IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-5238

BETWEEN	LANDSDALE DEVELOPMENTS LIMITED Plaintiff
AND	KEVIN LESLIE BONE Defendant

Hearing: 6 May 2009

Counsel: A A Hopkinson for Plaintiff
J Waymouth for Defendant

Judgment: 28 May 2009 at 10 am

RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON
(Application for Summary Judgment)

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*This judgment was delivered by Associate Judge Sargisson on **28 May 2009** at **10 am** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
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[1] The plaintiff in this proceeding, Landsdale Developments Ltd, claims summary judgment for the full amount of its claim of $325,000, plus interest and costs, against the defendant Mr Kevin Bone.

[2] The basis of Landsdale's claim is an agreement for sale and purchase of land entered by the parties on 15 May 2007. Mr Bone agreed to purchase land from Landsdale at Pulham Road, Warkworth for $3,450,000 including GST. The agreement required a deposit of $375,000, to be paid in two instalments. The first instalment of $50,000 was to be paid on the signing of the agreement, provided Mr Bone was satisfied with the outcome of his due diligence investigation under clause 28 of the agreement. The second instalment, the balance of $325,000, was to be paid three days after notification of the issue of the s 224(c) certificate under the Resource Management Act 1991.

[3] Mr Bone paid the first $50,000, but he failed to pay the balance of the deposit, notwithstanding the issue of the s 224(c) certificate, the details of which were notified to Mr Bone through his solicitor on 24 June 2008. Mr Bone sought an extension of time for the payment of the outstanding deposit on 27 June 2008, which Landsdale (through its solicitor) declined. Its solicitor wrote to Mr Bone's solicitor on four occasions between 1 July and 1 August seeking payment of the second instalment. Despite demand, Mr Bone has failed to pay the second instalment.

[4] There is no dispute Mr Bone has not met his contractual obligation to pay the second instalment of the deposit. There is also no dispute that Landsdale has put up sufficient proof for the purpose of making out its claim on a prima facie basis for the orders it seeks. It is therefore necessary for Mr Bone to demonstrate an evidential basis that is sufficient to set up a tenable defence. If he can do this then it is common ground that the claim should go to trial.

[5] Mr Bone says he has a defence and that he should not be held to the obligation to pay the second instalment until he is in a position to fund it. At the hearing, the only defence that counsel for Mr Bone pursued in support of this position was a defence based on promissory estoppel. Counsel indicated that Mr Bone relies on Landsdale's alleged promise not to enforce the contractual requirement for payment of the second instalment and to defer settlement until Mr Bone was able to secure funding to complete the entire purchase.

[6] It is Landsdale's position that the defence is untenable. It submits it has discharged the overall onus it has of showing that the defence raised by Mr Bone is untenable and there is nothing that properly remains for determination at trial.

Issue for Determination

[7] The essential issue is whether Mr Bone should now be held to his contractual obligation for the deposit, or whether he has a defence based on promissory estoppel that would make it inappropriate to hold him in breach of that obligation without the opportunity to raise the defence at trial. That turns on whether the purported promise is supported by the evidence, and if it is, whether it is sufficient to raise an arguable case of promissory estoppel.

The Evidence

[8] Counsel for Mr Bone relied on two statements in Mr Bone's evidence as key to the defence of promissory estoppel. Those statements were contained in Mr Bone's affidavit in support of his notice of opposition. The first is found at paragraph 7 of the affidavit and it states:

> That in particular I believe from my recollection that the representation made to me was along the lines that as long as I showed good faith by payment of the first deposit instalment in the sum of $50,000.00, the vendor would take that as confirmation of my bona fides to proceed, and would not be strictly enforcing the time provisions for payment of the second tranche of $325,000.00 [which is the subject of these proceedings].

[9] The second statement is at paragraphs 12-14 of the same affidavit and it reads:

> That I then again keeping in communication with the real estate agent and the salespersons engaged by the real estate agent advised them of the difficulties I was having, and again I recall in conversations that a representation was made to me by the real estate salesperson engaged by the real estate agent again along the lines that the requirement for payment of the deposit would again be wavered until such time as my funding was rectified.
>
> In other words I understood there was no necessity for me to make payment of the sum of $325,000.00.
>
> That on that basis I continued to pursue financing, but could not arrange any alternative finance for drawdowns due to the "*credit crunch*".

Summary Judgment –Relevant Principles

[10] Before granting summary judgment the Court must be satisfied that there is no reasonable, arguable or bona fide defence.

[11] In *Pemberton v Chappell* [1987] 1 NZLR 1 at 3, Somers J explained the concept of "no defence" as meaning the "absence of any real question to be tried". His Honour also noted that to defeat the application the defendant must provide sufficient particulars to show that there is a factual or legal issue worthy of trial.

[12] It is worth emphasising the approach which the Court will adopt to disputes of fact on summary judgment applications. As Somers J stated in *Pemberton* at 4:

> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment.

[13] At the same time, the Court will take a robust approach to summary judgment applications: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ (CA) 84 at 85-86. The object of the procedure would be thwarted if spurious defences or plainly contrived factual conflicts were permitted to prevent judgment being obtained, especially in the context of the structure of r 12.2(1) where the onus is on the applicant. A helpful indicator as to where the line should be drawn is found in the judgment of Greig J in *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 at 14:

> In a matter such as this it would not be normal for a judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331, at 341E, the Judge is not bound:

> "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

Promissory Estoppel

[14] The doctrine of promissory estoppel requires:

a) A clear, unambiguous representation or promise by one party to the other.

b) Reliance on the promise by the promisee to such an extent that it would be inequitable or unconscionable not to hold the promisor to the promise.

c) That the promisee has kept his word under the arrangement.

(See Burrows, Finn and Todd *Law of Contract in New Zealand*, (3rd ed, 2007) at 4.7.4).

[15] The Court of Appeal has succinctly summarised the law on promissory estoppel in *Krukziener v Hanover Finance Ltd* (2008) 19 PRNZ 162 at [38]–[39] as follows:

> Following the decisions of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 287 and *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, promissory estoppel is no longer confined to promises affecting pre-existing rights. However, the departure from a voluntary promise is not unconscionable in itself, even if detriment results. Rather, equity responds to the defendant creating or encouraging an assumption in the plaintiff, and its knowledge that the plaintiff will rely on the assumption to its detriment. The plaintiff must have been led to believe that the promise would affect or result in legal relations; thus a promise made in negotiations that are subject to contract will not lead to an estoppel: *Waltons Stores* at 406 and 422. Lastly, equity does not intervene to satisfy the promise, but to avoid the detriment. These requirements in the current authorities, as the High Court recognised, are seen as necessary to preserve the law of contract as the principal mechanism for the enforcement of promise.
>
> In this case, Mr Krukziener would have it that representation was made in pre-contractual negotiations, and that to Hanover's knowledge he acted to

> his detriment by entering into the contract on terms inconsistent with the representation. He relies on the negotiations, in other words, not to show a voluntary promise to refrain from existing pre-existing rights, nor to show that Hanover promised to create a new legal relationship, but to contradict the contract that followed the negotiations.

Discussion

[16] Applying the above legal principles to the factual allegations relied on by Mr Bone, I do not accept that there is a tenable defence based on promissory estoppel. My reasons are essentially twofold. First, the evidence of the alleged promise does not meet the threshold of credibility. Secondly, even if I am wrong about that, the defence of promissory estoppel is not available on Mr Bone's own evidence.

The evidence is not credible

[17] I have reached the conclusion that Mr Bone's evidence is not tenable because the existence of the purported promise is quite inconsistent with the exchange of correspondence that occurred at the relevant time between the parties' solicitors.

[18] Landsdale points to the clear-cut nature of the correspondence between the solicitors. Of particular note are two letters from its solicitor dated 13 and 27 June 2008. Relevantly the letter of 27 June 2008 states:

> My client is in the process of completing funding arrangements in respect of the second deposit of $325,000.00.
>
> My client requires an extension of timeframe for payment of the deposit until Friday, 11 July 2008 to enable him to complete restructuring of its financial facility.

[19] The preceding letter was dated 13 June 2008 and the relevant part reads:

> I am instructed by my client that the first deposit of $50,000 has been paid to Lochore's Real Estate.

[20] There is no suggestion in the first letter of any waiver relating to the second deposit, and the later letter makes clear Mr Bone was well aware of his obligation to pay that deposit.

[21] No issue has ever been taken with the correspondence. It is clear and unequivocal in its terms. The net effect of the correspondence was that Mr Bone sought an indulgence that was not given.

[22] I am therefore satisfied that this is a case where a robust approach to the evidence is justified.

Is promissory estoppel available in any event?

[23] Even assuming the purported promise was made, it does not provide a tenable foundation for a defence of promissory estoppel. Quite apart from the vagueness of the purported promise, counsel was unable to point to any detriment that Mr Bone has suffered as a result the promise if indeed it was made.

[24] The fact of the matter is there is nothing he can point to as a detriment. The only "detriment" that counsel relied on was that Mr Bone is being held to the obligations he contractually agreed to perform. Mr Bone was not led to believe if he took certain steps that they would affect or result in legal relations. Furthermore he has not undertaken any other obligations as a result of any alleged promise not to hold him to the terms of the agreement for sale and purchase. This is not therefore a case that calls for the intervention of equity to avoid a detriment incurred as the result of promise.

[25] I therefore agree with Mr Hopkinson that there is no tenable basis for the defence of promissory estoppel.

Result

[26] For these brief reasons I allow Landsdale's claim for summary judgment for $325,000, being the unpaid second instalment of the deposit. I also allow interest on the sum of $325,000 for the period of 27 June 2008 until the date of judgment at 17.42%. (This is the rate allowed under clauses 1.1(31) and 3.12(1) of the agreement for sale and purchase being double the highest 90 day bank bill rate during the period).

[27] Costs must follow the event. Landsdale is entitled to costs assessed on a category 2B basis together with disbursements to be fixed by the Registrar.

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Associate Judge Sargisson