[2013] JMSC Civ. 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 2256

BETWEEN	**HENZEL CLARKE**	**CLAIMANT**
A N D	**DAVID VINCENT**	**DEFENDANT**

Representation: Ms. Catherine Minto instructed by Nunes, Scholefield, DeLeon & Company for the First Defendant/Judgment Debtor
Ms. Jacqueline Cummings instructed by Archer, Cummings & Co. for the Claimant/Judgment Creditor

Written Judgment delivered February 7, 2013

Judgment summons – Execution of Order of Seizure and Sale after expiry/whether valid – whether judgment summons property before court.

CORAM: GEORGE J. (Ag.)

[1] The matter before me is a judgment summons in furtherance of the enforcement of a Default Judgment entered on June 14, 2008, against the Defendants herein. The vexed question which arose is whether this judgment summons is one that is properly before the court – i.e one which this court has jurisdiction to entertain. It is not in dispute that if the judgment debt, consequent upon the Default Judgment had been satisfied, then this judgment summons would be irregular, and would not be properly before the court, as there would be no judgment debt outstanding and so none to be satisfied or if the bailiff had lawfully seized goods to the value of or exceeding the value

of the judgment debt then this would have to be resolved before the Claimant can fairly be allowed to proceed by way of judgment summons. **(See Rendell Cameron v Patrick Drummond SCCA 92/99)**

[2] On July 25, 2008, further to a request of the Claimant, an Order for Seizure and sale was issued out of the Supreme Court and directed to the Bailiff of St James to seize and sell such goods and chattels of the Defendants as shall be subject to execution and to apply the proceeds of such sale in satisfaction of the judgment which had been entered against the Defendants. This judgment debt was for United States Five Thousand Three Hundred and Sixty Three Dollars and Fourteen Cents (US$5,353.14)

[3] On 27 July 2009, the said bailiff brought within his purview a Cataarman sail boat, belonging to one of the Judgment debtors (the 1st Defendant is also the Director of the 2nd Defendant), with an estimated value of United States Forty Thousand Dollars (US $40,000.00). There is a dispute between the parties as to whether or not the actions which the bailiff took in doing so amounted to a seizure of the boat in discharge of the said judgment debt. The Claimant/Judgment Creditor and the Bailiff contends that this was not a seizure and the Defendant/judgment debtor claims that in fact a seizure had taken place.

[4] The Defendant/judgment debtor has raised as a preliminary point that there had in fact been a seizure of goods above the value of the judgment debt and that the subsequent return of the order of seizure and sale endorsed "Null a bona" was not a reflection of the true position. Counsel therefore argued that the judgment summons was improperly before the Court and that the Court has no jurisdiction to hear it .This issue therefore becomes a preliminary issue to be determined before proceeding any further. Of course, if in fact the judgment summons is not properly before me, then it will be dismissed; If it is properly before me, then the court can proceed to hear the judgment summons application.

[5] In coming to a decision on this issue, a number of points have been raised by the Claimant and the judgment Debtor. In fact the court has invited submissions on some of these points. However, upon review and further analysis of the central issue it became clear that the question does not involve a consideration of all of these points, but is one that can be answered simply by determining whether,

(i) there was a seizure of the Defendant's property and

(ii) whether any such seizure was valid and

(iii) the legal consequences if not valid

[6] Unfortunately, neither the parties nor the Court focused on this issue and a lot of time was lost dealing with peripheral issues, some of which I now consider to be un-necessary for the purpose of determining this preliminary issue. In fact it appears that there was some confusion by both Counsel for the Claimant/Judgment Creditor and Counsel for the Defendant/Judgment debtor as to whether the Court would exercise its powers as it relates to misconduct of the bailiff further to section 23 or even section 31 of the Judicature (Supreme Court) Act, as it appears on the face of it that the bailiff had not performed his duties in the manner required by law. Some time was spent on this aspect through submissions to the Court. I had asked for the bailiff to be called to give evidence not for this purpose but to elicit further evidence from which I could be assisted in making a finding as to whether there had been a 'seizure' or not. I gave an earlier ruling during the course of these proceedings, that if there is considered to be misconduct by the bailiff then any determination of this would need to be dealt with in separate proceedings whereby the bailiff would have been advised of the misconduct alleged and given an opportunity to prepare a defence and to seek counsel's assistance if he so desired. These proceedings did not provide this opportunity and was therefore in my view inappropriate for any such power to be exercised, nor have I made any findings as to any alleged misconduct.

[7] This application has had a checkered history. The judgment summons came before the court initially without an affidavit in support on file, neither had personal service been effected, so the master adjourned the matter to allow for these things to be

done. Due to the non-attendance of the parties, it was subsequently adjourned for a date to be fixed by the Registrar. A reissued judgment summons was later filed and came up for hearing on the 8/11/10.

[8] On the 2/11/10 an affidavit in support of the judgment summons was filed by the claimant's attorney. The affidavit is that of Mr. Aaon Stewart, attorney with conduct of the matter at the time. In that affidavit (paragraph 3) he states that the Defendants had been served with the Default Judgment since or around 16/5/08, by registered post. ... that on or about 9/2/2010, they had been served with the judgment summons and that on the 6/10/10 they had been served with reissued judgment summons. He states in paragraph 6 that since the judgment was entered, the Defendants had not made any attempt to liquidate and or make arrangements to liquidate the judgment debt. By the penultimate paragraph he indicates that the Defendants own assets including a motor vessel registered with the Maritime Authority of Jamaica and exhibited a copy of Certificate of Registration.

[9] This matter came before me in my capacity as Master. The judgment Debtors were not present nor were they represented. However, it having come to my attention, that an Order for Seizure and Sale had been issued, I made enquires of the Claimant's Attorney. Upon the response received, I ordered that the Judgment creditor filed an affidavit exhibiting the "return" of the order for seizure and sale and outline therein whether any assets had been held/seized against the order as well as file the said 'return'. This counsel for the judgment Debtor asserted in her submissions was an irregularity which could not be cured and to this I will return.

[10] The matter was adjourned and an order made for the judgment debtors to be served with the adjourned hearing date and affidavit of service be filed. Subsequently, an affidavit of Miss Jacqueline Cummings attorney-at-law was filed by the claimant's attorneys-at-law on his behalf. This affidavit sought to speak to the 'order for seizure and sale' consequent upon my previous order.

[11] By paragraph 5, she states "... we are advised by the Bailiff and do verily believe that he made numerous efforts to execute the said order for seizure and sale by initially seizing a motor truck owned by the Defendants but which was found to have a lien registered against it. The Bailiff further seized a boat owned by the Defendants but found that this also had a lien against it." She further contended in paragraph 6 "that the Bailiff had not been able to obtain anything else of value from the Defendants with which to satisfy the judgment debt owed to the claimant and has returned the order for seizure and sale null a bona, with ....". These were exhibited as "JC 1".

[12] Exhibited was letter (report) from Daniel Robinson, the bailiff, dated 2/12/09 and stamped as having been received by the claimant's attorneys-at-law on the 9/12/09. In this letter he outlines the position as " I had initially levied a motor truck which I later found to have a lean registered on it. I then got papers for a boat and that also have lean on it." It is enlightening that he further stated that " I have made arrangements with the person who had interest on the Boat and we agree we would not fight but get together to sell the boat, but he seems to be reneging on the agreement. Very few buyers are interested in the boat ..... The boat was also vandalized and the engine stolen. I am now left in a situation where I am holding something that will be difficult to sell. Therefore it is my opinion that the best option is to resort to another plan to recover this money from Mr. Vincent." It is worthy of note that the bailiff did not institute interpleader proceedings, nor did any 3rd party.

[13] Implicit in this letter, is that the bailiff did not just "get papers for a boat" but in fact had some sort of possession/control of the boat. How then would he have been able to reach an agreement "with the person who had interest "in the boat to get together and sell the boat", and not fight. But it seems that this person had now gone back on this agreement – He states that very few buyers were interested in it and that it had been vandalized and the engine stolen. He does not say when, but it is reasonable to believe that this was subsequent to having received it, as would they have been interested in selling it in the first place or to seize it, if it had no engine and had not been vandalized? The concluding paragraph of this letter/report is extremely informative and illustrates the

point. He states that he "is now" left in a situation where he was now holding something that will be difficult to sell. Therefore he recommended that they "resort to another plan to recover this money from Mr. Vincent". If he is in fact "holding", then it would indicate possession and seizure of the item.

[14] This order for seizure and sale was issued out of the Supreme Court on the 25/7/08. The report/letter from Mr. Robinson is dated 2/12/09 and stamped as having been received 4/12/09. The order for seizure and sale was delivered to the bailiff for the parish of St. James since 30/7/08 yet it took one year and five months for it to be returned. On the 13/1/2011, affidavit was filed by the Defendant's attorneys-at-0law, in opposition to the judgment summons. To this affidavit Miss Catherine Minto exhibited the certificate of Registry of the subject boat (this appears to be an updated registration from that filed by the claimants); An inventory of items seized by the Bailiff and a list of goods seized by the Bailiff and one such inventory was referred to above. Significantly the inventory and list of goods are under the purported signature of Daniel Robinson, the bailiff. The Claimant has not taken issue with this and neither has the bailiff who was called as a witness and so therefore it is accepted that these are his documents.

[16] Exhibit CM2, is titled "List of Goods Seized under warrant to levy in above suit HCV 02256/2007. At the top of the document is the heading "Henzil Clarke v David Vincent/Resort Concessioners – Defendant. There is therefore no doubt that this document is in reference to the claim herein. It lists only one item – "catamaran sail boat" and gives an estimated value of US$40,000.00. At the bottom of the document is written date levied 27/7/2009, and signed by the bailiff and stamped twice, that stamp bearing the words "bailiff, St. James Montego Bay RM Court". It is therefore surprising that the claimant contends and the bailiff seeks to support the position, that this boat had not in fact been seized.

[17] I find that the bailiff had in fact seized the said boat and that at the time that he did so the boat was intact with its engine and had not yet been vandalized. Upon the boat being seized, the bailiff entered into an arrangement with a 3rd party, as to the sale

of the said boat on the basis that this 3rd party claimed an interest in the said boat. This 3rd party failed to honor the arrangement and in the meanwhile the boat's engine was stolen and it was vandalized. It is consequent upon that, that the bailiff sought to return the order for seizure and sale "Null a bona" and sent letter of 2/12/2009 to the claimant's attorney indicating that he had seized the boat but that he was "now left in a situation where" he was "holding something that will be difficult to sell".

[18] I agree with Counsel for the Judgment debtor that "the moment a writ or warrant of execution has been levied the judgment debtor is divested of control of the seized chattel (even if the seized property remains in his physical possession) and control now passes to the bailiff. I also fully embrace the principle enunciated by Vaughn Williams L.J in re A Debtor, Ex parte Smith [1902] 2K.B. 260, where he stated thus:

[19] "Seizure by the sheriff deprives the debtor of the power of selling his goods. The moment the sheriff takes possession the debt is pro tanto absolutely discharged not indeed finally, but so long as the state of things continues". However it is my view that this principle must be subject to whether in fact the seizure is lawful. If the seizure is unlawful then the bailiff has no right to it. The judgment debtor would still retain control and his remedy might lie in damages but not in an opposition to a judgment summons brought by the Claimant in circumstances where the bailiff acts for these purposes as an agent/officer of the Court and not for the Claimant.

[22] The bailiff having seized the boat the next question is whether this seizure is valid / lawful. The Civil procedure Rules (CPR) provides that a wit of execution (defined to include a writ of seizure and sale) is valid for 12 months. This period can be extended by a process of renewal.

By CPR rule 46.10

(1) The judgment creditor may apply for the renewal of a writ of execution.

(2) The general rule is that an application for renewal must be made within the period for which the writ is valid.

(3) Where the judgment creditor applies for renewal after the end of that period, **the court may renew the writ only if it is satisfied that the judgment creditor has-**

(a) taken all reasonable steps to execute the writ of some part of it; and

(b) been unable to do so

(4) **An application for renewal may be made without notice but must be supported by evidence on affidavit.**

(5) The judgment creditor must state in his evidence under paragraph (4) whether or not he is aware of any other judgment creditor and, if so, give such details of which he is aware as to the money due from the judgment debtor to each such judgment creditor

(6) On such an application the court must have regard to the interests of any other judgment creditor of whose existence it is aware.

Further on an application for renewal of a writ of execution the court may renew it for a period of not more than 6 months (r 43.11).

[23] According to the records, the bailiff seized this boat on 27/7/2009, clearly after the expiration of 12 months. The writ is valid for a period of 12 months. It is my view that until it is renewed by an order of the court, it is invalid. It cannot be made valid or revived after execution. The CPR is specific as to that the Court has to be satisfied about before it can renew a writ after the expiry period (see r 46.11 (3) above). There was no renewal of the writ prior to or after its expiry. The writ was therefore invalid and it is my view that any seizure upon it is thereby unlawful.

[24] I would also like to comment on the judgment debtor's contention that the judgment summons application is not properly before the court as it was filed prior to the filing of the returns of the order for seizure of sale and that the subsequent filing of this could not remedy the situation. I disagree with this position. The court in exercising its case management powers and its duty under Part 1.1 of the CPR is prudent to save time and costs and remedy any technical breach. The court being advised that the

bailiff had in fact returned the order of seizure and sale, properly gave time for this to be filed. In addition Rule 26.9 (1) Provides that in these circumstances where the consequence of failure to comply with a rule, practice direction or court order had not been specified then by rule 26.9

2. An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
3. Where there has been an error of procedure or failure to comply with a rule practice direction, court order or direction, the court may make an order to put matters right.
4. The court may make such an order on or without an application by a party.

[25] Finally, Ms. Catherine Minto on behalf of the judgment debtor submitted that the Rules indicate that where a judgment for money is stated in a foreign currency the Judgment creditor must follow the procedure set out in the CPR. Rule 43.7 states:

(i) This rule has effect where the court gives judgment for a sum expressed in a currency of a country other than Jamaica

(ii) The judgment creditor must when commencing proceedings file a certificate stating the Bank of Jamaica weighted average selling rate for the unit currency in which the judgment is expressed at the close of business the previous day.

[26] The judgment creditor has failed to do this. There is no penalty/sanctions imposed by the CPR for this failure. Consequently, I can have regard to the overriding objectives of Part 1.1 and exercise my powers under rules 26.9 (2) – (4). This I so do as it will save time and money. Additionally there has been a disproportionate use of the court's resources on this matter and this is likely to increase should the Claimant have to re-commence the Judgment summons proceedings. It would seem a 'nonsense' to dismiss the judgment summons for this breach of technicality only to have the judgment creditor file it again. No useful purpose would be served and there would be little, if any,

prejudice to the judgment debtor if the judgment creditor was given an opportunity to cure the defect. In view of this, I order that the Claimant/judgment creditor files and serves a certificate stating the Bank of Jamaica selling rate for the US dollar relative to the day before these enforcement proceedings were commenced, on or before the 1st March 2013.

[27] As the writ is invalid and the seizure unlawful, it therefore follows, that the seizure was wrongful and cannot be a basis for objection to the judgment summons. The judgment summons is therefore properly before the court as clearly the judgment debt in the circumstances, remains un-satisfied. In conclusion therefore, I find that:

(i) there was a seizure

(ii) this seizure was unlawful as the order for seizure and sale was invalid at the time of seizure and

(iii) that the Judgment summons is properly before the court.

[28] I order therefore that:-

(i) Judgment Summons adjourned to a date to be fixed by the registrar

(ii) Judgment creditor to file and serve a certificate outlining average weighting of the Bank of Jamaica Us dollar selling rate at the close of business the day before commencing these enforcement judgment summons proceedings on or before 1st March 2013.

(iii) No order as to costs on this preliminary issue.

(iv) Order for bailiff of St. James – Mr. Daniel Robinson to return to counsel for Judgment Debtor the Title to boat cataraaman DC dreamweever on or before February 15, 2013.

(v) Leave to appeal granted to the judgment debtor on condition that he pays into court judgment debt of US$5363.14 and costs of J$24,165.63 on or before April 8, 2013.

[29] I have made no order as to costs as I am of the view that the judgment debtor quite properly objected to the judgment summons application in circumstances where

his boat with an estimated value of US$40,000.00 had been seized, unbeknown to him, wrongfully; In circumstances where the bailiff and the judgment creditor blatantly denied that there had been a seizure although the evidence of this was patently clear. I have made findings against the Judgment creditor in this regard and accordingly exercise my discretion in making 'no order as to costs' although costs 'usually follows the event'.