IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY 12/9

CP.25/86

1299

BETWEEN DENNIS RALPH HEATH
of Auckland,
Company Director
Plaintiff

A N D BRUCE HERBERT ALLPORT
of Tauranga, Company Director
Defendant

Hearing: 21 August 1986

Counsel: G.R. Joyce Q.C. for Plaintiff
T.S. Richardson for Defendant

Judgment: 11 SEP 1986

JUDGMENT OF GALLEN J.

This is an application for summary judgment. The factual situation out of which the application arises is as follows.

By an undated agreement said to have been made on or about 13 September 1985, the plaintiff in these proceedings

agreed to purchase a property in Great South Road, Auckland from a vendor known as Fund of New Zealand Finance Limited for $900,000. The alleged date of the making of the agreement is referred to in an affidavit in reply filed on behalf of the plaintiff, the admissibility of which I shall have subsequently to consider. As the basis of his claim in these proceedings, the plaintiff relies upon a document which is now dated 13 September 1985. This document is referred to as a "Deed of Nomination". It appears to be made between the plaintiff and the defendant and purports to be signed by both. The general effect of the document is that in consideration of the sum of $100,000, receipt of which sum is acknowledged, the plaintiff nominates the defendant as purchaser under the agreement between the plaintiff and Fund of New Zealand Finance Limited. The signature which is said to be that of the plaintiff, is not witnessed. The signature of the defendant is witnessed by a Mr B.M. Scott, solicitor of Tauranga. The original agreement between the plaintiff and Fund of New Zealand Finance Limited was subject to a financial condition involving the raising of a loan by way of mortgage of $400,000. It also required the payment of the sum of $50,000 by way of deposit forthwith on the signing of the document and a further $50,000 on 30 September 1985.

In a letter dated 1 October 1985 from the solicitors for the defendant, it is stated as follows:-

> "We confirm that the contract may be treated as unconditional. Your client's copy is enclosed."

No condition was contained in the document described as Deed of Nomination, but this reference could only refer on material before me, to the financial condition contained in the principal agreement between the plaintiff and Fund of New Zealand Finance Limited. On 2 October, solicitors for the plaintiff replied to the solicitors for the defendant in the following terms:-

> "Thank you for your letter of 1 October. I confirm my telephoned advice that I have made my client's agreement with his vendor unconditional. I also confirm that the deposit payable under that agreement has not been paid and in terms of our agreement must be paid by your client. The amount due is $100,000 and it should be paid to Action Realty Ltd immediately. My client's vendor has made it very clear that if the deposit is not paid today he will be taking steps to cancel. If this happens it means your client has not fulfilled his obligations under our agreement and my client would be looking to him to recover his lost bargain.
>
> In addition, in terms of our agreement $100,000 is due now in consideration of the nomination. Would you kindly arrange for your client to pay the same to me forthwith."

This letter was replied to on 8 October 1985 in the following terms:-

> "The matter of payment of the deposit has been sorted out so there should be no further problems with the contract. We have notified Messrs Oliphant, Bell & Ross of the nomination of Mr Allport as purchaser. We have asked that all further correspondence in respect of the transaction be addressed to us.
>
> We understand that your client has agreed to accept a significantly lower sum than $100,000 for the assignment of the contract. As soon as the amount has been fixed would you kindly let us know and we will make arrangements for payment.

We assume that you have the original contract between Fund of New Zealand and Heath and if that is so we would appreciate your sending it it us. It does occur to us that the Inland Revenue will probably wish to see the nomination document at the time of appointment and might in fact raise problems regarding stamp duty. Certainly our client would not wish to become involved in double ad valorem duty; once on the original agreement and again on the Deed of Nomination, which does seem to be what could occur. Please let us have your comments on this matter as soon as possible as it is of considerable importance to all parties."

The plaintiff's solicitor replied by letter dated 14 October 1985 which is in the following terms:-

"Thank you for your letter of 8 October. I confirm my telephoned advice that I am Mr Heath's attorney and that as such I can advise you that there is absolutely no proposal to reduce the contract price. Further the sum became payable immediately the contract was signed. Your client is therefore in breach and notice is hereby given that settlement is required by 1 November 1985 time being of the essence.

I confirm I am holding the original contract between my client and Fund of New Zealand Finance Ltd but I will not hand it to you until settlement is made.

I also confirm that my client is liable for stamp duty on his purchase from the Fund and this will be paid on settlement. Assuming your client complies with the above notice I take it that the transfer to him will be direct from the Fund and merely contain a recital regarding the nomination in which case I do not need to prepare a transfer. I would be obliged if you would confirm this point."

There is no evidence to indicate that this letter was replied to. On 19 November 1985 the solicitors to the plaintiff wrote again to the solicitors to the defendant repeating the statement that the plaintiff expected to receive payment in full of $100,000 and indicating that payment was required by 15 January 1986, time being made of the essence.

Reference was made to a caveat having been registered to protect the plaintiff's interest as purchaser indicating that he was still liable to settle with the original vendor if the defendant failed to do so. The caveat referred to is dated 25 October 1985.

The solicitor to the plaintiff appears to have obtained a valuation of the property concerned from a firm described as "Ozich & Cheyne Ltd." This valuation is dated 17 September 1985. For the purposes of these proceedings, the significant part of this valuation is contained in that portion which deals with a lease of the property. This is described as being between the defendant D.H. Allport as lessor and Nationwide Holdings Limited as lessee. The valuation indicates that the document had been replaced by another agreement which had not been sighted by the valuers. They understood the terms to be that the period of the lease was 10 years with 1 ten year right of renewal; The commencement date was January 1986; the rental $133,000 per annum payable monthly in advance with two yearly rent reviews. The plaintiff produced a document which purported to be an agreement made between the defendant and Nationwide Holdings Limited for a lease of the property for a period of 2 years from 15 January 1986 at a rental of $140,000 per annum payable monthly in advance. This document is undated. A further undated document was also produced, purporting to be an agreement of lease made between Nationwide Holdings Limited and Felix Holdings Limited for a period of 2 years from 15 January 1986 and at a rental of $140,000 per

annum payable monthly in advance. Evidence indicates that Nationwide Holdings Limited is a company controlled by the plaintiff. Felix Holdings Limited is a company controlled by the defendant. Felix Holdings Limited has a share capital of $100.

The plaintiff also produced a document dated 12 November 1985. This is addressed to Mr R. George of Eastside Real Estate. It is in the following terms:-

> "This letter is to confirm our understanding that my signing of the lease agreement to lease the above property has been tendered now only to facilitate you client's financial arrangement with Marac and that I am not in fact bound until we have settled to my satisfaction how the rent is to be paid and what security your client is going to give to protect me for my part.
>
> At this point in time I am at liberty to withdraw from this agreement at any time."

The significance of this letter is that the plaintiff maintains that it provides a date for the two lease agreements to which reference has already been made. The reference to Marac also is said to tie in with a reference in the letter of 19 November 1985 from the plaintiff's solicitors to the defendant's solicitors.

The suggestion was made during the course of argument that the lease agreements were to be regarded as shams intended to be taken with the valuation based upon them, as a basis for raising money from Marac.

On 11 December 1985 the plaintiff's solicitors wrote to the defendant's solicitors advising that no extension of time would be given and asking that a transfer be forwarded to the original vendor's solicitor.

On 22 January 1986, a settlement notice was issued by the solicitors to Fund of New Zealand Finance Limited to both plaintiff and defendant. On 23 January 1986, the solicitors for the plaintiff wrote to the solicitors for the defendant referring to the settlement notice and indicating that if the defendant failed to comply with the notice, proceedings would be issued to cover the consideration for the document to which reference has already been made. Settlement was not in fact completed and on 7 March 1986, the solicitors for Fund of New Zealand Finance Limited, informed the plaintiff's solicitors that the contract was cancelled. The defendant had paid the sum of $100,000 required by the agreement to the solicitors for Fund of New Zealand Finance Limited, but no further sums. The plaintiff then commenced these proceedings.

The defendant opposed the entry of summary judgment on six grounds set out in an affidavit in support of application for leave to defend. In support of his notice of opposition, he also filed an affidavit by a solicitor Mr Barry Morton Scott and an affidavit by a Mr Richard Harold George, a Tauranga real estate agent. The plaintiff sought to file an affidavit in reply made by himself and exhibiting a substantial number of documents. The preliminary question is whether that affidavit may properly be received.

The question involved was considered by Chilwell J. in the unreported judgment of Sheppard v. Rutherford (Auckland Registry CP.No.6/86, judgment delivered 2 April 1986). The general effect of that decision is to support the proposition that affidavits cannot be admitted where they merely raise contentious matters, but that it must be proper to allow a plaintiff to expose a false defence by the simple expedient of filing an affidavit which exposes that false defence. In this case, the plaintiff maintains that the defendant's defence is false and that there is no defence to the claim. He says that that becomes clear when the additional affidavit is filed and that it is important that it should be received for that purpose. I indicated that it was my intention to receive the affidavit conditionally and apart from anything else, it was obviously an advantage to have the documents exhibited when considering the difficult and complex questions of law and fact which arise in this matter. In this regard I should say that I accept that the fact that questions are difficult, does not mean they should not be the subject of summary judgment where the resolution of them supports the plaintiff's entitlement to that remedy. In this case, the defendant's contentions can be best considered in relation to all of the material before he Court which includes that contained in the plaintiff's final affidavit.

The defendant contends that the agreement upon which the plaintiff's claim is based was either not complete or was

orally varied. This was based upon a contention that although the document itself referred to a consideration of $100,000, this was the subject of negotiation and as is indicated in the letter of 8 October 1985 from the defendant's solicitors to the plaintiff's solicitors, a significantly lower sum had been substituted. This was flatly denied by the plaintiff and it is clear from the correspondence that this contention was never accepted by the plaintiff. It is at this point that the evidence of Mr Richard Harold George, a real estate agent to whom reference has already been made, becomes important.

There is a dispute as to the status of Mr George and as to whose agent he was - whether he was in fact the agent of the plaintiff or the defendant. In the affidavit which he has sworn, he states that he was acting as agent for the plaintiff when he approached the defendant as a possible purchaser. For the purposes of this application, I think that I should assume at least the possibility that Mr George is the plaintiff's agent and on the evidence before me, this is in any event the more likely conclusion. Mr George in his affidavit states that negotiations proceeded after the document had been completed and that the consideration was made negotiable. He says that he informed the defendant it was not the intention of the plaintiff to hold the defendant to that price. He goes on to say that discussions of this kind had occurred on at least twenty occasions both by telephone and personally and that he had personal contact with the plaintiff just before Christmas 1985 in the presence of the defendant. I do not overlook the

fact that this is directly contrary to the material contained in the correspondence, but for the purposes of this application, I think the evidence of Mr George must be looked at in the context of what the evidence itself clearly establishes was at the very least an unusual arrangement, to use a neutral term. The valuation which is specifically related to the leasing arrangements and the leasing arrangements themselves which are undated, as well as the material in connection with them, taken with the clear involvement of both plaintiff and defendant in various capacities, suggest an arrangement which was perhaps more fluid than the document itself on which the plaintiff relies, suggests. That being so, it seems to me that the evidence of Mr George does raise a matter which requires resolution in substantive proceedings.

The matter does not end there. The plaintiff maintains that he was misled into entering the arrangement evidenced by the Deed of Nomination, by misrepresentations as to the availability of a suitable tenant and that this would give rise to various defences. This allegation too is supported by Mr George who indicates that he informed the defendant that the plaintiff would guarantee that a tenant would rent the buildings at a rental of $120,000 per annum. If Mr George was the agent of the plaintiff which on the facts before me is at least possible, then either the plaintiff was responsible for such a representation or Mr George is putting himself in a position of jeopardy with regard to proceedings

himself.

When the material before the Court is looked at overall, it does not seem to me that the whole situation is properly before the Court and that a summary judgment entered in relation to such a transaction would be quite contrary to the purposes for which that procedure is designed. Having come to that conclusion, it is unnecessary for me to consider the other grounds put forward by the defendant in opposition. In view of the fact that I consider this matter should proceed to a substantive hearing, it is in any event undesirable that I should express a view on them.

The application will be declined.

The plaintiff in the event of not succeeding in this application, indicated his intention to seek an amendment to the statement of claim, omitting the words "partly written and partly oral" where they appear in relation to the alleged agreement in the statement of claim and substituting the word "written". That amendment is allowed.

The defendant is to file a statement of defence within 14 days from the delivery of this judgment. I do not overlook that Mr Richardson requested that time to be extended. Having regard to the circumstances, I think it is inappropriate that resolution of this matter should be delayed

and the exploration which has been necessary for these proceedings should make it possible to conclude the proceedings without delay.

If further discovery is sought, then any application for discovery is to be made within 14 days of the date of filing of the statement of defence and to be complied with within the times fixed by the Rules. That condition applies to both plaintiff and defendant. On completion of discovery, the Registrar is to be asked to make a fixture for the resolution of the substantive proceedings.

Having regard to the circumstances, costs are reserved and are to become costs on the substantive proceedings.

Solicitors for Plaintiff: J.N. Barratt-Boyes Esq., Auckland

Solicitors for Defendant: Messrs Turnet, Scott and Blair, Tauranga