COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Appeal Division

App/Mag/00015/2018

Between:

BASIL BOWE

APPELLANT

VS

P.G.F. REALTY LIMITED

RESPONDENT

BEFORE: The Honourable Mr. Justice Gregory Hilton

APPEARANCE: Elvis Hanna for Appellant

Vincent Peet for the Respondent

Hearing Dates: 22nd January 2019

Decision

HILTON, J.,

1. This is an Appeal from the decision of the Stipendiary and Circuit Magistrate Samuel Mckinney handed down on the 25th April 2018 revolving around an aborted real estate transaction.

2. In the Magistrate Court civil trial the Appellant / Plaintiff (as Purchaser) had sought the return of his deposit of $4,500.00 which was held by the Respondent/ 1st Defendant (a real estate broker) on behalf of Basil Poitier and Sabrina Poitier (the 2nd and 3rd Defendants as vendors).

3. The Appellant claimed that the deposit should have been returned to him as he had always been ready, willing and able to compete the transaction, and that, the 2nd and 3rd Defendants had not produced a good and marketable title to the property the subject of the real estate transaction which was the cause of the transaction being aborted.

4. The 2nd and 3rd Defendants asserted that clear title was provided and to certify this took out title insurance to guarantee clear title. They further asserted that after a lengthy delay and giving notice to complete the Appellant / Plaintiff was not in a position to do so.

5. The salient part of the Magistrate's decision is set out below:

> In the court's view, the plaintiff failed to establish that the defendants were unable to produce clear title to the property specified in the Agreement. There were means open to the plaintiff to establish his claim, but for whatever reasons, the plaintiff did not rely on such means to prove his case to the requisite standard.
>
> The Defendant assert that for almost one year after making the deposit and signing the Agreement, the plaintiff failed to finalize the transaction. In an e-mail introduced into evidence by the plaintiff and marked

exhibit BB-3, the plaintiff's attorney representing him in the transaction, seemed to doubt that the plaintiff, her client, was interested in completing the sale or had the financial capability of satisfying the lending institution that he could service the loan.

The tone of the plaintiff in writing to his counsel seemed to suggest anxiety and frustration on the part of the plaintiff. He wrote the following to his attorney representing him in the purchase of the property **"Its not me and the bank that is refusing the loan, it's the seller. The assue is completely immaterial and irrelevant".** The plaintiff seemed to relying on asue payment to make a decision on going forward with the transaction.

Having considered the evidence in this case in its totality, the court finds that on the preponderance of the evidence and balance of probability the plaintiff was the one, who breached the Agreement by not being willing and able to compete the purchase of the property specified in the Agreement.

By signing the "Agreement" the plaintiff accepts the forfeiture of his deposit should he be found at fault for not competing the transaction, when called upon to do so.

The plaintiff's action for the recovery of four thousand five hundred dollars, amount of deposit, is dismissed with the cost to the defendants in the amount of five hundred dollars.

Plaintiff advised of his right to appeal the decision of this court to a Judge in the Supreme Court within seven days from today's date. Plaintiff is to enter in to bond condition to prosecute his appeal to completion and abide by the decision of the court appealed to.

6. In his Notice of Appeal the Appellant set out the following:

"THE APPEAL IS BASED IN THE FOLLOWING ISSUESS:-

(I) The said Order of the Stipendiary and Circuit Magistrate be set aside because the owners of the property could not produce a clear and marketable title for the said property;

(ii) The issue of an A-sue was not relevant to this matter because the Appellant had already been approved for the mortgage of the property when this purported issue was raised and the Appellant was only awaiting the assurance of a clear and marketable title to the said property in order to conclude the sale.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are that:-

(i) The issue of a clear and marketable title was not concluded when the issue of an A-sue was allegedly purposed by the Appellant.

(ii) The issue of a clear title has not been resolved to date; and

(iii) As a result the learned Magistrate erred in facts and in Law when he concluded as he did.

7. The Appellant's substantive submission (as far as I can glean from his written submissions) is that the Magistrate should not have taken into consideration a "WITHOUT PREJUDICE" Letter dated 11th September 2017 addressed to the Appellant from the Lawyers and "cc" to the 1st Defendant / Respondent which raised issue of the Appellant being in an A-sue which prevented the Appellant from servicing the prospective bank

loan/Mortgage until September 2017 (some three months after the deadline in the notice to complete).

8. For the purpose of this appeal I now set out the contents of that letter:

Dear Mr. Hanna:

Re: Lot #5, Pride Estates
Oswald and Sabrina Poitier to Basil Randolph Bowe

We Write further to your letter dated June, 2017, received on the 9th June, 2017 as well as a teleconference between yourself and the undersigned on the 9th June, 2017 (Hanna/Butler).

As discussed, please note that his matter is not a classic case where the Purchaser, Mr. Basil Bowe, was unsuccessful in obtaining financing and therefore entitled to the return of his deposit.

We received instructions from CIBC First Caribbean International Bank on the 24th June, 2016 confirming that Mr. Bowe had qualified for financing to complete the purchase and obtain a mortgage over the subject property. Further to our examination on title on behalf of Mr. Bowe, several requisitions were raised with the Vendor's attorney to which we did not receive a satisfactory answer. We were therefore forced to prepare a qualified Opinion on Title and submitted the same to the bank.

On the basis that the Vendors did not provide clear title to the subject property, the bank was of the view that title insurance over the property was needed. Mr. Bowe advised that he was not willing to cover the cost of the title insurance but that the same should be the responsibility of the vendors. We concurred with his position and further to his instructions; we wrote the Vendors' attorney and advised that Mr. Bowe was only

prepared to move forward with the transaction if the Vendors agree to cover the costs of obtaining title insurance. We would have obtained several insurance quotations and provided them to the bank as well as the Vendors' attorney.

The Vendors attorney wrote back to us refusing to cover the cost for the insurance and insisting that they have good title. In an effort to complete the transaction on Mr. Bowe's behalf, we communicated on several occasions with the Vendors attorney and were able to persuade them to take full responsibility for the payment of the title insurance. Subsequently, there was an understanding between the parties that the sale would successfully proceed to closure given the facts that the Vendors were prepared to pay for the title insurance.

However, we were advised by the loans officer that Mr. Bowe had entered into a financial commitment, i.e an "assue", which would prevent him from servicing the mortgage until September of 2017. This position was confirmed by Mr. Bowe during a teleconference. This came as a complete surprise to us given that Mr. Bowe knew that the sale was near closure and the impending mortgage had to be serviced.

On this basis, we advised Mr. Bowe that it is highly unlikely that the Vendors will be prepared to wait such a long period of time, especially since there was an agreement between the parties that the sale would close if the Vendors cover costs for title insurance. We explained to Mr. Bowe that he was at risk of losing his deposit because he had reneged on his commitment to compete the sale.

Nonetheless, we wrote to the Vendor's attorney, Mr. Phillip Mckenzie and requested the return of the deposit. In response to our letter, Mr. Mckenzie advised that the Vendors were prepared to cover costs for title insurance by Mr. Bowe. Under the circumstances, the Vendors were not prepared to return the deposit.

Yours faithfully,
CHANCELLORS CHAMBERS

9. I do not accept that the learned Magistrate was precluded from taking into consideration the contents of the "WITHOUT PREJUDICE" Letter as additional evidence was presented by way of email from the Appellant to the Appellant's then attorney dated 24th January 2017 which stated as follows:

> **From:** Randy Bowe [mailto:randybowe85hotmail.com]
> **Sent:** Tuesday, January 24, 2017 11:19 a.m.
> **To:** Velma Miller; Eugeina T. Butler
> **Subject:** Property Sale
>
> Hi Ms. Miller,
>
> I just got a call from C. Deal on the property sale that the seller agreed to absorb the cost. I just wanted to emphasize for you'll to please feel free to take your time. I wouldn't be in a comfortable position to assume the loan until about August 2017 (or maybe even later), as I am trying to repay a large assue.
>
> So please feel free to let me know when everything is sorted out, I won't move until I hear from you.
>
> Thanks

10. I am of the view that the learned Magistrate did not err in Law and addressed his mind to the burden and standard of proof appropriately when considering the facts which were presented at the trial.

11. As a consequence I find that the Appeal is without merit and it is dismissed with costs to the Respondent.

12. The Deposit is to be forfeited to the Vendors.

Dated the 31st January 2019

The Hon. Mr. Justice Gregory Hilton