[2023] JMSC Civ 85

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2019 CV 01749

BETWEEN	**SIMONE BROWN**	**CLAIMANT**
AND	**OLDRIAN OTTLEY**	**DEFENDANT**

Mrs. Dameta Franklin instructed by Oswest Senior Smith & Company for the claimant

Mr. Lemar Neale instructed by Nea|Lex for the defendant

HEARD: 13 MARCH & 18 MAY 2023

Civil Procedure - Rule 15.2 - application for summary judgment - whether the defendant has no real prospect of succeeding in the claim – rule 15.4(4) whether summary judgment may be entered on the issues - whether a failure to satisfy rule 15.5(4) of the CPR is fatal to obtaining judgment on the issues – whether judgment on the counterclaim in favour of the claimant should be entered

MASTER C. THOMAS

Introduction

[1] The application before this court is one for summary judgment in favour of the claimant on two of the issues raised in the claim. In addition, the claimant has by way of an oral application sought to obtain summary judgment on the counterclaim.

Background

[2] The claimant by way of her claim form and particulars of claim has averred that there was an agreement between her and the defendant that she would obtain a

loan from the National Commercial Bank Jamaica Ltd ("NCB") to cover certain financial obligations of the defendant. She was successful in obtaining the sum of $10,996,444.80, which was used by her and the defendant. According to paragraph 3 of her particulars of claim, $6,016,928.09 of the sum borrowed was to be used by the defendant to fulfil his financial obligations including the purchase of a 2016 Honda City motor car; and $4,979,516.71 was for her personal use. At paragraphs 6 and 7 of the particulars of claim, it is pleaded that initially, the defendant was to pay a monthly sum representing more than half of the monthly sum required to be paid on the loan but at the defendant's subsequent urging, the claimant agreed to accept the defendant's portion as representing half of the monthly sum due. As a consequence, the defendant agreed to pay the sum of $62,000.00 per month on the 8th of each month, but his payments had been late causing the claimant to incur additional expenses and some of the payments were less than the agreed monthly sum. The defendant made sporadic payments totalling $1,537,651.09. Accordingly, it was alleged, the defendant had breached the agreement. The claimant claimed the sum of $4,478,977.00 as being the "balance of the principal sum due" and, alternatively "that the 2016 Honda City motor car be sold to recover some of the payments due under the loan and that the balance be deducted from the defendant's salary on a monthly basis".

[3] Of the averments that I have mentioned at paragraph 2 above, save for the admission that the defendant purchased a 2016 Honda City motor vehicle from the loan proceeds; that the total loan was for $10,996,444.80; and that the defendant agreed to pay the sum of $62,000.00 monthly, the defendant denied the averments in the particulars of claim. Among the facts set out by the defendant are that: the agreement between the parties was for a joint loan but the claimant proceeded without his knowledge and consent to obtain the loan; from the loan proceeds he could only account for the sum of $3,700,000.00, which was used to purchase the 2016 Honda City motor car in the joint names of the parties; he was made aware that the monthly total to service the loan was $121,554.58 and that he has been consistent in making payments in the agreed amount to

the claimant via cash in hand and direct deposit to the claimant's account; it was a term of the agreement between the parties that the monthly loan repayment amount would be drawn from the claimant's account to avoid the risks of late payment and that he was assured that the monthly repayment sum would always be in the claimant's account at the time that he made his monthly payments to the claimant's account; and that he consistently made payment of the agreed sum to the claimant in cash and direct deposit between the 9th and 12th day of each month. The defendant counterclaimed for a declaration that he is the sole beneficial owner of the 2016 Honda City motor car.

Submissions

[4] The application, while stating at paragraph 1 that summary judgment was being sought "in respect of paragraphs of the particulars of claim", did not itemize any specific paragraph or issue. Mrs. Franklin, nonetheless submitted that summary judgment should be entered on the following issues:

(i) Whether there was an agreement between the parties that the defendant would pay the monthly sum of $62,000.00 per month;

(ii) Whether the defendant had breached this agreement.

Mrs. Franklin referred to rule 15.2 of the Civil Procedure Rules and **Sagicor Bank Jamaica Limited v Taylor Wright** [2018] UKPC 12 and submitted that: in respect of the first issue, there was an admission by the defendant at paragraph 7 of his defence that he would pay $62,000.00 monthly; and in respect of the second issue, it was incumbent on the defendant to provide proof to support his claim to making payments in the manner pleaded and since the defendant has provided no evidence, summary judgment should be entered in the claimant's favour.

[5] Mrs. Franklin also sought leave to extend the summary judgment application to the counterclaim submitting that the defendant had no real prospect of succeeding

because he is seeking a declaration that he is the sole owner in circumstances where there is no dispute that the claimant borrowed the money for the purchase of the motor car and the motor car was purchased in the names of both the claimant and the defendant.

[6] Mr. Neale resisted the application being granted on the issues from a procedural as well as a substantive perspective. Procedurally, he submitted that the claimant had failed to comply with section 15.4(4) of the Civil Procedure Rules ("CPR"), which requires that in circumstances where the applicant is seeking summary judgment on issues, the applicant should itemize these issues. He stated that he was therefore taken by surprise as he formed the view based on the content of the application that the application was for summary judgment to be entered on the entire claim.

[7] Mr. Neale also highlighted what he submitted were a number of issues of fact which were raised in the claim and which would have to be determined after the "forensic process of cross-examination at a trial". In respect of the first issue on which summary judgment is being sought, he submitted that the agreement was an agreement within the larger agreement as to how much money was to be borrowed and there was no evidence as to all the terms of the agreement as well as the period of repayment of the loan. In respect of the second issue, he submitted that there is a dispute as to whether the defendant is making payments as he claims or the payments were sporadic as claimed by the claimant. The answer to this would determine whether there was a breach of contract and could only be determined after cross-examination. In support of these submissions, he relied on **Swain v Hillman** [2001] All ER 91; **Three Rivers District Council v Governor and Company of the Bank of England (No 3)** [2001] UKHL 16 and **Sagicor Bank v Taylor Wright**.

[8] With respect to the counterclaim, he submitted that the oral application to amend should not be allowed because the defendant had no notice that this was being pursued and the defendant was not seeking summary judgment on the counterclaim. In any event, he submitted, the defendant had a realistic prospect of success because the "tone" of the claim was that the motor vehicle was bought for the benefit of the defendant and the claimant would be holding it on trust for him.

Discussion and analysis

[9] The following are some of the principles that have been established by the authorities as being relevant to an application for summary judgment:

(i) The case must be more than just arguable; however, it does not require a party to convince the court that his case must succeed (**International Finance Corporation v Utexafrica SPRL** [2001] EWHC 508, relied on by Simmons J (as she was then) in **Cecelia Laird v Ayana Critchlow & Another** [2012] JMSC Civ 157).

(ii) The burden of proof is on the applicant to prove that the other party's case has no real prospect of success (**Island Car Rentals v Lindo** [2015] JMCA App 2).

(iii) Where the applicant establishes a prima facie case against the respondent, there is an evidential burden on the respondent to show a case answering that which has been advanced by the applicant. A respondent who shows a prima facie case in answer should ordinarily be allowed to take the matter to trial (*Blackstone's Civil Commentary* 2015, para 34.11).

(iv) The court will be guided by the pleadings as well as the evidence filed in support of the application (**Sagicor Bank v Taylor Wright**).

(v) The court must exercise caution in granting summary in certain cases, particularly where there are conflicts of facts on relevant issues which have to be resolved before a judgment can be given (**Doncaster v Bolton Pharmaceutical Co Ltd** [2006] EWCA Civ 1661**; Cecilia Laird**).

[10] Mr. Neale has made heavy weather of the fact that the claimant has breached rule 15.5(4) of the CPR. Rule 15.5(4) provides as follows:

15.4 (1) Except in the case of a counterclaim a claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgment of service.

(2) If a claimant applies for summary judgment before a defendant against whom the application has been made has filed a defence, that defendant's time for filing a defence is extended until 14 days after the hearing of the application.

(3) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.

(4) The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing.

(5) The court may exercise its powers without such notice at a case management conference.

(Part 11 contains general rules about applications)

[11] I am of the view that even though the language of rule 15.4(4) of the CPR appears to be mandatory, a failure to observe this rule would not be fatal, but would be an irregularity in respect of which the court could make an order to put matters right, provided, of course, that there would be no irremediable prejudice to the respondent to the application. It seems to me that paragraph 15.4(5) in authorizing

the court to exercise its powers to enter summary judgment even without a notice of application lends support to the conclusion that the failure to fully comply with the rules in relation to the content of the notice is not fatal. I am of the view that there would be no prejudice in considering the application in relation to the two issues raised by Mrs. Franklin as Mr. Neale did hear the arguments and was able to respond to them. In fact, he conceded that a breach of rule 15.4(4) would not be fatal to the application as the court could exercise its powers under rule 26.9 of the CPR to cure any procedural irregularity.

[12] Mr. Neale's primary basis for resisting the application is that there are factual issues which arise for consideration. These were listed in his written submissions as follows:

(i) Whether an agreement exists between the claimant and the defendant for the claimant to borrow the sum of $10,996,444.80 as pleaded by the claimant;

(ii) If not, whether any agreement exists between the claimant and the defendant;

(iii) What are the terms of such an agreement?

(iv) Whether the defendant received the sum of $6,016,928.09;

(v) Whether the defendant is in breach of any agreement;

(vi) Whether the court can order the vehicle sold based on the claim as pleaded; and

(vii) Whether the court can order that the defendant take over the loan for the motor vehicle and have the outstanding amount deducted from his salary.

[13] I am of the view that while these are indeed issues raised in the claim, it is not necessary for the court to determine all of them in order to decide the claim and determine whether the claimant is entitled to any of the reliefs being sought. So, despite the claimant's averments as to the sums that she and the defendant agreed that she would borrow and how much of it was to be used for the

defendant's benefit, it seems to me that at the end of the day, the crux of her claim was that the defendant had breached their subsequent agreement that he would pay half the monthly loan payment of $121,554.58, which it was agreed would be monthly payments of $62,000.00. Therefore, upon the defendant's admission that he had agreed to pay half of the monthly loan payment of $121,554.58 and that he agreed to pay the sum of $62,000.00, issues (i) and (iv) above would no longer be of relevance as they would have been subsumed or overtaken by the subsequent agreement to pay $62,000.00. In other words, applying the Privy Council's approach in **Sagicor Bank v Taylor**, even if the claimant were to fail in establishing issues (i) and (iv), this would not mean that she could not succeed on the claim; that is, even if the court were to accept the defendant's case on issues (i) and (iv), it could still find that there was an agreement to pay $62,000.00 and that there was a breach of that agreement. I am likewise of the view that it would be unnecessary for the court to determine what are the exact terms of the agreement. Based on the claim as pleaded, the real complaint is that there was a breach of a specific aspect of the agreement to pay $62,000.00 monthly, which is to pay the said sum on the 8th day of every month. Therefore, in order to determine whether summary judgment should not be granted, it must be determined that there are factual issues "which have to be resolved before judgment can be given" and that evidence given at the trial may impact on the resolution of this issue.

[14] It is my view that it is unnecessary to enter summary judgment on the issue of whether the defendant had agreed to pay the sum of $62,000.00 monthly as the admission forms part of the pleadings and consequently has removed this from the court's determination as an issue of fact in dispute. With respect to the issue of the breach of the agreement, it is true that the defendant has not put forward any evidence to support his contention that he has been making payments in accordance with what was agreed. This notwithstanding, **Sagicor Bank v Taylor Wright** demonstrates that the pleadings must also be considered and it is clear from the defence that the defendant's case is that (i) he made the payments on

specific dates, that is, between the 9th and 12th of each month; and (ii) the agreement was that the loan payment would be deducted from the claimant's account to avoid late payment.

[15] I am of the view that based on the statements of case of both parties, the following are some of the issues of fact that would have to be resolved before the court can determine whether there was a breach of the agreement to pay the monthly sum of $62,000.00:

i. Whether there was an agreement for the defendant to pay the sum of $62,000.00 monthly on the 8th of the month as alleged by the claimant;

ii. Whether it was agreed that the sums would be deducted from the claimant's account to avoid the risk of late payments;

iii. Whether the defendant made payments every month between the 9th and 12th of the month as he alleged;

iv. If the defendant did make those payments on those dates, was this a breach of the agreement in that the payments were late;

v. Whether the defendant breached the agreement by paying less than the agreed sum;

[16] In light of the divergence in the cases of both parties, the above issues as to the terms of the agreement will have to be decided after cross-examination. It seems to me that in these circumstances, it cannot be said that the defendant's case is barely arguable. If the defendant's account of the agreement is accepted, then the payment of the sums on the 9th to 12th of each month, although made after the 8th of each month would not be a breach. I am of the view that the claimant has not shown that the defendant has no real prospect of succeeding in his defence.

[17] Where the counterclaim is concerned, I took the view that I would not consider this aspect of the summary judgment application as the defendant would have had no notice of the claimant's intention to enter judgment on the counterclaim to adequately respond.

[18] With respect to the application to dispense with mediation, no arguments were advanced as the primary focus was the application for summary judgment. I note that apart from the claimant's mere assertion that the defendant has refused to go to mediation, there is no evidence put forward by the claimant as to the attempts at agreeing a mediator and/or mediation dates, although I also note that the defendant did not file any evidence disputing this. The defendant's failure to file an affidavit relative to this issue may have been because, as Mr Neale indicated, Mr. Neil was confused as to whether this aspect of the application was being pursued in light of the first order seeking what appeared to have been summary judgment on the entire claim, which if granted would have rendered an order to dispense with mediation unnecessary. In light of this, I would not interpret the failure to file evidence disputing this aspect of the claimant's evidence as one that should lead to the interpretation that this was being accepted. In any event, I am of the view that this is a matter that would benefit from mediation.

Conclusion

[19] In the circumstances, I make the following orders:

1. The application for summary judgment to be entered against the defendant in favor of the claimant is refused;
2. The application to dispense with mediation is refused;
3. The parties are to proceed to mediation and mediation is to be concluded on or before 15 September 2023;

4. If mediation is unsuccessful, the parties shall attend a case management conference on 27 September 2023 at 12:30pm for ½ hour;
5. Costs of the application to the defendant to be taxed, if not agreed.

Carla Thomas
Master in Chambers