

**IN THE SUPREME COURT OF BELIZE, A.D. 2015**

**CLAIM NO. 179 of 2009**

**MARVA ROCHEZ**

**CLAIMANT**

**AND**

**CLIFFORD WILLIAMS**

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings

2015

8th October

29th October

Written Submissions

2015

Claimant/Counter Defendant - 15th October

Defendant/Counter Claimant - 16th October

Mr. Kevin Arthurs for the Claimant.

Mrs. Kathleen D. Lewis for the Defendant.

**Keywords: Contract for the Sale of Land - Specific Performance - Breach - Delay - Limitation Act Cap 170 - Striking Out where Limitation not Pleaded - Late Filing of Defence to Counterclaim - Summary Judgement (Fixed Date Claim)**

## JUDGMENT

1. Marva Rochez agreed to sell and Clifford Williams agreed to purchase, property situated at “Q” Street North in Corozal. The terms of their written agreement, dated 29th May 2000, (The Agreement), was that Clifford Williams would pay \$5,000.00 upfront and from June 30<sup>th</sup>, 2000, make payment on the outstanding mortgage held by the Belize Social Security Board (BSSB). On full satisfaction of the mortgage Ms. Rochez would then transfer title to him. Upon payment of the said \$5000.00, she handed over possession of the property to Clifford Williams and subsequently left Belize to live in the USA. She has never returned.
  
2. Mr. Williams agrees that he never made any of the mortgage payments which he sets at \$10,000. although there is no precise statement in the contract. He insists that he attempted to make payment but the BSSB, through its officers (whose names he was unable to recall), refused to accept payment. Their reason being, that he was not the person in whose name the mortgage had been made. He also accepts that he never intimated this difficulty to Ms. Rochez and attributes this solely to his ignorance of her contact information. He continued in occupation and maintained the property. She in turn, never transferred the property to him.
  
3. In or around June 2004, Ms Rochez was informed by the BSSB that the mortgage was in arrears, interest was accruing and they intended to foreclose on the property if payment was not made. She says she sent various messages explaining the situation to Mr. Williams, who made no effort to ensure payment. He denies ever being notified. Fearing that the property

would be lost, she sought the assistance of a friend in Belize through whom she was able to pay off the outstanding mortgage. She does not put into evidence the full amount she paid.

4. Relying on The Agreement, Ms Rochez asserts in her claim that Mr. Williams was a bare licensee. Her statement of claim explains that she had signed an agreement to borrow \$5,000.00 from him to offset legal costs to the BSSB in relation to a mortgage she had secured. As a result, she allowed him to occupy her house from August 2000. Thereafter, he was expected to pay the BSSB \$150.00 for 19 months until her debt of \$2,800.00 had been satisfied. Further, on completion of the mortgage payments he was to continue paying \$150.00 each month as rent. He paid neither the mortgage nor the rent and consequently on November 30, 2007, she served notice to quit and deliver up possession on him. He has ignored this notice and so she accordingly claims:

1. *Recovery of possession.*
2. *Mesne profits.*
3. *Costs.*
4. *Further relief as the court deems just.*

5. Mr. Williams in his Defence, also relies on The Agreement and states that he is now in a position and stands ready to finalize. Moreover, he has acquired a beneficial interest in the property based on several improvements he has made thereto. He counterclaims for specific performance.

### **Preliminaries**

6. Two days prior to trial the Claimant filed a defence to the counterclaim and an application for summary judgement. I shall deal with these matters and the myriad of oral applications he made just before trial as preliminaries. After which the trial issues would be addressed.

### **Preliminaries:**

7. **A. The Defence to the Counterclaim**

As history only; the fixed date claim in this matter was filed on the 27th February, 2009. A counterclaim was attached to and filed with the defence on the 4th May, 2009. The Claimant filed a reply to that defence on the 15<sup>th</sup> May, 2009. She was then represented by other Counsel. That reply did not specifically address the counterclaim but denied the allegations set out in the defence, joined issue with the defendant and denied that the defendant was entitled to the relief claimed. It was not until the 6<sup>th</sup> October, 2015, almost six and a half years later, that the Claimant filed a defence to the counterclaim.

8. She explained that her original Attorney had been murdered in 2010 before the first hearing in the matter. In 2013 she received assistance from the Legal Aid Service Center. She was subsequently represented by yet another Attorney who was replaced by her current attorney in November of 2014. It seems that at all times the Claimant had competent legal representation. During this protracted period of time the matter had been assigned to various judges. The reason for the inactivity is not clear, but it continued from 2009 until December 2014 when the file was reconstructed and assigned to the present Judge. Case Management was scheduled to begin on the 19th

December 2014, but was adjourned for the defendant to be served. Eventually, on the 29th April, 2015, after a number of adjournments, directions for trial were issued. That order was not complied with and had to be varied. During all that time Counsel for the Claimant made no application to file any additional statement of case.

9. In Belize, unlike Britain, the reply and defence to counterclaim need not comprise one document. But that is the usual procedure followed. A Counter Defendant has 28 days after service of the counter claim in which to file a defence - Rule 18.9(2). From the Supreme Court (Civil Procedure) Rules it is clear that a defence to a counterclaim is somewhat different to a defence to an ordinary claim form. The most glaring difference being that when no defence is filed to an ordinary claim, the claimant is entitled to apply for default judgement and if he does not, there is no sanction for filing that defence out of time. The defendant may, at anytime before the entering of a default judgement, agree an extension with the claimant (no more than 56 days) or apply to the court for an extension of time – Rule 10.3(8). The matter simply will not be listed for case management until a defence is filed - Rule 27.3 or until an application is made to fix a case management conference pursuant to Rule 27.3(4).
10. On the other hand, where no defence has been filed within 28 days after service of the counterclaim, the Counter Defendant is deemed to have admitted the counterclaim in accordance with Rule 18.12(2). Part 12 (Default Judgement) does not apply - Rule 18.9(3). The Counter Defendant is then bound by any judgement or decision in the main proceedings in so far as it is relevant to any issues arising in the counterclaim. All this occurs

through application of the rule and without any action from the counterclaimant. It is triggered simply by the expiration of those 28 days.

11. A Counter Defendant simply does not have the same freedom enjoyed by an ordinary defendant. By way of comparison, neither does a defendant to a fixed date claim. A Claimant on a fixed date claim is precluded from applying for a default judgement by Rule 12.2(a). However, Rule 27.2(3) allows for the first hearing of the fixed date claim to be treated as a trial of the claim, if it is not defended. This is done through operation of the rule and not through any act of the Claimant.
  
12. In my view the counter defendant should have applied for an order extending the time for filing a defence and for permission to change his statement of case as it was being done after case management - Rule 20.1. Neither application had been made before the filing. Counsel for the counter defendant made an oral application to file out of time only when the court queried the late filing. He made no attempt to satisfy the court that the change was necessary because of some change in circumstances which became known after case management - the test laid down in Rule 20.1(3). Counsel, having placed himself on record long before the case management began, had more than ample opportunity to make the necessary applications. Further, “(a)n application made close to trial may be refused where its effect would be unfair on the other party (*Calenti v North Middlesex NHS Trust (2001) LTL 10/4/2001*)” **Blackstone’s Civil Practice 2013 (ibid) para 46.23.**
  
13. *“Where the problem is an error of procedure, the judge has to consider whether to cure*

*the irregularity, which may avoid a striking out order Firth v Everitt [2007] EWHC 1979 (Ch), LTL 25/9/2007” Blackstone’s (ibid) parag 33.11.* However, because there is a consequence to not filing a counter defence within the specified time frame, the court cannot invoke its general, power under Rule 26.9, to rectify such a procedural error.

14. The court therefore found that there was a failure to comply with the rules and the filing was, consequentially, invalid. Additionally, allowing the ridiculously late defence to the counterclaim would be extremely prejudicial to the Counter Claimant. The Counter Claimant would have had no time to reply and the witness statements already filed may not have addressed the issues raised in that defence. It would also require changing the trial date of an already inordinately delayed matter to accommodate full consideration of that defence and perhaps the filing of a reply by the Counter Claimant. So in the best interest of justice and with full appreciation of the overriding objectives, the court invalidated the filing of, and used its power under Rule 26.3 (1) (a) to strike out, the defence to the counterclaim.

#### **B. Application for Summary Judgement**

15. The Claimant application for summary judgement was also filed on the 6th October 2015. It was listed for hearing on the same date as the trial and was denied in short order pursuant to Rule 15.3(b). This Rule precludes the granting of such a judgement in proceedings (such as the instant) which are begun by a fixed date claim form.
16. Having been thus denied, counsel for the Claimant attempted to make an oral application to strike out the defence and the counterclaim - the defence,

on the ground that it disclosed no reasonable grounds for defending the claim, since the footing of the defence was statute barred and the counterclaim on the ground that it was likewise statute barred. The court refused to entertain the application at that time and informed that it would proceed to trial. Counsel raised the issue in his written closing submissions. I, however, find it tidier to deal with that matter now.

**C. Should the Defence and/or Counterclaim be struck out for being Statute Barred**

17. Limitation, once pleaded, is a complete defence but it must be specifically pleaded. The Claimant is under no duty to prove that his claim is not statute barred. This is because he maintains an action notwithstanding the limitation has expired. The court will not take this defence of its own motion. It is for the defence to raise it appropriately in its defence. *"Limitation is a procedural defence and does not affect the existence of the claimant's cause of action Ronex Properties Ltd. v John Laing Construction Ltd (1983) QB 398. Although it is a complete defence it will not be taken by a court of its own motion but must be specifically set out in the defence. This means that a Statement of Claim could proceed to trial if the defendant fails to plead it in his defence. Where it has been pleaded as a defence the claimant can either discontinue the claim or the defendants can apply to have it struck out as an abuse of process - A Practical Approach to Civil Procedure by Staurt Sime pg 89"* **Barbara Estelle Romero v The Minister of Natural Resources et al Claim No. 302 of 2012 Supreme Court of Belize.**
18. It is the defendant's duty to set out all the facts on which he relies to dispute the claim - Rule 10.5(1). If he does not do this, then he is precluded from relying on any omitted factual argument, unless the court gives permission. This permission is usually sought at case management. Thereafter, such

permission is only granted where the Defendant can satisfy the court that there has been a significant change in circumstances which became known after case management. No such application had been made by Counsel. The Claimant/counter defendant having not pleaded the limitation can not now raise it as a ground for striking out either the defence or the counterclaim. She is bounded by her pleadings and will not have the benefit of an amendment thereto without effecting an actual amendment. Now, the trial issues are due for consideration and determination.

### **Trial Issues**

19. 1. Was the Defendant a bare licensee
2. Is the Defendant entitled to specific performance of the contract

### **Was the Defendant a Bare Licensee**

20. What concerns the court is that the claim is not grounded in contract nor is it a claim on a vendor's lien, rather, it is simply for possession. The contract attached to the Statement of Claim clearly does not support the claim nor does any of the evidence subsequently provided by the Claimant. Although a court must be cautious not to dictate to parties how they should frame their case, the court saw it as imperative during case management, to draw the discrepancy, between the pleadings and the attached contract, to Counsel for the Claimant's attention. Yet, there was no application to amend the statement of case.
21. Nevertheless, the entire trial turned on the issue of the contract and compliance there with. Both parties clearly viewed the issue as live and crucial to the case. The Claimant, in his reply, in fact joined issue with the

defendant. The court is therefore entitled to make a finding of fact as it relates to this issue. Accordingly, this court finds that there existed, between the parties, a valid written contract for the sale of the property. The Defendant paid \$5000.00 towards the purchase price and agreed to pay off the mortgage (whatsoever sum that may be). He was put into possession of the property and has occupied same since 2000. The Defendant, having paid part of the purchase price and having been put into possession by the Claimant, was not a bare licensee, nor was he a tenant. The claim has therefore not been proven and must be dismissed. We turn now to the counterclaim.

### **Is the Defendant entitled to Specific Performance**

22. It has already been stated earlier that where the Counter Defendant fails to file a Defence within 28 days after service of the counter claim, he is deemed to admit that claim. There exists between the parties a binding written contract for the sale of land. There can be no doubt that upon the execution of a valid contract for the sale of land, the vendor becomes a trustee and the purchaser holds an equitable interest in that property. This is known as the doctrine of equitable conversion and is explained by Jessel MR in **Lysaght v Edwards (1876) 2 CH D 499 at 506**

*"The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, ...."*

23. The basis of that trust is an acceptance that a contract for the sale of land would be enforced specifically. Equity looks upon things agreed to be done

as actually done. The equitable lien arises automatically and operates as a charge on the land until the purchase money is paid. Unlike a legal lien, it is not dependent on possession and so exists even where the purchaser has been allowed into possession by the vendor. The lien does not give the vendor a right to possession of the land but he may apply to the court for a declaration of the charge and sale of the property to satisfy his claim. Perhaps this would have been a better course of action for the Claimant.

24. The Agreement had no precise date for completion, and time was not specified to be of the essence. In such circumstances, equity would willingly decree specific performance unless there had been unreasonable delay. There is no rule as to what is unreasonable delay. In fact, "*(a) exceptional case where delay will not be a bar is where the plaintiff has taken possession under the contract, so that the purpose of specific performance is merely to vest the legal estate in him*" **Cheshire & Burns - Modern Law of Real Property 14ed p 128** relying on **Williams v Greatrex [1957] 1 WLR 31** where a delay of ten years was not a bar. "*Mere delay in completion did not bar a suit for specific performance in the absence of laches unless a notice was served on the party in delay requiring him to complete within a reasonable time. However it was only in connection with specific performance that this indulgence was shown*" **Megarry & Wade - The Law of Real Property 6th Ed p 705.**

25. The Counter Claimant relies on a memorandum to prove his case, he may obtain a decree of specific performance in equity. Because land is invariably treated as being of unique value, specific performance is available to the purchaser as a matter of course. The remedy is discretionary and the court may accordingly refuse to grant it. The onus is on the Defendant to show that there is some good ground for refusal. Since nothing has been proven

and the Counter Claimant stands ready and willing to perform his contractual obligations, the court may properly make such an order.

26. Dixon J. in **JC Williamson Ltd v Lukey and Mulholland (1931) 45CLR 282 at 297** explain that *“Specific performance in its proper sense is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties’ rights are settled and defined in the manner intended.”* In essence specific performance concerned with executory contracts such as the one presently before the court. It must be made clear that the performance which is compelled, is the due performance of the transaction, in proper form, according to the contract. The contract remains in force and is not merged into the judgement. However because the court is seised of the matter it controls the content, variation or cancellation of the order and it does so in accordance with equitable principles.
27. He who seeks equity must do equity. The Counter Claimant must therefore be prepared to act equitably. This maxim is the foundation of the principle of mutuality of remedies – if specific performance is available to one party then it will be available to the other. Both principles will be applied for the specific enforcement of The Agreement.
28. Although Rule 18.12(2)(a) states that by not filing a defence on time the Defendant is deemed to have admitted the counterclaim it does not explain the procedure to be followed for judgment to be entered. To my mind the procedure laid out in 18.12(2)(b) is not appropriate as no default judgment has been entered against this Ancillary Claimant. For guidance therefore the

court turns to Part 14 Judgment on Admission and in particular Rule 14.4(2). Part 18 specifically precludes the application of Rule 14 to ancillary claims, save for a few sections one of which is Rule 14.4. Although the court is aware that no written admission has been made it feels safe in its application of 14.4 (2) for guidance only. That rule allows for the terms of the judgment to be such as it appears to the court that the Applicant is entitled to on the admission.

29. The agreement which is the basis of the counterclaim speaks nothing of mortgage payments equal to \$10,000. In fact, the counterclaim simply refers to an agreement which the counterclaimant, under oath, accepted to be The Agreement. The court is aware that the Counter Claimant did not make any of the mortgage payments as contracted and that the mortgage has already been paid in full by the counter defendant. Since equity will not permit a party to insist unconscionably upon his legal rights, the terms for payment of the outstanding part of the purchase price will accordingly be varied.

**THE COURT ORDERS AS FOLLOWS:**

1. The Claim is dismissed.
2. The Defence to the Counterclaim is invalidly filed and accordingly struck out.
3. The Counter Defendant having not filed a Defence to the Counterclaim is deemed to have admitted the Counterclaim pursuant to Rule 18.12 (2)(a).
4. The contract for the sale of land dated 29th May, 2000 is to be specifically performed.

5. A statement of account from the BSSB is to be secured detailing the total amount paid by Ms Rochez since the date of the contract and up until the full satisfaction of the mortgage.
6. The Counter Claimant is to pay to the Counter Defendant, in full satisfaction of the purchase price, the sum on the statement of account.
7. On completion of payment of the purchase price the Counter Defendant shall immediately transfer title to the property to the Counter Claimant.
8. Costs to the Defendant/Counter Claimant in the agreed sum of \$8,000.00.

**SONYA YOUNG**  
**JUDGE OF THE SUPREME COURT**