortgage remains callable at three month's notice."

15. I pause to note that that very paragraph is quoted by Mr Burgess in his affidavit. So at the time that he signed the affidavit he must have been aware of it.
16. At the foot of the letter is the statement:
17. *"I understand the terms and conditions above and that there may be a residual liability to me on completion of the sales of the units for which I accept full responsibility"*.
18. That statement is signed, dated 6th May 2009, by "Gregory Burgess". The letter is from one Rebecca DeAllie, a manager of First Bermuda.
19. Taking the letter at face value, it was a condition of First Bermuda lending Mr Burgess money that he appointed Mr Wallington as a project manager. By signing the letter, assuming for a moment that he did, Mr Burgess agreed to do so. If he did not wish Mr Wallington to act as project manager he should not have signed the letter and should not have borrowed the money. Had First Bermuda become aware prior to these proceedings that, as Mr Burgess now says, he had not appointed Mr Wallington, no doubt First Bermuda would have sought to recover the monies at an earlier stage.
20. Thus, so far as First Bermuda was concerned, Mr Wallington was at all material times acting as project manager clothed with Mr Burgess' ostensible authority. First Bermuda was therefore not at fault for acting on his instructions. At least not on Mr Burgess' case as it stood before lunch.
21. However, after lunch, Mr Burgess' case developed a rather broader ambit. It was said that it was not his signature on this letter, either. It was also said that he had not in fact borrowed the fourth through seventh loan instalments

and that Mr Burgess questioned whether he had borrowed monies on the first through third loan instalments.

22. Thus, on Mr Burgess' case as it now stood, not only Mr Wallington but First Bermuda was implicated in the fraud.
23. I find it implausible that if Mr Burgess really believed that he had not borrowed these monies, and that he was a victim of such a far reaching fraud, he would not have made these allegations at an earlier stage. For example, if it was really his case that it was not his signature on the letter dated 5th May 2009, he would have said so in the affidavit in which he quoted from that letter. Hence I find that any case based on the fraud as it is now alleged has no realistic prospect of success.
24. Insofar as the allegation of fraud stood before lunch, and allowing for the possibility that that allegation was made in good faith and that Mr Burgess may have been panicked into expanding it, that case fails to address the two difficulties that I have outlined. Namely (i) the monies loaned before Mr Wallington's involvement as project manager, and (ii) the fact that First Bermuda was dealing with Mr Wallington on the basis that he had ostensible authority to act for Mr Burgess.
25. Drilling down into how the fraud as initially alleged was supposed to have worked, First Bermuda has provided a detailed breakdown as to how the loan monies were applied under Mr Wallington's project management. Of the \$1,719,969 accounted for, \$134,787.01 were paid to Mr Wallington (\$20,000) or his company, Bermuda Real Estate Consultants (\$114,787.01). No doubt Mr Burgess would take issue with those payments.
26. In that respect, I note that in the project management agreement at Schedule 4 there is a provision dealing with payment to Mr Wallington headed "Remuneration", which appears to show that he would not be entitled to any remuneration at all. This is a surprising provision. On the other hand, Mr Burgess must have been aware that Mr Wallington would not be offering his services gratuitously.

27. Mr Mussenden has not submitted what would have been a reasonable fee for Mr Wallington to charge, and hence to what extent the fee that he actually charged was unreasonable.
28. The remaining expenses appear to have been incurred in relation to the project. It has not been explained to me in what way they are disputed, nor, if there was a fraud, how they would have benefited Mr Wallington or would otherwise have fitted into the scheme of the fraud.
29. It appears from Mr Burgess' affidavit that he was at all material times aware that Mr Wallington was acting as project manager. He must have been aware that Mr Wallington was not doing this on an unpaid basis. He must also have been aware that the works that Mr Wallington was project managing were funded by loan monies. He cannot seriously have believed that First Bermuda was funding them from its own resources.
30. In the circumstances, I find that Mr Burgess' fraud based defence, whether as articulated before lunch today or after lunch, would have no realistic prospect of success. It is therefore unnecessary for me to consider in any detail the allegations of forgery.
31. The allegation that the project management agreement contains a forged signature appears inherently implausible. Apart from having allegedly forged Mr Burgess' signature on the project management agreement, Mr Wallington appears in all other respects to have acted as a legitimate project manager. His signature was purportedly witnessed by a senior figure at First Bermuda, Betty Brown, who has now retired. The evidence before me, albeit multiple hearsay, is that she agrees that she did witness Mr Burgess signing that document. I note that the matter has been investigated by the police, and that they have decided to take no action.
32. None of these factors is a conclusive rebuttal of the allegation that Mr Burgess' signature on the project management agreement was forged. But they serve to emphasise that, in making good that allegation of forgery, Mr Burgess would have a high hurdle to surmount.

33. As to the expanded version of the fraud, I regret to say that the very late stage at which these allegations were made suggests that Mr Burgess was “making it up as he went along” in order to overcome the difficulties that had been pointed out to him with his claim as it previously stood.
34. Be that as it may, if Mr Wallington has acted fraudulently towards Mr Burgess, then Mr Burgess’ remedy lies in an action against Mr Wallington. Although I appreciate that, Mr Wallington having left Bermuda, apparently for the Ukraine, any such remedy may be more apparent than real.
35. For these reasons I dismiss the application to set aside the default judgment, and I shall hear the parties as to costs.

Dated this 2nd day of November 2012 _____

Hellman J