

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 186 OF 2006

(MALCOLM ZABANEH

CLAIMANT

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BETWEEN (AND

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(FRUIT PROCESSORS LIMITED

DEFENDANT

BEFORE the Honourable Madam Justice Michelle Arana

Mr. Dean Barrow, S.C., for the Claimant

Mr. Derek Courtenay, S.C., for the Defendant

JUDGMENT

1. Mr. Malcolm Zabaneh, the Claimant in this action seeks a declaration that Fruit Processors Ltd. the Defendant Company obtained title to his property through a Deed of Conveyance which Mr. Zabaneh claims was fraudulently executed. Mr. Patrick Polack is the Managing Director of the Defendant Company who signed the conveyance on behalf of Fruit Processors Ltd. Mr. Zabaneh is also seeking recovery of possession and cancellation of that Deed of Conveyance, along with an order directing rectification of the Lands Register by the Registrar of Lands. Since the Claimant also alleges tha

the Defendant knew of the fraud he is also seeking damages, and an injunction restraining the Defendant from dealing with the property in any way.

THE FACTS

2. Mr. Zabaneh states that on June 28th, 1993 he became by virtue of Minister's Fiat Grant No. 374 of 1993 (EXhibit MZ1) the owner of 93.73 acres of land situate along the Southern Highway near Mile 3, Stann Creek District. In 1999, he mortgaged this property to a bank and the mortgage deed is dated October 22nd, 1999(Exhibit "MZ 2").

3. In or around February 1998 or 1999, according to Mr. Zabaneh's witness statement, Mr. Patrick Polack telephoned him to inform him that he had bought Zabaneh's property on the Southern Highway near Mile 3.Mr.

one 23,777 which he became by virtue of Minister's Fiat Grant No. 374 of 1993 (EXhibit MZ1) the owner of 93.73 acres of land situate along the Southern Highway near Mile 3, Stann Creek District. In 1999, he mortgaged this property to a bank and the mortgage deed is dated October 22nd, 1999(Exhibit "MZ 2").

3 or 1999, according to Mr. Zabaneh's witness statement, Mr. Patrick Polack telephoned him to inform him that he had bought Zabaneh's property on the Southern Highway near Mile 3.Mr. Polack that he had not sold this property and had not signed any document regarding this land.

office nor did he ask Mr. Polack permission to look at the conveyance. After examining the signature and the other document, Mr. Polack declared that something was wrong as the two signatures did not match. After receiving assurances from Mr. Polack that he would inform his lawyer (Mr. Harry Courtenay) of the discrepancies surrounding the signature on the conveyance, Mr. Malcolm Zabaneh and his father left Mr. Polack's office.

5. Mr. Zabaneh claims that several days later he received a telephone call from someone who identified himself as Harry Courtenay, attorney at law, who informed him that the problem concerning his property had been solved and the property would be returned to him. Mr. Zabaneh said that he knew that Mr. Harry Courtenay was also the lawyer for Barclays Bank PLC, the same bank with whom he was negotiating a mortgage, and that the Bank had informed him that its lawyer would conduct a title search to ensure that his title was free and clear.

6. Several years passed. Then, in 2005, Mr. Zabaneh attempted to convey this property to his brother in law in order to relieve his indebtedness under the mortgage to Barclays Bank, and that is when he checked the Land Register in Belmopan and saw the conveyance (Exhibit "MZ 3") in favour of Mr. Polack's company. He brought this action seeking recovery of his property and other relief.

7. Mr. Patrick Polack for his part agrees in his witness statement that Mr. Malcolm Zabaneh and his father visited his office concerning the conveyance of the property on the Southern Highway Mile 3. Under cross examination Mr. Polack agreed that Malcolm Zabaneh did tell him that he had not sold this land. He said that he asked Mr. Zabaneh to sign on a piece of paper, then he showed the specimen and the conveyance to Malcolm and his father, Emilio Zabaneh for comparison, and they both agreed that the two signatures looked the same. Under cross examination he later said the specimen signature seemed "reasonably" close to the signature on the conveyance .Mr. Polack is saying that at no time did he ever acknowledge to Malcolm Zabaneh or to Emilio Zabaneh that the signature on the conveyance appeared to be fraudulent. As far as Mr. Polack was concerned, he had conducted previous business transactions with the real estate agent Rudolph Hislop who negotiated the land deal purportedly on Mr. Zabaneh's behalf. Mr. Hislop has since been extradited to the United States on a charge of Murder. Mr. Polack states that he had no reason to doubt the veracity of the signature on the conveyance, especially since the signature had been witnessed by a senior Justice of the Peace Mr. Paul Rodriguez (now deceased). He is therefore urging that the court reject the Claim and refuse all relief sought by the Claimant in this matter.

THE ISSUES

8. 1) Is this a claim for recovery of land or is this a claim under tort?
- 2) Is this claim statute barred under the different sections of the Limitation Act cited by the Defendant?

NATURE OF THE CLAIM

9. The Defendant argues that this is a claim under the law of tort and as such it is statute barred under Section 4 of the Limitation Act Chapter 170 of the Laws of Belize.

Section 4(as far as is relevant to this particular case) reads as follows:

Actions of contract and tort and certain other actions

“The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-

(a) Actions founded on simple contract or on tort;”

Counsel for the Defendant submits that this claim is founded on tort because the Claimant seeks to set aside a Deed of Conveyance on the ground that it was obtained by fraud or deception. He argues that since the Claimant became aware of the sale of his property in late 1998 or early 1999 but did not bring this claim until May 5th 2006, the claim is now statute barred because more than 7 years have elapsed since the cause of action first accrued.

Counsel for the Claimant contends that this action is brought not in contract or tort, but as an action to recover land and as such, the relevant period under the Limitation Act section 12(2) is 12 years from the date on which the right of action accrued to the Claimant.

Section 12 (2) so far as is relevant reads as follows:

“No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

10. I agree with the submission of Counsel for the Defendant that this is clearly not an action for recovery of possession. The Claimant by his own testimony reveals that he was never in possession of the said property. When cross examined on this point, Mr. Zabaneh said that he "passed the land every now and then and walked in there several times." He went on to explain that he "looked at his survey marks". That was the sum total of the evidence put forward by the Claimant, which clearly falls short of the legal standard to prove possession of property.

11. I agree with the submission of counsel for the Defendant that this is an action which is founded on the tort of deceit. The Claimant alleges that the Defendant obtained title to the property by fraud. The particulars of the fraud as set out in his Statement of Claim are as follows:

- (i) The Defendant and its Directors at all material times knew of the Claimant's ownership and possession of the aforementioned property.
- (ii) The Defendant dishonestly and secretly without the knowledge of the Claimant, forged a deed of conveyance dated 23rd February 1999 under and by which the Defendant sought to deprive the Claimant of his property.
- (iii) The Defendant forged or caused the signature of the Claimant to be forged on the aforementioned Deed of Conveyance and to make it appear as if same was executed by the Claimant.
- (iv) The Defendant and its directors by deceit made a false oath and false statements in the attestation in the said deed of Conveyance, dishonestly stating that the Claimant executed the said Deed.
- (v) The Defendant stated falsely that it had paid the purchase price stated in the Deed of Conveyance to the Claimant.
- (vi) The Defendant facilitated and falsely obtained the registration of itself as the owner and proprietor of the Claimant's property in the Deeds Register kept in the Lands Department.
- (vii) The Defendant deceived the Registrar General in obtaining the registration of the said false Deed of Conveyance.

Have these particulars of fraud been bourn out by the evidence presented by the Claimant in this case? Having examined all the evidence in this case, I find that none of the particulars of fraud have been established. Counsel for the Claimant has graciously and correctly conceded that the steep burden of proof of fraud has not been discharged by the evidence of the Claimant.

12. I accept as true the evidence of Mr. Patrick Polack that he had no reason to think that the signature on the conveyance was false, in light of the fact that he had paid valuable consideration for the land, he had a history of conducting real estate transactions with the ill fated Mr. Hislop, and the signature on the conveyance had been witnessed by a senior Justice of the Peace of Dangriga Town. Even after Mr. Zabaneh discovered the situation and brought the matter to Mr. Polack's attention, it was Mr. Zabaneh's responsibility to take immediate and appropriate action to set aside the conveyance and get back his property.

13. I also find that the Claimant failed to bring his action within the time period specified by the Statute of Limitations. According to Mr. Zabaneh's own testimony, he discovered the sale of his property in or around February 1998 or 1999 and armed with this knowledge he confronted Mr. Polack. Yet the evidence reveals that between 1999 and 2005, Mr. Zabaneh did absolutely nothing to get this situation rectified and get back his property. He was content to sit back quietly and rely on the assurances Mr. Polack allegedly

gave to him, and do nothing for over 7 years. Section 4 of the Limitation Act prevents actions based on tort being brought after six years have passed. Mr. Zabaneh has only himself to blame for failing to act in a timely manner after discovering this fraud. I adopt the reasoning in Counsel for the Defendant' s submission in citing the following passage from Halsbury's Laws of England(4th edition) Volume 12 at page 548 paragraph 1368:

“A plea of *non est factum* may be supported by proving that the deed is a forgery, the seal and signature of the party charged having been counterfeited. A deed, the signature or seal to which is forged, is a nullity; but *if* a man in whose name a deed is forged admits or represents the deed to be his, or keeps silent after discovery of the forgery, he may be estopped as against any person who had altered his position on the faith of the admission, representation or silence, from denying the deed to be his.”

14. Since I have decided this case on other grounds, there is no longer any need to consider the evidence of Ms. Marin, the Forensic Analyst. I will simply say that even if I were to find that her expert testimony was of assistance in convincing me that the signature on the conveyance is false, the fact remains that this matter is now barred by the Statute of Limitations because the Claimant waited too long to bring his matter to court.

15. I find that this particulars of fraud in this Claim have not been proven, the matter is statute barred and all relief sought by the Claimant is therefore denied.

16. Costs to the Defendant to be taxed or agreed.



MICHELLE ARANA
SUPREME COURT JUDGE

Dated this 4th day of November, 2008.