

IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. 767 OF 2021

BETWEEN:

FRANK ALEXANDER EILEY

Claimant

AND

ALEX NUNEZ

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Trial Date: 6 June, 2023

Submissions: 21 June, 2023 and 05 July, 2023

Delivery date: 30 August, 2023

APPEARANCES:

Mr. Oscar Selgado, Counsel for the Claimant

Mr. Estevan Perera, Counsel for the Defendant

JUDGMENT

INTRODUCTION

1. The claimant ("Frank Eiley") is a businessman from San Pedro Town, Ambergris Caye, Belize. The defendant ("Alex Nunez") is a teacher at the San Pedro High School. Frank Eiley filed a claim against Alex Nunez dated 26

November, 2021 to recover the sum of BZ\$104,212 plus interest and costs for breach of a sale agreement (“the agreement”).

2. I dismiss the claim for several reasons. Frank Eiley simply failed to prove his case. I find that the evidence before the court did not establish the existence of any agreement between the parties for the sale of registered land. Having failed to prove that there was an agreement in existence, Frank Eiley was unable to prove a breach of it. I find also that Frank Eiley is not entitled to recover the sum of BZ\$104,212 as claimed. A person who makes a claim must be able to prove it, whether in whole or in part, and having failed to do so Alex Nunez is entitled to his costs of the proceedings.

FACTS

3. Frank Eiley claims that on 8 December, 2019 Alex Nunez visited him at his establishment in San Pedro Town and, in the presence of his son-in-law, Jaime Rodriguez, offered to sell him two parcels of land viz. Parcel 8691 Block 7 and Parcel 8505 Block 7, both located in the San Pedro Town Registration Area, Belize (together “the specified parcels”). During January 2020 to July 2020, Frank Eiley commenced making payments directly to Alex Nunez or one Jorge Aldana in fulfilment of the terms of the agreement. He claims that Jorge Aldana received several payments on behalf of Alex Nunez. Frank Eiley provided receipts evidencing all sums paid to Alex Nunez.
4. Frank Eiley alleges that despite receiving all the payments, Alex Nunez failed and/or refused to transfer ownership of the properties to him. Frank Eiley states, further, that Jaime Rodriguez eventually purchased one of the parcels (i.e. Parcel 8691 Block) through another source and obtained proper transfer

of title to the land, which was annexed to the pleadings. No other detail of this transaction was given in the pleadings.

5. Alex Nunez filed a defence and counterclaim on 11 January, 2022 denying the claim. He asserts that there was no agreement, written or oral, between the parties. Alex Nunez alleges in his defence that he neither offered to sell nor entered into any agreement for the sale of any properties with Frank Eiley. In particular, he states that he was not involved in any agreement or dealings made between one Jorge Aldana and Frank Eiley. Jorge Aldana did not work for nor was he authorized to act on behalf of Alex Nunez. Alex Nunez admits only that Frank Eiley paid him the sum of BZ\$10,200 to visit the land department on the mainland Belize, on a number of occasions, to secure a purchase price from the Government of Belize for the specified parcels.
6. In his reply, Frank Eiley maintained that the parties had entered a sale agreement for the specified parcels but conceded that Alex Nunez was not involved in any arrangements that Frank Eiley had with Jorge Aldana. Frank Eiley conceded also that Jorge Aldana did not work for nor was he authorized to act on behalf of Alex Nunez.
7. Despite the concessions and/or admissions, Frank Eiley did not file an amended claim but proceeded to trial on the pleadings as filed. At the trial, counsel made an oral attempt to correct the sum claimed as damages, based on the reply.

ISSUES

8. The issues that arise for determination at trial are as follows:

- i. Whether a sale agreement existed between Frank Eiley and Alex Nunez?
- ii. If yes, whether Alex Nunez breached the agreement?
- iii. Whether Frank Eiley sufficiently proved his damages?
- iv. Whether Frank Eiley's reply to the defence constitutes an effective amendment of the claim?

SUBMISSIONS BY PARTIES

9. Counsel for Frank Eiley submits that Frank Eiley was relying on common law rules to enforce his contract with Alex Nunez. He advances that, at common law, there are two types of contracts that are enforceable – contract by deed and simple contract. A simple contract may be in writing, orally or by conduct. Counsel for Frank Eiley argues that the claim is made pursuant to the existence of a simple contract and the evidence has satisfied the three main elements of the contract. Counsel submits, further, that this is the most cogent issue for determination by the court. He maintains that Frank Eiley has established by his evidence that the parties entered a simple contract for the sale of land.

10. Counsel for Frank Eiley also submits that the absence of a written agreement is not a point in contention between the parties, as Frank Eiley is relying on a verbal agreement. Counsel argues that the court ought, therefore, to accept that there was part performance of the contract by Alex Nunez, who admits to accepting BZ\$10,200 to secure the purchase price for the two parcels. Frank Eiley's counsel argues, further, that this part payment is evidence of a wider agreement for the sale of land by Alex Nunez to Frank Eiley "*since no one would ordinarily pay that large sum of money simply to have a man go from San Pedro to Belmopan to ask for the purchase price of two parcels of*

land."¹ He advances that Frank Eiley knew Alex Nunez for over twenty years so this is evidence that, "*the Claimant would never bring a malicious claim against someone he knew for that long period of time.*"²

11. In opposition, counsel for Alex Nunez submits that Alex Nunez did not offer to sell nor did he enter into any sale agreement for the specified properties with Frank Eiley. In fact, the legal requirements³ to constitute a valid contract did not exist. Frank Eiley's case was completely disproved by Alex Nunez who testified to the fact that he never entered into such an agreement with Frank Eiley. Counsel argues, also, that Alex Nunez was not involved in any dealings made by Frank Eiley and Jorge Aldana; he did not authorize it and Jorge Aldana did not work for him. He submits that Frank Eiley has advanced no evidence of the existence or breach of any sale agreement. Frank Eiley also failed to provide evidence that he paid Alex Nunez monies to sell him the specified properties.

ANALYSIS

Whether a sale agreement existed between Frank Eiley and Alex Nunez and if so, did Alex Nunez breach the agreement?

12. The first and second issues are interrelated so they can conveniently be disposed of together.
13. Frank Eiley's pleaded case was that Alex Nunez visited him at his place of business in San Pedro on 8 December, 2019 and offered to sell him the specified parcels for BZ\$50,000 each. The agreement was made orally. He made several payments by instalments to the defendant but titles to the

¹ Submissions of claimant page 3

² Ibid page 6

³ Halsbury's Laws of England Volume 22 (2019)

specified parcels were never transferred in his name. He claims he is entitled to recover the specified sum of BZ\$104,212 which includes interest and administrative costs. His claim is short on details.

14. To obtain the remedy sought, Frank Eiley must prove the existence of a valid sale agreement; that there was a breach; and the amount recoverable in damages.

15. At the trial, Frank Eiley advanced no evidence of an agreement between the parties. He provided several unsigned receipts and some WhatsApp messages that were not admitted into evidence for the truth of their contents. Frank Eiley, in fact, did not provide a witness statement for himself but relied on two affidavits and a witness statement filed by: (i) Jaime Rodriguez (his son-in-law and business partner); (ii) a justice of the peace; and (i) a police officer respectively. His witnesses either gave evidence of the alleged payments to Alex Nunez or of the existence of WhatsApp messages between the parties, purportedly about the non-performance of an agreement. Additionally, the alleged witness who was present at the time of the oral agreement (Jaime Rodriguez) provided an affidavit that was silent about the existence of the agreement. Instead, Jaime Rodriguez's affidavit focused solely on having witnessed several alleged payments made to Alex Nunez without giving a proper context.

16. I refuse the suggestion of counsel for Frank Eiley that the witnessing of these payments sufficed to show offer and acceptance to constitute a valid contract for sale of registered land. I also refuse to accept as cogent evidence the several unsigned receipts that did not connect the payments to Alex Nunez. Frank Eiley's witnesses could not or did not speak to the existence of the agreement. Their evidence fell far short of being helpful to determine the issues before the court.

17. Moreover, the specified parcels are registered lands, whose disposition is governed by the Registered Land Act (“RLA”).⁴ Section 40(2) of the RLA requires contracts for the sale of registered land to be in *writing*. An unregistered written contract can be enforceable as a contract but an unwritten contract is not enforceable.

*40.-(2) Nothing in this section shall be construed as preventing any unregistered instrument from operation as a contract, but **no action may be brought upon any contract for the disposition of land or any interest unless the contract upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person lawfully authorised by him.***

Provided that such a contract shall not be unenforceable by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract—

(a) has in part performance of the contract taken possession of the property or any part thereof; or

(b) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. [Emphasis added]

18. The RLA is clear that the absence of writing, alone, shall not make the unregistered contract unenforceable. Thus, an unregistered written contract

⁴ RLA Cap.194 sections 40 (1)

can be enforceable as a contract but an unwritten contract is not enforceable, unless the intended purchaser has possession⁵ of the property.

19. The fact that the specified parcels are registered lands, for which there is no written agreement and with respect to which Frank Eiley made no claim as to possession, was not addressed by the parties. There was no written sale agreement and Frank Eiley gave no evidence at trial either through himself or his witnesses of an oral agreement with possession. He thus failed to show how the alleged unwritten contract for the specified parcels of land, as registered properties governed under the RLA, was actionable within the statutory framework. In my view, the arguments of counsel for Frank Eiley that sought to rely on the long standing relationship between Frank Eiley and Alex Nunez, as justification for the absence of an agreement in writing, are incapable of establishing the existence of a valid oral agreement or its breach.

20. The oral agreement is required to be proved by reliable and admissible evidence and must conform to the framework of the RLA. Section 40 (1) states:

“No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every disposal of such land ... otherwise than in accordance with this Act shall be incapable of creating, extinguishing, transferring, varying or affecting any estate, right or interest in the land ...”

⁵ Under section 40(2) possession of the whole or part of the property, in part performance of the contract or continuing possession in part performance, or some act done in furtherance of the contract, will suffice to make it enforceable even in the absence of a written contract

21. Further, under section 41(1) (a) & (b) of the RLA, the onus is placed on the person proposing to deal with owners of registered land, *“to investigate or ascertain the circumstances in or consideration for which such proprietor or any previous proprietor was registered or the manner in which any such consideration or part thereof was utilised; or to search the register kept under the General Registry Act.”* Based on Frank Eiley’s evidence, these steps were not done by him.

22. Frank Eiley relies on an unwritten contract under the common law, whilst ignoring the statutory framework. In any event, the pleading of an offer by Alex Nunez for the specified parcels for BZ\$50,000 each in the presence of Jaime Rodriguez was not substantiated by any evidence. The affidavit evidence of Jaime Rodriguez was bare of any details of the oral contract between the parties and/or about any discussions in 2019 between the parties about the sale of the specified parcels or of any terms, conditions or details of the alleged agreement. Jaime Rodriguez gave no evidence that he was even a witness to Frank Eiley and Alex Nunez entering into the verbal agreement.

23. During cross-examination, Jaime Rodriguez confirmed that he did not supply any evidence of the existence of the sale agreement or its breach:

Q: Mr. Rodriguez, the claimant’s claim is that there existed a Sales Agreement between the parties in the year 2019 but please tell this Court that your affidavit doesn’t speak to the year 2019. Your affidavit starts with 6th January, 2020, correct?

A: That is what it says there, yes

Q: Your affidavit does not speak to any discussion or incidents which took place in the year 2019, correct? Can you look at your affidavit?

A: Can you rephrase?

Q: Your affidavit that's before you doesn't speak to anything in respect to any discussions which took place in the year 2019, correct?

A: No, sir. If it is not there, then no.

Q: Tell this Court whether or not you have attached any written sale agreement to your witness statement, your affidavit.

A: If I attached a written agreement?

Q: Yes, to your affidavit, tell us whether or not you did so sir.

A: I did not.

Q: Tell this Court whether or not in your affidavit you spoke of any parcel numbers for any property. ...

A: No, sir.

.....

Q: Tell this Court whether or not in your affidavit you spoke of any parcel numbers being sold.

A: The one here does not state any parcel number.

Q: And it doesn't speak of any parcel number being sold?

A: In my affidavit, no.

Q: Tell this Court whether in your affidavit you spoke about any closing date.

A: We never had any closing date.

.....

Q: ... tell this Court whether or not you mention a purchase price for a first parcel.

A: No.

Q: Tell the Court whether or not you spoke of a purchase price of a second parcel.

A: No.

Q: Tell this Court whether or not in your affidavit you spoke about a date when an agreement was entered into.

A: I have here the 6th of January was the first payment.

Q: I am not asking you that; answer my question ... [did] your affidavit mention the date of any agreement entered into?

A: No, sir.

24. As a witness, Jaime Rodriguez was unhelpful. He failed to assist the court in making a finding of liability for breach of contract. Similarly, Pedro Vasquez, a justice of the peace and stepfather of Jaime Rodriguez, provided unhelpful evidence to the case of Frank Eiley. During cross-examination, Pedro Vasquez confirmed that his affidavit gave no evidence of the sale agreement and that the cash vouchers certified by him did not contain Alex Nunez's signature. He could not explain why the wording of his affidavit was identical to that of his stepson, Jaime Rodriguez, but maintained that he did not copy or see Jaime Rodriguez's evidence. He seemed confused by the contents of his affidavit and some of the terminologies used and displayed a genuine disconnect between its contents and what he remembered. As a witness, he inspired no confidence in the believability of his evidence.

25. Counsel for Frank Eiley asks the court to ignore the deficiencies and draw an inference from the evidence of these two witnesses that they had witnessed payments made towards the purchase of the specified parcels of land. He advances that these payments are sufficient to establish that there was an offer and acceptance between the parties.

26. I am not satisfied that these witnesses were reliable or produced evidence to substantiate the existence or breach of any unwritten agreement. Their evidence was silent on any offer or acceptance between the parties. If anything, the evidence was thin on details of contractual dates, including the usual information on closing timelines, schedules delineating boundaries and/or other pertinent terms of such agreements. The evidence of both Jaime

Rodriguez and Pedro Vasquez fell far short of proving that an offer or acceptance occurred between the parties. In my judgment, Frank Eiley mounted an evidentiary weak case that did not satisfy the requirements of a valid contract.

27. The evidence as to consideration, also, was not proved at trial. There was evidence by Jaime Rodriguez and his stepfather Pedro Vasquez of consideration being passed, including by unsigned and unsubstantiated cash vouchers. Counsel for Frank Eiley submits that at least seven of these payments amounting to BZ\$65,200 ought, on a balance of probabilities, to be accepted as consideration for the purchase of the properties. There was no justification put forward to convince the court that it ought to adopt this position. Counsel's arguments were not accepted.

28. I find it hard to believe that these witnesses, who allegedly witnessed the regular payments of such substantial sums to Alex Nunez, would not once query the lack of signature by Alex Nunez evidencing receipt of the monies. These witnesses both approached the court without attaching vouchers to their affidavits, or giving any explanation as to why fairly substantial sums, as large as BZ\$22,500 and BZ\$10,000, were not signed as being received by Alex Nunez.

29. I also considered Alex Nunez's admission of receiving a payment of BZ\$10,200 from Frank Eiley for travelling on several occasions to secure a purchase price for the specified parcels. I was not convinced as to the veracity of this evidence of Alex Nunez. However, counsel for Frank Eiley, who questioned the logic of this assertion that Frank Eiley would pay such a large sum to secure a price at which he could buy the properties, provided no proper evidence to discredit Alex Nunez's case. Alex Nunez's claim that the alleged

payment of BZ\$10,200 was not towards the sale of the specified parcels to Frank Eiley but for a different purpose was not disproved.

30. I considered next whether there was any evidence of intention to create legal relations between Frank Eiley and Alex Nunez. Frank Eiley relies on WhatsApp conversations between the parties about the non-performance of an unidentified agreement to prove that the parties intended to create legal relations. Corporal Keron Cunningham gave evidence of the WhatsApp messages passing between the parties. These messages were allowed into evidence to prove that they existed and not for the truth of their contents. The communication did not mention any relevant details about the alleged agreement, such as to identify it as the agreement engaged in these proceedings, nor was the consideration paid by Frank Eiley specified therein. If anything, the messages vaguely referred to outstanding monies and contained threats about what will occur if not returned. The messages did not even identify the outstanding sums allegedly due to Frank Eiley.

31. During cross-examination, Corporal Cunningham stated that he had no personal knowledge of the agreement, its breach or of the truth of the messages passing between the parties. His evidence did not help Frank Eiley's case.

32. In my view, Frank Eiley is unable to rely on the evidence of Corporal Cunningham or any of his other witnesses to prove that the parties had entered into a valid agreement, containing an offer, acceptance, consideration and intention to create legal relations. There was no evidence of part performance of the unwritten agreement or that Frank Eiley was in possession of the specified parcels of land. In fact, by the time the claim was

filed, Frank Eiley's son in law, Jaime Rodriguez, had bought one of the parcels of land and obtained proper title from its owner.

33. In my judgment, Frank Eiley has failed to prove the existence or breach of any agreement between the parties. Moreover, he did not discredit the evidence of Alex Nunez nor did he satisfy me that Alex Nunez's evidence ought to be rejected. The evidence simply did not support a finding of liability for breach of any agreement.

If a sale agreement existed, did Frank Eiley sufficiently prove his damages?

34. Having found that Frank Eiley has failed to prove the existence of any agreement or its breach, this third issue of proof need not be addressed. For the sake of completion only, and because the bulk of the evidence in this matter consisted of an attempt to prove damages, I will briefly address the issue of damages.

35. The jurisprudence is clear that to justify a claim for an award of substantial damages, Frank Eiley must prove both the *fact* of the damages and its *amount*. If by the end of the trial, the court is not satisfied of either limb, Frank Eiley's action may fail or, at most, he will get nominal damages where his right has been infringed.⁶

36. At the close of pleadings, Frank Eiley by his reply had adjusted the amounts paid to Alex Nunez to approximately BZ\$65,200 but did not file an amended claim. At trial, Frank Eiley did not give evidence and none of his witnesses attached the cash vouchers to their affidavits. In any event, the receipts and/or vouchers were unsigned by Alex Nunez. The case of Frank Eiley for damages was unproved.

⁶ McGregor on Damages page 325 para. 8

Whether Frank Eiley's reply to the defence constitutes an effective amendment of the claim?

37. For guidance, I will address the last issue of amendment. The law requires that pleadings are to be amended to maintain the integrity of the claim and so leave no doubt in the mind of those who must answer the case. The procedure for making amendments is straightforward and well-traversed.⁷
38. At the trial, counsel for Frank Eiley contended that having filed a reply to the defence, Frank Eiley's claim was sufficiently amended. Frank Eiley's reply conceded that Alex Nunez was not involved with nor had Alex Nunez authorized payments to be made to Jorge Aldana. It could be inferred that this admission meant that the claim was reduced.
39. It was assumed that having failed to make an application for an amendment, Frank Eiley expected Alex Nunez to do the mathematical adjustments to know the case Alex Nunez has to meet, post filing of the reply. This is not how the rules were intended to operate in the civil jurisdiction. This approach certainly militates against the overriding objective of dealing with cases justly, and in a way that will save time and resources and promote efficiency in litigation. A reply is not an amendment; it serves a different purpose and the terms cannot be substituted for each other or be used interchangeably.
40. The CPR require that a claim be set out briefly and facilitate amendments whether by consent or application. The Rules do not encourage the approach of a claimant who refuses to properly amend his claim. Moreover, the fact that Alex Nunez does not object to the failure to amend is not a licence to Frank Eiley to disregard the practice and procedure of the civil court.⁸ Frank

⁷ Zuckerman on Civil Procedure page 230 para. 6.31

⁸ *Tchenguiz and others v Grant Thornton LLP and others* [2015] QBD 961 or [2015] EWHC 405

Eiley's approach, in this matter, does not further the overriding objective of delivering swift justice to all concerned. A claimant must by his pleadings clearly identify the extent of the dispute between parties and not leave Alex Nunez and the court in uncertainty as to its parameters.⁹ These principles on pleadings were reaffirmed by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd.*¹⁰ Lord Woolf emphasized the importance of pleadings for knowing each party's case and stated that, "*In particular they are still critical to identify the issues and the extent of the dispute between the parties.*"

41. Frank Eiley has a responsibility to prove his claim, as pleaded and/or amended, and did not do so in this case.

COSTS

42. The successful party is entitled to an award of costs. Frank Eiley has failed to prove his case and must pay Alex Nunez his costs of the action.

DISPOSITION

43. It is ORDERED that:

- i. The claimant's claim is dismissed for failure to prove the existence or breach of any sale agreement.
- ii. Costs to be paid by the claimant to the defendant to be assessed and/or taxed by the Registrar, if not agreed.

Justice Martha Alexander
Judge of the High Court of Belize

⁹ [1969] 3 All ER

¹⁰ [1999] 3 All ER 775 at p 792J