



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 335

BETWEEN:

SONYA FOX

Plaintiff

-v-

KIM SIMMONS

Defendant

EX TEMPORE RULING

(in Chambers)

Date of hearing: March 3, 2014

Mr. Jaymo Durham, Amicus Law Chambers Ltd., for the Plaintiff
Mrs. Lauren Sadler-Best, Trott & Duncan Limited, for the Defendant

Background

1. The Plaintiff issued a Specially Endorsed Writ on September 25, 2013 against the Defendant as Administrator of the Estate of Karen (Hudson) Lewis. The deceased was the legal owner of a property which the Plaintiff rented from her, through an agreement that was actually signed by the deceased's mother, Janet Simmons dated April 30, 2012. There was a subsequent agreement dated May 31, 2012 which sought to replace the earlier agreement. The principal difference of relevance to the present application is that the duration of the lease was not for three years, as in the first agreement, but was until the estate or probate "has been settled".
2. The relief which the Plaintiff sought substantively was:
 - (a) a declaration that the contract dated 31st May, 2012 was void;
 - (b) a declaration that the initial contract was in effect; and also
 - (c) "*A declaration that the Defendant is estopped from terminating the tenancy*" before the expiry of the three year term of the original tenancy agreement, "*otherwise than by breach of the tenant's obligation*".
3. The matter came before Hellman J on September 25, 2013, in Chambers, and he granted an interim order permitting the Plaintiff to remain in occupation of the premises pending the determination of the terms of the tenancy agreement. Clearly, it was anticipated that this Court would at today's hearing, in effect, decide, whether or not the Plaintiff should be allowed to remain in possession any longer based on an adjudication of the merits of the claim. Clearly, Hellman J cannot have contemplated that the Court would determine any controversial issues of fact. He merely envisaged that the Court would construe the agreement and decide whether or not the Second Lease was in fact invalid, according to its terms.

Findings

4. Having reviewed the authorities relied upon by Mr. Durham, for the Plaintiff, I do find that the second agreement was invalid, because the term of the lease was indefinite. The authorities which he referred to, included the following: *Prudential Assurance Co. Ltd-v-London Residuary Body* [1992] 2 AC 386 at pages 391 and 394 (per Lord Templeman). He also referred to *Mexfield Housing Co-operative Ltd-v-Berrisford* [2011] Ch 244, which provided a further illustration of this principle. Reference was also made to the case of *Siew Soon Wah-v-Yong Tong Hong* [1973] A.C. 836.

5. The crucial question is whether, as a result of the second contract being void, the Plaintiff has a seriously arguable case for a right to remain in the property unless she is found to be in breach of contract.
6. The Defendant's case is that the second agreement, on any sensible view of the facts, simply evidences a surrender of the first agreement. So what the Plaintiff is left with is a monthly tenancy, which the Defendant either has validly terminated or is entitled to terminate, on one month's notice. The Plaintiff, on the other hand, contends that, having regard to the circumstances in which the first lease and the second lease were negotiated, it was of paramount interest to her, to the Defendant's knowledge, that she should have a lease for at least 3 years. Because she was taking out a bank loan, which required her to have some kind of stability for the business which she was to run from the premises in question.
7. The issue of surrender, which was raised by Mrs. Sadler-Best by reference to Megarry & Wade, *'The Law of Real Property'*, 7th edition, at paragraph 18-011, is not as straightforward as it might appear. Because the evidence as to the circumstances in which that agreement was entered into was very unclear. The only evidence before the Court at present is the evidence of the Plaintiff. And she says that she expected that the new duration was going to be effectively the same as the old duration. So it is far from clear at this point that the first agreement lapsed.
8. But, even if the first agreement was regarded as having lapsed, I find that there is a serious issue to be tried on the question of proprietary estoppel. It does seem to me that it is arguable that it would be inequitable for the Defendant to treat the tenancy as a month to month tenancy. And that estoppel issue, by common accord I think, cannot be determined one way or another in this Chambers hearing.
9. Mrs. Sadler-Best sought to launch a very nuanced attack on the Plaintiff's attempt to continue the injunction by arguing that, firstly, damages would be an adequate remedy and, secondly, that the balance of convenience favoured her client.
10. It seems to me as a matter of principle that when one has a claim, the essence of which is the right to remain in the property unless the lease is terminated for breach, damages cannot in those circumstances be an adequate remedy. Because the very equity which the Plaintiff is seeking to enforce would be extinguished by the Court declining to grant injunctive relief. In these circumstances, no question of the need to consider the balance of convenience arises.
11. Mrs. Sadler-Best also sought to argue that there was no assurance given to support an estoppel. That question is not one that can be resolved in the Defendant's favour at this stage, having regard to the fact that the Defendant has elected to file no evidence. In any event, on the face of the documents, it seems to me to be arguable that the Defendant granted the lease, acting on behalf of the owner of the property, for a term

that was negotiated after the Plaintiff made it plain that it was important that she have a three year lease to enable her to obtain funding from the Bank.

Conclusion

12. So, in all the circumstances, I find that, although the second lease is invalid, there is a serious issue to be tried as to the Plaintiff's claim to be entitled to stay in the property is terminated for cause. Accordingly, the Defendant should be restrained from removing her, other than for breach of contract, until further Order or until the determination of the trial of this matter.

[After hearing counsel, the Court directed that an injunction should be drawn up in the usual form with the Plaintiff required to give the usual undertaking as to damage, and awarded the costs of the present hearing to the Plaintiff in any event, to be taxed if not agreed, on the standard basis. The Court also gave directions for the further conduct of the action, but encouraged the parties to pursue a settlement as it appeared possible that the costs of a trial might be disproportionate to the parties' respective commercial interests in the dispute.]

Dated this 3rd day of March, 2014 _____

IAN R.C. KAWALEY CJ