

CARLOS KAHN AND LUZ S. KAHN, PLAINTIFFS-APPELLANTS, VS. JACOBO ASUNCION, DECEASED, SUBSTITUTED BY TRINIDAD R. DE ASUNCION, ROBERTO ASUNCION, SILVINO ANTONIO AND CONSUELO ASUNCIO...

G.R. No. L-23377. April 27, 1967

Ponente: BENGZON, J.P., J.

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BENGZON, J.P., J.:

Assisted by her husband, Luz S. Kahn filed on March 30, 1964 a suit against spouses Jacobo Asuncion and Tri-nidad R. de Asuncion in the Court of First Instance of Rizal, to enforce an alleged oral agreement entered into by her and defendants sometime in January 1964.

Plaintiff's complaint stated the terms of the unwritten contract to be as follows:

- (a) Plaintiff Luz S. Kahn shall develop into a subdivision of 50 lots, defendants' parcel of land known as Lot No. 644-B-2-C-2-B covered by Transfer Certificate of Title No. 39854, Register of Deeds for Quezon City;
- (b) Plaintiff and defendants shall divide the subdivision's gross income at 55% for plaintiff and 45% for defendants;
- (c) Plaintiff, by way of accommodating defendants, shall borrow money from a lending institution to pay therewith the debts secured by encumbrances on defendants' afore-stated lot;
- (d) Defendants shall amortize said loan by paying 75% of their 45% share in gross income aforementioned, to the lending institution until full liquidation of loan and interest;
- (e) The subdivision lots which shall be 400 square meters, more or less, shall be sold at a price of not less than P40.00 per square meter, and all proceeds received from the sale shall immediately be distributed to the parties, subject to defendants' payment of the loan next abovementioned;
- (f) Plaintiff shall spend at least P160,000.00 for the subdivision's development and the acquisition of a right of way to provide access and outlet to the national highway;
- (g) Plaintiff shall have exclusive control in the hiring and dismissal of engineers, surveyors, clerks and laborers, in the development and administration of the subdivision lots, but all expenses arising out of or in connection with the subdivision or sale of the lots, wages and salaries of subdivision personnel, shall be taken from plaintiff's 55% share in gross income; and
- (h) Defendants shall immediately deliver possession of the subject lot to said plaintiff.

Plaintiff further averred that in compliance with her obligations under the contract, she has done the following:

- (1) Obtained a loan and/or overdraft line with her bank to pay the monetary encumbrances on the subject lot;

- (2) Conferred, negotiated, assured and guaranteed prospective buyers of the sale in their favor of subdivision lots;
- (3) Contracted an engineer to take charge of subdividing the land;
- (4) Caused to be made and paid for a project study showing the probable profits of the parties; and
- (5) Taken over the negotiation for a right of way on the property of the Philippine Housing and Homesite Corporation abutting the national highway.

She thus sought from defendants the reduction of the alleged oral agreement into a public instrument, and the delivery of the parcel of land in order that it be subdivided.

And since defendants likewise allegedly promised to grant the subdivision a 12-meter right of way thru another lot of theirs, plaintiff further sought to compel them to grant said right of way. Alleging finally that defendants fraudulently attempted to defeat their agreement, refused and delayed performance of their obligations, plaintiff asked for P20,000 actual damages, P100,000 moral damages, P50,000 exemplary damages and P20,000 attorney's fees.

On April 28, 1964, defendants filed their answer stating that no agreement was reached for the development of the subject land into a subdivision; that all negotiations to develop it on a joint venture were abandoned; that the parties continued negotiations for an outright sale of the land to plaintiff but reached no agreement. Raised also was the affirmative defense that the claim on which plaintiff's causes of action are based is unenforceable under the statute of frauds.

On April 29, 1964, defendants moved for a preliminary hearing on the aforesaid defense. And the court granted the same. After said hearing, and submission of memoranda by the parties, the court issued an order on June 4, 1964 dismissing plaintiff's complaint on the ground that the claim asserted therein is not enforceable under the statute of frauds.

Plaintiff thereupon appealed to Us to raise questions of law.

In the course of the litigation, a notice of lis pendens was registered with reference to defendants' subject land. Defendants filed here a motion to cancel said notice. And We deferred action thereon until the case is taken on the merits. Subsequently, also, defendants-appellees' counsel manifested that defendant Jacobo Asuncion died in December 1965; his surviving spouse - and co-defendant - Trinidad R. Asuncion was allowed to be substituted in his place.

The parties discuss the following issue in this appeal: Does the statute of frauds bar the present suit? Article 1403, par. (2), subpar. (e), provides:

"ART. 1403. The following contracts are unenforceable, unless they are ratified:

x x x x x

"(2) Those that do not comply with the Statute of Frauds as set forth in this number. In the following cases an agreement hereafter made shall be unenforceable by action, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing, or a secondary evidence of its contents:

x x x x x

"(e) An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein;"

X X X X X

Defendants-appellees contend that plaintiff's alleged contract is one for the sale of real property or an interest therein, and, therefore, barred from enforcement by the statute of frauds, it not being in writing.

Plaintiff however argues that even if the alleged contract with defendants falls under the kind mentioned in the statute, the latter does not operate to bar its enforcement because said contract has been partially executed thru her performance of her obligations thereunder.[1]

The reason for excluding from the operation of the statute of frauds executed agreements is that otherwise fraud would be promoted, instead of prevented, since one party would be able to keep the benefits derived by him from said partial execution, and, at the same time, evade his responsibilities, obligations or liabilities under the contract.[2]

It should be remembered that the parties did not proceed to trial and adduce evidence; rather, the suit was dismissed after a preliminary hearing on the affirmative defense in question. It therefore amounted to a dismissal upon a motion to dismiss.

The point of preliminary inquiry herein is therefore whether plaintiff's acts of partial execution redounded to defendants, benefit.

Specifically examining said acts as alleged in plaintiff's complaint, We note:

(1) Obtaining a loan and/or overdraft line: For purposes of a motion to dismiss the allegation to this effect is admitted hypothetically. Since the complaint states "and/or", it is not clear whether a loan was actually obtained, thereby involving actual withdrawal of funds, or whether an overdraft line was simply opened and the amount thereof made disposable, or any amount actually withdrawn therefrom. Did defendants benefit from the loan and/or overdraft line? What is the status of the encumbrances on the subject lot? Nothing appears on record.

(2) Negotiation with prospective buyers of the lots: What benefit has such negotiation yielded to defendants?

(3) Contracting an engineer to take charge of subdividing the land: Since the subdivision in its preliminary stage has not yet been actually undertaken, We do not know what other preliminary steps were taken wherein defendants might have derived any benefit from this, giving defendants opportunity to prove otherwise.

(4) The project study: This is the undertaking which plaintiff categorically alleged that payment was made therefor. Who asked for such study? What was the agreement on this Step, if any? No evidence at all appears before Us.

(5) Negotiation for a right of way on PHHC lot: Similarly, whether defendants' lot profited or not therefrom, so far is a matter best left for evidence to establish.

Furthermore, that there were negotiations, first for a joint venture and later on for an outright purchase, is not denied. That these ripened into an agreement is what defendants deny. Plaintiffs however insist on a perfected contract. There lies the dispute which has to be solved in accordance with their respective evidence.

Finally, We note that plaintiffs refer at page 12 of their brief to an alleged handwritten document signed by defendants evidencing their conformity to the subdivision project. Subject to appropriate rules on pleadings and evidence, this matter should be threshed out before the court below.

From all the foregoing, it results that the point whether defendants benefited from plaintiff's acts cannot as yet be ascertained from the records. Consequently, the ground for a motion to dismiss under the statute of frauds does not appear to be indubitable as required. In such a case, the Rules of Court provide that the determination thereof

be deferred until trial is had (Sec. 3, Rule 16):

"SEC. 3. Hearing and order. - After hear-ing the court may deny or grant the motion to allow amendment of pleading, or may defer the hearing and determination of the motion until the trial if the ground alleged therein does not appear to be indubitable."

Such procedure is without prejudice to subsequently re-solving, on the strength of evidence adduced during the trial, the issue of whether the statute of frauds bars the enforcement of the agreement involved.

WHEREFORE, the appealed order of dismissal is hereby set aside and the case is remanded to the court a quo for trial and further proceedings, without prejudice to the ultimate resolution of the affirmative defense, as the evidence may warrant. Petition to lift annotation of lis pendens on defendants' title is denied. No costs.

SO ORDERED.

Concepcion, C.J., Reyes, J.B.L., Dizon, Regala, Makalintal, Zaldivar, and Sanchez, JJ., concur.
Castro, J., took no part.

[1] *Almirol v. Monserrat*, 48 Phil. 67; *Asturias Sugar Central, Inc. v. Montinola*, 40 O.G. [7th Supp] No. 11, p. 89; *Factoran v. Sabanal*, 81 Phil. 512.

[2] *Carbonnel v. Poncia*, L-11231, May 12, 1958.

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