

DALAM MAHKAMAH TINGGI MALAYA KUALA LUMPUR

(BAHAGIAN SIVIL)

GUAMAN NO: S6-22-96-2007

ANTARA

MASTERSKILL (M) SDN BHD

.....PLAINTIF

DAN

1) KEMACAHAYA DEVELOPMENT SDN BHD

2) K.PASUPATHY

3) CHIN YAM MENG

4) LENG KOK ONN

5) SYARIKAT KEMACAHAYA

SDN BHD..... DEFENDAN-DEFENDAN

GROUND OF JUDGMENT

Enclosure 21 is the 2nd defendant application to strike out the Plaintiff's Defence to the 2nd Defendant's counterclaim under 0 18 r 1 (1) (a) RHC.

Enclosure 49 is the Plaintiff's application to strike out the 2nd Defendant's counterclaim under 0 18 r 19 (1) (b) , (c) and (d) RHC.

These 2 Enclosures are interrelated and I will take them together in my grounds herein below.

Brief Facts

2nd defendant's Contention:

The 2nd Defendant entered into a Sales & Purchase agreement dated 2.12.2006 with the 1st Defendant ("the SPA") to purchase the property in Mukim Ulu Langat Selangor (the property).

The 2nd Defendant claimed to have fully paid the purchase price of the Property and hence claim that the 1st Defendant is a bare trustee of the Property for the 2nd defendant.

The 2nd Defendant, as purchaser of the said Property, has through its solicitors letter dated 5.12.2006 sought vacant possession of the Property as the 2nd Defendant was now the legal owner of the Property. (Paragraph 5 of the Defence & Counterclaim)

There is no privity of contract between the Plaintiff and the 2nd Defendant, and thus the Plaintiff has no cause of action against the 2nd Defendant.

The Plaintiff was obliged to quit and deliver vacant possession of the property to the 2nd Defendant on or before 24.2.2007 (Paragraph 6, 7 and 11(b) of the Defence & Counterclaim), but to date has refused to do so and the Plaintiff remain in occupation of the Property.

Wherefore the 2nd Defendant has prayed for, inter alia, vacant possession and of ingress and egress into the Property in its Counterclaim.

Reply and Defence to Counterclaim of the Plaintiff

Plaintiff's Contention

The Plaintiffs are purchasers of the said property vide SPA dated 13.10.2006 entered into between the 1st and 5th defendant.

Despite having lawfully purchased the property, the Plaintiff is facing the threat of trespass to the said property and to its occupants by the 2nd to 4th defendants.

Plaintiff claims that there are the beneficial owner of the said property after having purchased the property.

Although there did exist a Sale & Purchase Agreement between the 1st and 2nd Defendant at one time, however the same had been terminated due to non payment of purchase price.

The 1st Defendant (vendor) has now executed an affidavit confirming that the Sale & Purchase Agreement between the 1st and 2nd Defendant has been terminated for failure to make payment pursuant to the terms of the agreement.

Having no contractual relationship with the Plaintiff and no rights 'in rem' whatsoever in the subject property, the 2nd Defendants Counter-Claim is certainly frivolous and vexatious and an abuse of court process.

If at all, the 2nd Defendant should initiate an action against the 1st Defendant is for breach of contract.

The Plaintiff seeks to raise the following in its Defence to Counterclaim:

- i) Allegation of fraud by the 1st and 2nd Defendants; and
- ii) Allegation that the 1st Defendant is the trustee of the property for the Plaintiff until such time when title can be perfected.
- iii) Allegation that the 2nd Defendant has full knowledge of the following:
 - The Plaintiff's rights over the Property;
 - The Plaintiff's caveat over the Property;
 - The Plaintiff's occupation of the Property; and

- That the 2nd Defendant is privy to the financial transaction between the Plaintiff and the 1st Defendant.

The Court's Finding

The facts shows that there is a competing claims on the said property. From the affidavits, these are my findings:

i) Allegation of fraud against the 1st and 2nd defendant:

The Plaintiff alleges fraud and conspiracy between the 1st and the 2nd defendant but the pleadings of the Plaintiff does not contain the necessary particulars of any claim of fraud. Allegation of the Plaintiff without condescending as to particulars. Plaintiff must plead the full averments for it to amount to an averment of fraud. A general allegation of fraud is insufficient to amount to an averment of fraud of which any Court ought to take notice. (Refer to **Lee Kim Luang v Lee Shiah Yee** [1988] 1 CLJ 717)

- ii) The 2nd defendant had purchased the property vide SPA dated 2.12.2006 and had paid the full purchase price of the property from the 1st Defendant. The 1st defendant via its affidavit deposed on 13.2.2007 had confirmed this.

Plaintiff had not paid the balance of the purchase price under the SPA with the 1st defendant and the said SPA had been terminated by the 1st defendant. The Plaintiff, through its own admission in paragraph 6, 7 and 14 of the Statement of Claim , had admitted to not paying the balance purchase price for the property.

Therefore the contention of the Plaintiff that the 1st defendant being the trustee of the Plaintiff of the property is wrong. Plaintiff had not acquired any title or interest on the property and neither does it has any beneficial interest in the same.

Refer to the case of ***Borneo Housing Mortgage Finance Berhad v Time Engineering Bhd*** [1996] 2 MLJ 12 where the Federal Court held that:

“ The contractual events which result in a vendor becoming a trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price timeously paid and when the vendor has given the purchaser a duly executed, valid, and registrable transfer of the land in due form.”
(emphasis added)

Since the Plaintiff have failed to pay the purchase price of the property, the Plaintiff cannot claim that they are the owners of the property. Thus, the 2nd Defendant is the lawful proprietor of the land and the Plaintiff is not entitled to

remain in occupation of the property without the consent of the 2nd defendant, nor can the Plaintiff prevent the 2nd defendant from entering upon the property.

- (iii) The SPA is between the 1st Defendant and the 2nd defendant and the Plaintiff is not privy to the SPA. Therefore the Plaintiff has no cause of action against the 2nd defendant. If any remedy is to be sought by the Plaintiff, it would be against the 1st defendant.
- (iv) The fact that there is a caveat on the land should not be an obstacle for the 2nd defendant to enter into the SPA.
- (v) Inconsistent pleadings of the Plaintiff:

In Plaintiff's Reply and Counter Claim, Plaintiff pleads "...hartanah kepunyaannya.."

In Plaintiff's Statement of Claim paragraph 2, Plaintiff pleads that the Plaintiff is currently paying rental of RM 10, 000.00 per month.

In paragraph 10 of the Statement of Claim, Plaintiff avers that Plaintiff is ready and willing to complete the SPA.

Inconsistent pleadings is liable to be struck out. (Refer to ***Samanda Holdings Berhad v Sakullah Holdings Sdn Bhd & Ors*** [2006] 5 CLJ 459)

Based on the above reasons, the Plaintiff does not have a Defence to the 2nd defendant's Counter Claim and the defence to Counter Claim discloses no reasonable defence and is obviously unsustainable.

Therefore I granted order in term of Enclosure 21 for prayer (1) and (2) with costs. For Enclosure 49, I dismissed with costs.

Datin Zabariah Mohd Yusof

Tarikh : 10.6.2009

Bagi Pihak Plaintiff : Encik K. Hari Krishnan
Tetuan B.H.Lawrence & Co

Bagi Pihak Defendant : Encik M. Rajkumar & T. Gunaseelan
Tetuan Law, Raj, Teh & Partners