

**IN THE SENIOR COURTS OF BELIZE**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM No. CV 187 of 2023**

**BETWEEN:**

**[1] EMIL JOVANI REYNOSO**

Claimant/Applicant

**and**

**[1] MARIANO CHAN**

First Defendant

**[2] LEONOR CHAN**

Second Defendant

**[3] LA IMMACULADAD CREDIT UNION**

Third Defendant/Respondent

**Appearances:**

Mr. Oscar Sabido for the Claimant/ Applicant

Mr. Estevan Perrera for the Third Defendant/ Respondent

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2023: November 27;

2024: May 14

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**JUDGMENT**

**NOTICE OF APPLICATION FOR PERMISSION TO DISCONTINUE CLAIM**

**[1] Nabis J.:** The claimant has filed on 25<sup>th</sup> October 2023, "notice of for permission from the court to discontinue claim herein as against the third defendant where any party has given an undertaking to the court" hereinafter referred to as "the application".

- [2] After hearing both parties, the application is dismissed, there is no order as to costs and the matter will be listed for a case management conference.

### **BACKGROUND**

- [3] The claimant, Reynoso, filed his case against the defendants on 29<sup>th</sup> March 2023. Reynoso and the second defendant, Leonor, were married in 2009. The third defendant, the Credit Union, had advanced a loan to the first defendant, Mariano, for and on behalf of Reynoso in March 2013 in the sum of **Seventy-Three Thousand Two Hundred and Seventy-Eight Dollars and Twenty Cents (\$73,278.20)** with interest at a rate of **twelve per cent (12%) per annum** to purchase Parcel -538 Block 4 Trial Farm Registration Section (the property) with a building thereon to be registered in the name of Reynoso and Leonor as their matrimonial home. Mariano is the father of Leonor.
- [4] All transfer documents of the property were duly executed with Reynoso and Leonor as transferees and held in escrow by the Credit Union. Reynoso assumed responsibility for the loan and had paid monthly instalments since 2013. In 2015, despite the payments being made on schedule, the credit union requested that Reynoso sign a promissory note "*for and on behalf of Mariano Chan*" for the balance of monies owed. The Credit Union failed to register the transfer of the property and in March 2019 requested Reynoso to sign new documents which included Mariano as a transferee. Thereafter, Land Certificate LR 20190325 dated March 21<sup>st</sup>, 2019, was issued in the names of Mariano, Reynoso and Leonor.
- [5] In February 2021, the Credit Union registered a charge on the property with Mariano as the borrower and Mariano, Reynoso, and Leonor as Chargers and the Credit Union as Chargee to secure the payment of **Sixty-Three Thousand Dollars (\$63,000.00)** by Mariano.

- [6] In December 2021, Reynoso and Leonor divorced and the property was to be retained by Reynoso, free and clear from all rights, titles and claims by Leonor. In August 2021, Reynoso wrote to the Credit Union that Mariano was not legally entitled to be entered as a joint tenant and that Leonor had relinquished her rights. Reynoso temporarily discontinued making payments to the loan in December 2022 pending the outcome of the matter.
- [7] The Credit Union by letter dated January 6<sup>th</sup>, 2023, wrote to Reynoso, Leonor and Mariano demanding payment of the balance of the loan made to Mariano in 2021 and if the payments were not made, then the property would be sold, and all proceeds applied to the outstanding balance on the 2021 loan.
- [8] Reynoso, thereafter, sent letters to Mariano and Leonor demanding that they release their title and interest respectively in the property as they would benefit from the public auction of the property. Mariano and Leonor refused. Reynoso indicated his willingness to pay the balance of the loan by way of subrogation.
- [9] The Credit Union filed its defence on 3<sup>rd</sup> March 2023. Much of Reynoso's claim was denied. It was averred that the loan was made to Mariano as the primary borrower who was a member of the credit union and was primarily responsible for the loan. It was further put forward that at all times the transfer/ loan documents were to be in the name of all three Mariano, Reynoso and Leonor as borrowers. All three borrowers had responsibility for the loan repayment. It was further stated that in 2015, Mariano had fallen behind on payments and they all met with the Credit Union to restructure the loan, thus they all signed promissory notes at that time. It was further asserted that in 2019, when the property was transferred to all three of them, they had known it was to be in the capacity as joint tenants.
- [10] The Credit Union further maintained that it was always the intent that Mariano's name be included on the property title and that in fact, the loan balance was **Sixty-Six Thousand Eight Hundred and Twenty-Eight Dollars and Twenty-Six Cents**

**(\$66,828.26)** and not **Sixty-Three Thousand Dollars (\$63,000.00)** as avouched by Reynoso. The Credit Union further asserted that there exists no cause of action against it and its rights to auction the property is independent of the dispute between Reynoso and Mariano and Leonor. There was no legal basis for the injunction sought.

**[11]** Mariano and Leonor in their defence claimed that Mariano was the primary borrower on the loan as the claimant could not qualify for same. The loan was for an investment along with Leonor. The claimant was not a party to the loan and his name was only added because he agreed to pay 1/3 of the loan which he never did. It was pleaded that it was Mariano who had responsibility for the loan and that the money was used by Mariano and Leonor to improve the property. Much of the claimant's pleadings were denied, in essence, the first and second defendants averred that they had substantially serviced the loan with very little assistance from the claimant. They counterclaimed inter alia that the property was jointly owned by all three of them, that the property title be severed and that the property be sold and the balance to the Credit Union be paid.

**[12]** There were many pleadings to follow:

- Defence and Counterclaim of Mariano and Leonor on 4<sup>th</sup> May 2023.
- Reply to the defence of the Credit Union on 26<sup>th</sup> May 2023.
- Amended Claim Form and Statement of Case on 31<sup>st</sup> May 2023.
- Reply to the defence and counterclaim on Mariano and Leonor on 26<sup>th</sup> May 2023.
- Amended reply to defence and counterclaim of Mariano and Leonor on 31<sup>st</sup> May 2023.
- Second amended claim form and statement of case on 29<sup>th</sup> June 2023.
- Second amended reply to the defence and defence to counterclaim of Mariano and Leonor on 13<sup>th</sup> June 2023.

- Last amended claim form and statement of case on 6<sup>th</sup> July 2023.
- Last amended reply to the defence and defence to the counterclaim of Mariano and Leonor on 6<sup>th</sup> July 2023.

**[13]** The claimant also filed on 6<sup>th</sup> July 2023, a notice of application for an injunction against the Credit Union that they be restrained from selling the property by public auction or otherwise along with specific disclosure of certain documents relating to the loan. This injunction application was never heard by the court.

**[14]** At a case management conference held on 20<sup>th</sup> July 2023, there was an order for standard disclosure on or before 11<sup>th</sup> August 2023 and that parties were to return to court for further case management on 5<sup>th</sup> October 2023. The matter was also referred to mediation by Justice Chabot.

**[15]** On 18<sup>th</sup> October 2023, a Tomlin Order was presented to the court. Save for the Credit Union, the parties had reached an agreement at mediation. This in effect brought an end to the proceedings between Reynoso, Mariano and Leonor.

The consent order was as follows:

1. All proceedings in this claim, including the counterclaim, shall be stayed upon the terms set out in the Terms of Settlement in the abovementioned Schedule save for the purposes of carrying out the Terms of the Settlement into effect.
2. The claimant and the first and second defendants have the liberty to apply for the purpose of the enforcement of the said Terms of Settlement.
3. There shall be no order as to costs.

The claimant was asked by the court to indicate what course of action he would now be taking. He thereafter filed the instant application.

**[16]** This was followed immediately by the Credit Union filing a notice to strike out the claim against it on 25<sup>th</sup> October 2023 with the claimant filing an affidavit in opposition on 3<sup>rd</sup> November 2023. The strike-out application was heard on the same day as the instant application. The claimant has now withdrawn this notice by Notice of Withdrawal dated 16<sup>th</sup> April 2024.

**[17]** The two applications were scheduled for hearing on the same day, 9<sup>th</sup> November 2023, thereafter, Counsel for both parties appeared before me on 27<sup>th</sup> November 2023 to listen to the recording of the case management conference before Justice Chabot which was held on 20<sup>th</sup> July 2023.

**[18] ISSUES:**

- (i) Whether there were undertakings made to the court by the claimant and the Credit Union?
- (ii) Does the claimant require the court's permission to discontinue the claim against the Credit Union?
- (iii) Whether the claimant is entitled to discontinue with no order as to costs?

**PERMISSION TO DISCONTINUE**

**[19]** The **Civil Proceeding Rules (CPR)** provide the following regarding a discontinuance:

*"37.2 (1) The general rule is that a claimant may discontinue all or part of his claim without the permission of the court.*

*(2) However –*

*(a) a claimant needs permission from the court if he wishes to discontinue all or part of a claim in relation to which –*

*(i) the court has granted an interim injunction; or*

*(ii) any party has given an undertaking to the court;*

37.3 (1) *To discontinue proceedings or any part of proceedings, a party must-*  
*(a) serve a notice of discontinuance on every other party to the proceedings; and*

37.5 (1) *Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant under Rule 37.3(l)(a).*

(2) *The proceedings are brought to an end as against that defendant on that date.*

(3) *However, this does not affect –*

*(a) the right of the defendant under Rule 37.4 to apply to have the notice of discontinuance set aside; or*

*(b) any proceedings relating to costs.*

37.6(1) *Unless –*

*(a) the parties agree; or*

*(b) the court orders otherwise,*

*a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued incurred on or before the date on which notice of discontinuance was served.*

## **THE APPLICATION**

[20] The Application for permission to discontinue was supported by the affidavit of Reynoso on even date. The Application is made pursuant to **CPR 37.2(2)(a)(ii)** for the following orders:

1. That the Claimant/Applicant be granted permission to discontinue the claim herein against the Third Defendant [LICU].

2. That the notice of discontinuance which as per Rule 37.3(4) must contain details of the order by which the Court gave permission be filed and served on every Defendant within twenty-four (24) hours after the order of the Court is perfected.
3. That in granting permission to discontinue against the LICU, the Court waive liability for costs in accordance with Rule 37.6(1)(b) based on agreements/undertakings made by all parties at the case management hearings on July 20<sup>th</sup>, 2023.
4. That further or other relief as this Honourable Court deems just be granted.

Reynoso, thereafter, filed a second affidavit in support of the Application on 8<sup>th</sup> July 2023. The Credit Union filed an affidavit of Yadelí Urbina, its general manager in response to the application on 3<sup>rd</sup> November 2023.

### **CLAIMANT'S ARGUMENTS**

[21] The claimant bases his application on what occurred at a case management conference on July 20<sup>th</sup>, 2023, and on his own pleadings. At this CMC, the Judge ordered standard disclosure and the matter was also referred to mediation. The claimant alleges that he made an undertaking to pay off the loan and that the Credit Union undertook not to actively sell the property if the loan balance was paid off. In his affidavit, the claimant stated that there was a serious breach of the agreement by the Credit Union not to register Mariano on the title for the property. The Claimant deposed as follows:

*"11. The response from LICU's Counsel was once the Claimant pays off the balance of the debt to the LICU there is no sale and if there is a payoff, it is fine, no costs, there will be no need to be here, but "that there will be cost implications if the Claimant holds us here until the end of the matter".*



12. *LICU's attorney further stated that he has not yet filed his application to strike out because he is waiting pleading to close, waiting for LICU to be paid off, then the matter will be strictly between the Claimant and the First and Second Defendants."*

He further deposed:

- "15. *My attorney told the Court that I make a clear undertaking in paragraph 19 of my Statement of Claim and paragraph 46 of my application for an injunction to pay off the outstanding balance of about \$25,000.00 owed to the LICU under the charge and that there is agreement from my side that based on my understanding there is an agreement with the Court's suggestion that there is no need to deal with my application in a formal manner that will incur costs and time needlessly as the Court suggests.*
17. *The Court asked counsel for the LICU if the LICU's position was that if the Claimant paid off the balance of the debt, the true issue is then only between the Claimant and the First and Second Defendants.*
18. *"Counsel for LICU responded that if the Claimant or the First and Second Defendant paid, there would be no sale and that the LICU had nothing to do with the dispute between the parties and that LICU has not filed its application to strike out yet to see if the parties will arrange payment. It is to be noted that the application to strike out was never filed and no costs were incurred."*

[22] The claimant argued in support of the application that the Credit Union failed to assist the court in meeting the requirements of the overriding objective. The claimant also referred to **CPR 25.1(c)** where the parties are to utilise means of resolving the matters including mediation. The Credit Union was accused of not adhering to the court order regarding mediation as the Tomlin Order was not signed by the Credit Union. Counsel argues that the claim was one of subrogation of the parties for the benefit of the claimant to have the proceeds of the sale based on his contribution to the loan. The discontinuance resulted from this; it was as a result of the settlement rather than a claimant changing his mind for no good reason. The claimant suggested that the Credit Union had misapplied **CPR 37.6(1)** and that to apply that rule would be unfair. It was argued that given the facts of the matter, it was not a simple application of **CPR 37.6(1)** and that the court had the power to rule otherwise.

### THIRD DEFENDANT'S ARGUMENTS

- [23] The Credit Union in response set out misconceptions of the claimant. The Credit Union argued that the case had not been closed and that mediation was voluntary and not mandatory. The Credit Union suggested that the claimant has failed to recognise that costs can be awarded at different stages of litigation and that there are cost implications with the filing of more pleadings and applications. It was suggested that the claimant was of the view that because the Tomlin Order was signed by Reynoso, Mariano and Leonor, the Credit Union had to approve it also and lastly that it needed permission to discontinue.
- [24] Counsel for the Credit Union submitted that the application should be struck out and that the court should make the appropriate cost order associated with it. He argued that there was no undertaking to the court and that none exists and that the instant application is a waste of time. It is the Credit Union's position that there is no discontinuance and the claim and issues between the claimant and the Credit Union are alive. Furthermore, **CPR 37.6** is not an issue as the matter remains not discontinued.
- [25] The Credit Union filed the affidavit of Yadeli Urbina in response to the instant application. It was deposed as follows:
- “3.....
- (b) *There exists no “undertaking” to the court by any of the parties. None of the parties said to the court that their client gives any specific undertaking to the court. Being ordered to go to mediation is not an “undertaking”.*
- (c) *There exists no “undertaking” as to costs from any of the parties to the court. The issue of cost has yet to arise before the Honourable Court.*
4. *The Third Defendant merely informed the court that if the borrowers (the Claimant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) paid the monthly loan payments, then the Credit Union would not need to enforce the sale of*

*the property under and by virtue of the charge documents. The Third Defendant also informed the court that the property was no longer up for sale since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants visited their offices and made good on the requisite monthly payments.*

5. *The Claimant fails to appreciate that it filed a claim against the Third Defendant in the High Court of Belize wherein it raised some very serious accusations against the Credit Union.....”.*

## **DISCUSSION**

[26] The claim against the Credit Union was for injunctive relief that the property not be sold by way of public auction or otherwise and as counsel had indicated in court for the production of certain documents. The Credit Union pleaded in its defence that there was no cause of action against it. The issues in the matter had been between Reynoso, the claimant and the first and second defendants, Mariano and Leonor. This had been determined at the mediation. There was no order as to costs in the Tomlin Order and the Mediation Order had not been signed by the Credit Union. The claimant made heavy weather of the Credit Union's non-participation in the mediation. The Court gave an order for parties to go to mediation upon an agreement by the parties. The claimant's view is that when the third defendant did not conclude the mediation process meant it was defying a court order. I do not agree, mediation is voluntary as per the CPR and in any event during the mediation process itself, a court cannot mandate that the parties reach a settlement. It is my view that the Credit Union did not conclude the mediation process as the other parties had agreed to no costs. The Credit Union was made a party to this matter when the true issues were between the other parties. I have already stated on what basis the claimant joined the Credit Union.

[27] The crux of the application was whether there was an undertaking by any party at the CMC on 20<sup>th</sup> July 2023.

## CONCLUSION

[28] I do not accept that any undertaking was made to the court. The claimant indicated a willingness to pay the outstanding monies owed on the loan, which was in fact done by the other parties. The Credit Union's only real interest was to have the loan paid and it was agreed that once the loan was up to date that there would be no sale. In my view, these are not undertakings to the court and were not embodied in a court order in any event. This is a fact. I even had the benefit of listening to the recording of the CMC before Justice Chabot. Thus, I have no alternative but to hold that permission is not required to discontinue against the Credit Union despite the valiant attempts by counsel for the claimant. This disposes of issues (i) and (ii), and as a result, I do not have to deal with issue (iii). The application is therefore dismissed. I had also heard the application by the Credit Union to strike out the claim against it, and this was subsequently withdrawn as a result each party must bear its own costs. I am yet to be convinced that there is any live issue between these parties. However, the matter has not been discontinued as of now. I will therefore fix a date for case management for the parties.

## DISPOSITION

[29] It is hereby ordered:

1. The application for permission to discontinue the claim is dismissed.
2. Each party is to bear its own costs.



Nadine Nabie

High Court Judge