



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015CD00133

BETWEEN	BLUE WAVES INVESTMENT LIMITED	CLAIMANT
AND	JAMAICA BAUXITE MINING LIMITED	DEFENDANT

Interim Payment – Claim based on estoppel – Defendant expressed preparedness to pay part of claim – Defendant has counterclaim exceeding that amount – No Defence to counterclaim filed – whether interim payment to be ordered.

Kadene Dixon and Francine Derby instructed by Dixon & Associates for the Claimant.

Saverna Chambers for the Defendant.

Heard: 19th and 24th October, 2017

In Chambers

Cor: Batts J.

1. On the 24th October 2017 I refused the Claimant's application for an interim payment. I promised them to put my reasons in writing. This judgment fulfills that promise.

2. This application for an interim payment is made pursuant to Civil Procedure Rules 17.6 (1) (a) and (d). They provide -

“17.6 (1) The Court may make an Order for an Interim payment only if-

- a. The defendant against whom the order is sought has admitted liability to pay damages or some other sums of money to the claimant.

- d. except where paragraph (3) applies it is satisfied that if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or costs.”

3. The Claimant’s attorney in her submissions relied on paragraph 18(1) of the Defence as reflecting an admission of liability. She also referenced her client’s affidavit which says some reimbursement had been done. The admission of Mr. Cox (for the Defendant) in paragraph (3) of his affidavit dated October 9, 2017, that reimbursements had been done, was also relied upon. She argued that equity would assist the Claimant even in the absence of express contractual terms. The Defendant’s attorney denied that there has been an admission of liability and pointed to the strength of the defence as well as inconsistencies in the Claimant’s documentary evidence. She also points out that the counterclaim had not yet been defended.

4. I have reviewed the affidavit evidence and the respective statements of case. It seems to me that the Claimant cannot succeed with this application. In the first place the claim is for reimbursement of sums spent whilst the Claimant was a tenant. The lease pursuant to which she was in

possession made no provision for compensation in respect of sums spent on the leasehold property. The claim therefore relies on estoppel, the alleged representation/encouragement being oral. This is denied.

5. The Defendant says any expressed preparedness to reimburse the Claimant was voluntary and not mandatory or obligatory. By Affidavit and in its defence the admission is made that compensation was given for improvements in the past. The Defendant was awaiting documentary support for some others before making reimbursement. In paragraph, 18(i) of its Defence the Defendant says it is prepared to reimburse the Claimant \$1,836,481.00 with respect to the new shower room. The Defence otherwise takes issue with the claim and there is a counterclaim for the amounts the Defendant says it has spent and for rent. In that regard, however the Claimant's attorney asserts that no notice was served by the landlord pursuant to Clause 3(10). In a situation where the Claimant is relying on a claim, which is outside the four corners of the lease, it is difficult to understand the Claimant at the same time asking the court to keep the Defendant within those four corners.
6. The resolution of these issues will turn largely on a judge's view of the witnesses. It is in these circumstances impossible to say that the Claimant "would" succeed if the matter goes to trial or in what amount. As regards the alleged admission, the pleading is an indication of a preparedness to pay a certain amount. The Defence has a clear denial of liability which accompanies this olive branch. It is not in my view an admission of liability to pay.
7. There is, in any event, a counterclaim to which there is as yet no Defence filed. As per Rule 17.6 (5) (b) I am entitled to take that into account. I

cannot, in the face of a credible counterclaim to which there has not yet been a Defence filed, make the order for interim payment. This is because the counterclaim if successful would exceed the amount “admitted” in Para 18 (1) of the Defence.

8. It is well established that the burden, on an applicant for interim payment, is a high one. The Claimant must show to a high standard that she is likely to succeed in her claim. It must be demonstrated that the Claimant “would” obtain judgment, see *Etta Brown v AG HCV 03390 of 2007* unreported judgment of Brooks J (as he then was) as applied by F. Williams J (as he then was) in *Administrator General for Jamaica v Lloyd Lewis [2015] JMSC Civil 116* unreported 17 June, 2015.
9. In this matter, the Claimant relies on an equitable principle of estoppel seeking compensation not provided for in her lease. She relies on the Defendant’s expressed willingness to pay some part of her claim. This willingness by the Defendant is one expressed even while maintaining no legal obligation to do so. More importantly, the Defendant has filed a counterclaim in an amount sufficient to set off the amount they say they are willing to pay. The Claimant has not yet filed a Defence to that counterclaim. In these circumstances (where there are factual issues, as to whether representations sufficient to establish an estoppel were made, and where there may be judgment entered on the undefended counterclaim) I cannot grant an interim award. It is to my mind impossible at this stage to say with any degree of confidence that the Claimant “would” succeed at trial. There is also no admission of liability to support such an order.
10. On the 24th October 2017 I therefore made the following orders:

- (1) Application refused.
- (2) Costs to the Defendant to be taxed if not agreed.
- (3) Leave to appeal granted.