

IN THE SUPREME COURT OF BELIZE, A.D. 2006

CLAIM NO. 299 OF 2006

	(EUGENE OBRIGEWITSCH	CLAIMANTS
	(JOYCE GUSTAFSON	
	(
BETWEEN(AND	
	(
	(ARTHUR GONZALEZ	DEFENDANTS
	(ROBERTA GONZALEZ	

Coram: Hon. Justice Sir John Muria

Hearing: 15 & 29 May 2007
Judgment: 30 October 2007

Ms. Agnes Segura-Gillett for Claimants
Ms. Velda Flowers for Defendants

JUDGMENT

Muria J: The Claimants in this case are seeking possession of and rents due on the property rented out to, used and occupied by the Defendants since January 2004. The Defendants are strenuously resisting the Claimant’s claims, relying on their alleged right of option to purchase in the rental agreement made between the parties on 30th September 2003.

This case turns on the question whether the defendants exercised their option to purchase the claimant's premises prior to Agreement of sale between the claimant and Judy Ann Mooney on 31 December 2004.

Brief Background

The Claimants are of Canadian nationality. By a conveyance dated 21 January 1993 they became the legal owners of a parcel of land and house comprising 4286.69 yards situated at the corner of Calle Cementerio and West Street in the village of Sarteneja, Corozal District, Belize. In September 2003 under a rental agreement the Claimants rented the property to the Defendants at a rental \$500.00 BZD per month. The Claimants, however, agreed to forego the first three months rent in return for the work which the Defendants were to do to make the residence re-liveable. The Defendants actually commenced occupation of the premises on 1st January 2004, and were not expected to start making rental payments until 1st April 2004.

The first three months rent-free aside, the Claimants claim that they had not recovered any rental payments from the Defendants for some forty one (41) months since April 2004 (excluding the months for which rents were paid). The Defendants on the other hand, produced a list of expenses incurred to make

improvement on the premises and claimed the right to deduct these expenses from the rent as part of purchase payments for the property.

After a period of exchanges in discussions and correspondence, the Claimants gave the Defendants notice to vacate the property. At first it seemed that the Defendants were going to vacate the property subject to finding alternative accommodation. However, subsequently, the Defendants changed their mind and decided not to vacate the property. They insisted on their right of option to purchase which they said they had exercised. With this impasse the Claimants have come to the Court in these proceedings.

The Claim

By their fixed date claim issued on 16 June 2006, the Claimants seek the following orders from the Court:

- (1) an Order for the Recovery of Possession of the said property;*
- (2) Seven Hundred and Fifty Dollars (\$750.00) arrears of rent;*
- (3) Cost of use and occupation of the premises at the rate of five Hundred Dollars (\$500.00) per month (or proportionately) from 15th March 2005 until possession be delivered up;*
- (4) Costs incurred via agent in the sum of One Thousand Seven Hundred Thirty Eight Dollars and Forty Seven Cents (\$1,738.47);*

- (5) *Cost of storage and transportation if household items from March 31st 2005 to May 31st 2006 in the sum of Two Thousand Seventy Dollars (2,070.00);*
- (6) *Cost of storage of household items from March 1st 2006 at the rate of Seventy Five Dollars (\$75.00) per month until possession be delivered up;*
- (7) *Interest on arrears of rent and damages at such rate and for such period as the court shall deem fit pursuant to section 166 of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize, Revised Edition 2000; and*
- (8) *Costs.*

By their defence, the defendants denied the Claimants' claim and have counter-claimed for specific performance of the agreement of 30 September 2003.

The Agreed Issues

Pursuant to the order of the Court made on 22 March 2007, the following issues were agreed upon, namely:

1. *Whether the Defendants exercised their option to purchase the said premises prior to the Agreement for Sale executed on December 31st 2004 between the Claimants and one Judy Ann Mooney;*

2. *Whether there subsists a valid Agreement for Sale between the Claimants and the Defendants and if so, what are the terms of that Agreement;*
3. *What remedies are available to the Parties in the circumstances.*
4. *What sums (if any) are due to the Claimants by the Defendants under the rental agreement?*

Before I will deal with these agreed issues, I feel it would be of help to set out also the facts which the parties have agreed to pursuant to the direction of the Court also contained in the Order made on 22 March 2007.

Agreed Facts

The following facts have been agreed:

1. *That the Claimants are the Legal Owners of the property situated at the Corner of Calle Cemeterio & West Street in Sarteneja Village, Corozal District;*
2. *That the Defendants were let into possession of the premises on the 1st January 2004, by virtue of a Rental Agreement entered between the Parties in September 2003.*
3. *That it was a term of the Rental Agreement that rent would be in the sum of \$500.00 per month and it was agreed that the Claimants would forego rent for the period of January 1st 2004 to March 31st 2004 in lieu of work that the Defendants were to undertake on the premises to make it “reliveable”;*

4. *That it was a term of the said rental agreement that the Defendants had the option to purchase the property anytime prior to any other sale.”*

Two Documents

Apart from the various correspondences which the parties have agreed to, the two documents which are central to the respective claims by both parties in this case are the Rental Agreement dated September 2003 (“EO & JG2”) and the undated handwritten letter from 1st Claimant to the Defendants (“AG & RG1”). These two documents are brief and I shall set them out also in this judgment. Exhibit “EO & JG2” is as follows:

“This Agreement will pertain to rental arrangements made between the Owners and Renters of a residence and property located on the lot on the west side of Cementario Street in the Village of Sarteneja, Belize. The Owners, Eugene Obrigewitsch and Joyce Gustafson, have agreed to forego collecting any rental income from the Renters, Arthur and Roberta Gonzalez, for a 3 month period in lieu of work the Renters will be doing to make this residence reliveable. This period will commence the first month the Renters occupy the house as their Sarteneja living quarters. The rent thereafter shall be \$500.00 Belize dollars per month.”

The Renters shall be responsible for the reinstallation and payment maintenance of all appropriate available utilities.

Should the Renters incur any further personal costs which are mutually deemed essential to make and keep this residence liveable and are improvements which will remain with the house and property, these will also be deducted from any future rental payments.

This agreement is made with the understanding the house and property in question have been and remain for immediate sale. In the absence of any commercial selling agents the selling price of this residence and property is \$60,000.00 U.S. dollars (or Belizean equivalent thereof) but will rise to \$70,000.00 U.S. dollars if any real estate brokers become involved.

If the above mentioned renters and/or they're Church Organization should at any time decide to purchase this residence and property prior to any other sale, their accumulated rental payments will be fully factored in towards the purchase cost by way of making this transaction more readily available to them.

Owners: _____
Renters: _____ ”

and Exhibit “AG & RG1” is as follows:

*“Arthur and Roberta,
Tried phoning you off and on all day Thursday with no response, and will leave this note Friday if you’re not at home. Mel (the realtor and I drove over this morning so he can assess the place and take digital photos for his listing. We’ve decided it would be best leaving things as they are for now but I feel its appropriate obtaining some form of assurance from you that the tiling will be completed by the end of this year, and some form of tangible measure which can also assure us you do have sufficient means to purchase the house and property after January 1 as per the verbal agreement we’ve already established that being a straight buy-out of Joyce’s half with myself carrying some form of mortgage.*

Joyce feels it’s appropriate (and I concur) that it would also be a good idea to gather whatever receipts you have and present the same to us be way of demonstrating that you have, indeed, been using the Referred rental income to actually make and keep the place liveable.

Please phone me as soon as you read this to obtain further clarification and to discuss whatever else needs to be talked out. At the moment I’m continuing my Sat-Sun-Monday night hotel job but this may soon change as I’ve advised them to obtain a suitable replacement employee. As regards our further plans we still intend returning to Canada asap, and will do so directly our Sarteneja house and property is sold.

Eugene S. Obrigewitsch”

There is no date on this note but from the evidence it is obvious that it was written sometime in November 2004.

I shall now turn to the issues raised and I shall deal with them in the light of submissions by Counsel for each of the parties.

Whether rentals due and owing

The agreed facts show that the claimants are the legal owners of the premises in question and the defendants were let into possession of the said premises at an agreed rent of BZ\$500.00 per month. Although the parties entered into a rental agreement in September 2003, the defendants actually commenced occupation of the premises in January 2004. The parties agreed also that the defendants would not pay rent for the first three months in 2004 (January, February and March) to enable the defendants to carry out some work on the premises to make it “re-liveable”.

It is also agreed that further personal costs which are “mutually deemed essential” to make and keep the house liveable would also be deducted from any future rental payments.

I pause here to observe that the relationship between the parties in this case is one of landlord and tenant who have agreed to be bound by the agreement which they entered into on 30 September 2003. No amendment or alteration of that agreement can be made by one party unless mutually agreed to by the other party.

In basic terms, the claimants' claim is for breach of contract and recovery of possession of their house and rents due and owing. They claim that the defendants have been occupying their house without paying rents for some 41 months and so have been illegal occupants of the said house.

The evidence presented to the court is that, apart from the two months (January and February 2005) rents being paid, no further payments have been made by the defendants to the claimants by way of rents for the months of April – December 2004, and from March 2005 to the present. The defendants did not dispute that they have not paid rents for all those months (some 41 months). Instead the defendants contended that they had to spend money on the house to make it liveable, not only during the first three months of their occupation of the house but thereafter as well, from April – December 2004. These expenses, they said, should be offset from the rent.

I read the witness statements of both the claimants and defendants and heard their oral evidence in Court. I have also considered the Rental Agreement dated 30 September 2003. Having done so, it is quite clear that under the Rental Agreement, the defendants were allowed rent-free occupation for the months of January, February and March 2004. In return for that rent-free period, the defendants were to make the house liveable. The defendants were therefore expected to commence payments of the rent as of 1st April 2004 from which period, the defendants were no longer entitled to occupy the claimants' premises rent-free. Failure by the defendants to do so would be a breach of the Rental Agreement.

The claim by the defendants of the list of expenses incurred from April 2004 to December 2004 is an arrangement taken by the defendants upon themselves to do outside the agreement. No account can be taken of it unless the parties "mutually deemed" it essential. In other words the parties must mutually agree that further expenses on the part of the defendants on the premises is essential.

Have the parties come to any mutual arrangement or consensus this point? I think AG & RG 1 would appear to support the defendants' position on this aspect of the

case. In their undated note (AG & RG1) the claimants agreed that further expenses incurred by the defendants on the house could account toward rental payments.

This is supported by the claimants' words:

“Joyce feels it’s appropriate (and I concur) that it would also be a good idea to gather whatever receipts you have and present the same to us by way of demonstrating that you have, indeed, been using the referred rental income to actually make and keep the place liveable.”

That being done, the claimants, although legally obliged to pay the rents due, it was mutually agreed that the further expenses incurred could be accounted toward the rents due and payable.

Purchase of house by Judy Ann Mooney.

In or about late December 2004, Judy Ann Mooney who is the daughter of Joyce Gustafson, made an offer to purchase the property in question from the claimants for US\$60,000.00. The evidence shows that the defendants were notified of this proposed sale of the property to Ms. Mooney and that they (defendants) would need to vacate the premises. They were given two (2) months notice to vacate the premises, that is, by February 2005. The defendants were not able to move out of

the house by February 2005 and had assured the claimants' attorneys that they would vacate the premises by 14 March 2005. However, before that date, the defendants had advised the claimants that they were not going to vacate the premises.

The agreement between Ms. Judy Ann Mooney and the claimants for the purchase of the said premises was executed on 31 December 2004.

Claim of an Option to Purchase.

The defendants' claim that they had exercised their right of option to purchase the premises in October 2004. The defendants relied on Exhibit "AG & RG1" written by the first claimant. The defendants relied on Exhibit AG & RG1 as evidencing an agreement between the parties giving an option to defendants to purchase the property. It was said to be a confirmation of an oral agreement between the parties that they defendants would have the option to purchase the property.

I must say that I agree with the submission by Counsel for the claimants that Exhibit AG & RG1 does no more than showing that discussions between the first claimants and first defendant as to a contemplated future purchase of the premises by the defendants. The note does not point to any definite intention on the part of

the claimants to accept that the defendants have option to purchase. In any case, as correctly submitted by Counsel for claimants, the defendants have not given any notice in writing of the exercise of the option to purchase nor has a time period with which to exercise the option would lapse has been given, prior to 31 December 2004.

The legal position on the option to purchase is usefully stated in the case of *Caribbean Asbestos Products Ltd -v- Andre Leopold Lopez, Carlos Antonio Lopez, Marcia Rose Zita Brown and Yvonne Therese Elizabeth Lindo* (1974) 21 WIR 461 at 465 where Court of Appeal of Jamaica:

“An option when granted for value confers a right or privilege in the optionee to call for the sale to him of the land in accordance with the conditions specified for the exercise of the option and the lessor undertakes that he will not within the time, if any, specified in the option clause, which is indeed a separate contract, deal with the land in any way inconsistent with the right of the optionee to purchase the land together with a binding agreement not to revoke the offer during the time, if any, specified in the option. If the offer is accepted within the time specified a contract of sale is made.”

There is a more fundamental reason which adversely affects the defendants' claim that they had exercised their option to purchase the claimants' property in this case. As agreed between the parties, the defendants' "accumulated rental payments will be fully factored in towards the purchase cost" should they come to exercise their option to purchase. They had not exercised their option to purchase by 31 December 2004. Thus even if by mutual agreement, accumulated rentals would be earmarked to be factored in towards the purchase cost, there was no longer to be a purchase, since the option had not been exercised. Any accumulated rental payments would simply have to be paid to the claimants instead. The evidence before the Court is conclusive that the defendants had not paid the rents due, save for the months already referred to in this judgment and from expenses mutually "deemed essential" to make the house liveable.

On the evidence before the Court, viewed against the agreed facts in this case, it is open to the Court to conclude that although the defendants have an option to purchase under the Agreement dated 30 September 2003, it cannot be said that they have in fact or law exercised that option prior to the sale of the land to Judy Ann Mooney even on the strength of AG to RG1. The court is satisfied that the defendants knew or at least were aware that they had not exercised the option prior to the sale of the property to Judy Ann Mooney.

Hence their willingness to vacate the premises in March 2005 when they were notified of the sale. However they later changed their mind and claimed that they had exercised their option relying on “AG to RG1.” Unfortunately, for them, AG to RG1 does not hold any of the hallmarks of an exercise of an option to purchase. Those hallmarks include, notice in writing by the optionee (Defendants) to optionor (Claimants) of specified period to exercise the option, at an agreed price. See *Broadway Import and Export Ltd -v- Levy* (1996) Supreme Court of Jamaica, No. CL1993 B 081 (unreported); see also *Caribbean Asbestos* (above).

The notice to exercise the option must be in writing, made by the defendants and if the requirement is not expressed, it is implied. See *Birmingham Canal Co. -v- Cartwright* (1879) 11 Ch D 421, 434.

I have considered Exhibit “AG &RG5” dated March 3, 2005 written by the defendants to the claimants. While that letter may serve as the defendants’ intention in writing to exercise their option to purchase, it rather came too late in the day, as the property concerned had already been sold to Judy Ann Mooney on 31 December 2004.

Conclusion

The requirements for a valid exercise of the option to purchase prior to 31 December 2004 in this case have been missing. The only conclusion is that the defendants cannot be said to have exercised their option to purchase the Claimant's property in this case prior to the same being sold to Judy Ann Mooney.

They had not exercised their option to purchase prior to the premises being sold. Their continuous occupation of the property since 31 December 2004 is therefore without authority and must be unlawful. They must now vacate the property.

As the property had been sold to Judy Ann Mooney on 31 December 2004, the Claimants are entitled to all outstanding rental payment up to 31 December 2004, less the sum expended and mutually agreed, to make the premises liveable up to 31 December 2004.

There is no evidence of any rental agreement between the new owner of the property and the defendants from 31 December 2004 to date. That, of course, is a matter between the new owner and the defendants.

In the light of the facts as agreed to by the parties and as found by the court together with the agreed issues and the evidence presented to the Court, I find that, there was no sale agreement between the claimants and the defendants. There was only a Rental Agreement.

I also find that the defendants had not exercised their option to purchase the claimant's premises in this case prior to the sale of the same to Judy Ann Mooney on 31 December 2004.

In the light of the above finding, the counter-claim by the defendants for specific performance cannot stand and it must fail.

As from 31 December 2004, an agreement to transfer the lawful ownership of the premises in Judy Ann Mooney was executed. Notice to vacate possession had been given to the defendants who should now vacate the said premises. From 31 January 2005, the claimants would be receiving \$500.00 (Canadian Dollars) pursuant to the executed sale agreement of 31 December 2004, although payment has not yet started due to the dispute between the claimants and the defendants. The claimants are, therefore, not entitled to claim any further rental from the

defendants as of 31 December 2004, as they cannot benefit twice from the same property.

In the present case, the claimants are entitled to judgment in the following terms:

1. *The claimants were entitled to recover possession of the premises in question up to 31 December 2004 after which time the said property shall vest in Judy Ann Mooney pursuant to the Agreement dated 31 December 2004.*
2. *The claimants shall recover all rents in arrears up to 31/12/04, together with interest thereon until paid, less the sum mutually agreed by the parties as deemed essential to make the house liveable.*
3. *The claim by claimants for cost of use and occupation at the rate of \$500.00 from 15/3/05 until delivery of possession cannot be granted to the claimants and therefore denied.*
4. *The costs incurred, via agent, in the sum of \$1,738.47 on behalf of the claimants in respect of this case is granted.*
5. *The cost of storage and transportation in sum of \$2,070.00 is granted.*
6. *Cost of storage at \$75.00 per month from March 1, 2006 until possession is not made out and declined.*
7. *The defendants' counter-claim for specific performance fails and it is dismissed.*

8. *The defendants to vacate within 14 days, if they have not done so yet.*
9. *The claimants to have the costs of this action to be taxed if not agreed.*

Order accordingly

(Justice Sir John Muria)