[2015] JMSC Civ. 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04430

BETWEEN	Lijyasu Kanekore	CLAIMANT
AND	COK Sodality Co. Credit Union	1st Defendant
AND	Deidre Doley	2nd Defendant
AND	Donovan Ward	3rd Defendant

Defendants' application for summary judgment - whether claim has a real prospect of success - whether the execution of a bill of sale results in the transfer of title to the grantee of the bill of sale - whether application could be heard while application for default judgment was pending.

Mr. Lijyasu M. Kandekore, Claimant in Person

Mrs. G. Gibson-Henlin instructed by Henlin Gibson-Henlin for the Defendants

Heard: 17th April 2015.

In Chambers

Coram: Batts J.

[1] On the 17th April 2015 having heard submissions I made the following Orders:

i. Summary judgment granted

ii. Claim dismissed with cost to the Defendants to be taxed if not agreed

Iii Leave to appeal granted if required

I promised then to put my Reasons in writing and this I now do.

[2] This matter concerns an application for summary judgment brought by COK Sodality Co-Operative Credit Union limited, (First Defendant), Deidre Daley, (Second Defendant) and Donovan Ward the (Third Defendant) against Lijyasu M. Kandekore, (The Claimant), pursuant to rule 15.2 (a) of the Civil Procedure Rules, 2002 (the CPR). The sole ground on which the application for summary judgment is based is that the Claimant has no real prospect of succeeding on the claim and, as such, it is appropriate for summary judgment to be entered in favour of the Defendants. The application, of course, is robustly contested by the Claimant. Prior to this matter being brought before me the Claimant sought an interim order for an injunction which was refused by my brother Frazer J on the 10th October 2014.

[3] Mr. Lijyasu Kandekore the Claimant borrowed a sum of $750,000.00 from the First Defendant at an interest rate of 22% per annum. The agreed monthly repayment totalled $31,507.12 which was to be allocated in the following ways; $28,642.84 represented the loan and interest payment and $2,864.28 a share contribution.
The Claimant provided as security for the loan a Bill of Sale over his motor vehicle and also granted a Power of Attorney relating to the same vehicle to the First Defendant.
The Claimant's failure to pay the monthly amounts as per agreement resulted in three months arrears as at the 3rd July 2014. The First Defendant instructed the Third Defendant (a bailiff) to seize the motor vehicle which was the security for the loan.
The Claimant demanded the return of the motor vehicle even though the outstanding amounts were not settled. The refusal of the First Defendant to comply with the Claimant's wishes resulted in this claim against the Defendants for damages for:

I. The unlawful seizure of his motor car
II. Unlawful entry to his home and unlawful prevention of the Claimant from leaving or entering his home
III. Damage to the Claimant's electronic gate
IV. Aggravated damages
V. An account and the return of the motor car licensed 7979FA

[4] The Defendants relied upon Rule 15.2 of the Civil Procedure Rules, 2002 which states:

> **“The court may give summary judgment on the claim or on a particular issue if it considers that the Claimant has no real prospect of succeeding on the claim or issue or if the Defendant has no real prospect of successfully defending the claim or issue.”**

It was submited that in circumstances where the Claimant has a case which is bound to fail it is in his interest to know as soon as possible that that is the position. The authority relied upon by counsel to highlight this point and the test laid down was that of **Gordon Stewart et al v Merrick Samuels SCCA no. 2/2005** at page 94 where Harrison J.A stated as follows:

> **“The prime test being “no real prospect of success” requires that the learned trial judge do an assessment of the party’s case to determine its probable ultimate success or failure. Hence it must be a real prospect not a “fanciful one”. The judge’s focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. “Real prospect of success” is a straightforward term that needs no refinement of meaning”.**

[5] Reliance was also placed by counsel on the well known authority of **Swain v. Hillman [2001] 1 All ER 91** in which Lord Woolf MR applied the overriding objective of the Civil Procedure Rules 2002 in the following way:-

> **"It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objective contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice."**

[6] The Defendants further asserted that the seizure of the Claimant's vehicle was lawful on the following grounds:

I. The Bill of Sale gave to the First Defendant an absolute right to the property in the assigned motorcar and a right to possession of it upon the Claimant's default in his loan repayment

II. The Claimant was in default of his loan agreement with the Fist Defendant. He did not pay the amounts due under the loan

III. The act of the seizure of the motor vehicle was done under the authority and power of the Bill of Sale and loan agreement

IV. The Claimant has not challenged the validity of the Bill of Sale

V. The Claimant's possession of the motorcar is subject to his honouring of his obligations under the Loan Agreement and Bill of Sale.

VI. The Claimant's loan account remains in arrears as amounts are still due and owing ; the Claimant has not paid off his account.

VII. The First Defendant was therefore entitled to possession of the motorcar.

[7] Defendant's Counsel relied heavily on the case of **National Commercial Bank v Owen Campbell and Toushane Green [2014] JMCA Civ 19, (unreported judgment delivered 30th May 2014),** in which the Court of Appeal held that a bill of sale transfers ownership of the motor vehicle on the execution of the Bill of Sale to the first appellant. Counsel drew my attention to the words of Brooks JA at paragraph 65:

> **"Execution of a bill of sale by the owner of goods results in the transfer of title to those goods to the grantee of the bill of sale; in this case NCB."**

Counsel likened parts of their case to that of the NCB case and submitted that in light of the fact that the interim order sought by the Claimant was refused it would be appropriate to grant the summary judgment.

[8] The Claimant strongly opposed the Defendant's application for a summary judgment on the following grounds;

I. The Defendants previously sought summary judgment against the Claimant

II. The time for filing a defence had expired

III. The Claimant has filed a request for default judgment

IV. The Claimant was informed by the Registrar that judgment could not be entered on his behalf while the application for summary judgment was pending

V. That Pursuant to Rule 12.13 the Defendants are prohibited from making submissions and may not be heard on anything except "(a) costs; (b) the time of payment of judgment debt; (c) enforcement of the judgment and (d) an application under rule 12.10(2)".

VI. The court should not entertain the application for a summary judgment and it must of necessity be struck out.

VII. An appeal to the Court of Appeal against the decision of Fraser J. is pending and is scheduled for case management conference four days after the scheduled hearing of this application.

VIII. The success of the Claimant in the Court of Appeal would render the summary judgment a nullity

IX. The scheduled request for summary judgment cannot be entertained while the appeal of the substantive matter is pending before the Court of Appeal because such a summary judgment hearing would be an impermissible exercise of authority by the Supreme Court over a matter currently within the jurisdiction of the Court of Appeal

[9] In considering whether or not to grant an application for summary judgment the court will be mindful to direct itself to the provisions laid down in the Civil Procedure Rules specifically part 15.2 and the overriding objective contained in part 1, in an effort to ensure justice is served between the parties. An application for an Injunction involves somewhat different considerations than one for summary judgement. The pending appeal does not therefore preclude my entertaining this application.

[10] The question to be answered is does the Claimant have a real prospect of succeeding on the claim? The short answer to that question is in the negative. The Claimant stated that the Defendants sought summary judgment on a previous occasion. However there has been no such application before this court prior to the current application for summary judgment. There is none recorded on the court's file. The Claimant also stated that he made an application for Default Judgment to be entered in his favour. It is well established that pursuant to part 12 of the Civil Procedure Rule specifically 12.1 a Claimant may obtain judgment without trial where a Defendant has, (a) failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or (b) has failed to file a defence in accordance with Part 10. As such a default judgment can only be entered if the Defendant has not acknowledged

service or filed a defence. The Claimant's reliance on this rule is misplaced as the Defendants have all acknowledged service and filed Defences within the prescribed time.

[11] The Claimant further asserts that pursuant to Rule 12.13 the Defendants are prohibited from making submissions and may not be heard on anything except "(a) costs; (b) the time of payment of judgment debt; (c) enforcement of the judgment and (d) an application under rule 12.10(2)".

It is important that a clear understanding be had of this particular rule. The rule speaks to the Defendant's rights following default judgment being entered.

The Claimant erred in stating that the Defendants are prohibited and can only be heard on items a – e of the Rule 12.13. This is so because a default judgment was not entered on behalf of the Claimant and as such there is as yet no need for an application to set aside judgment. The Defendants have filed an Acknowledgement of Service and Defence within time. See affidavit of Toniesha Rowe dated 15th April 2015 at paragraph 5.

[12] My brother Fraser J refused an application for injunction brought by the Claimant. This was because he felt the balance of convenience favoured the Defendants. This is not surprising when regard is had to the strength of the Defendant's case. The learned judge stated (at paragraph 26)

> **"On the face of the evidence before the court the Claimant is in arrears but in any event even if I am wrong in that finding I have found from a construction of the agreement that even if he was not in arrears once money was outstanding on the loan the security could be seized."**

[13] The evidence exhibited before me is clear. The Claimant did enter into a legally binding agreement between himself and the First Defendant for the loan amount of $750, 0000.00 with a specific amount to be repaid monthly. The Claimant did by way of a by Bill of Sale and Power of Attorney use his motor vehicle as security. The Claimant did default on his payments and when no payment was forthcoming after issuing a caution the First Defendant authorised the Third Defendant in the capacity of a bailiff to seize the motor vehicle.

[14] The First Defendant therefore acted lawfully when they authorised the Third Defendant to enter the Claimant's premises and seize the motor vehicle. At the time of the seizure of the motor vehicle the Defendants were entitled to possession of same and therefore the seizure was lawful.

[15] It is clearly outlined in the various clauses of the Bill of Sale and in particular clause four:

> **"That in exercise of the power to seize the said chattels assigned, the credit union, its servants and agents may enter and remain upon any premises where the said chattels may be believed to be and if necessary may break open doors and windows, gates or fences in order to obtain possession thereof and to seize and take away same"**

[16] The Claimant being an attorney at law read and properly understood the terms and conditions in the agreement between the parties, or ought reasonably to have done so. There is no evidence before me to suggest that the Defendants or their agents utilized excessive or unreasonable force when seizing the motor vehicle or that they acted otherwise than accordance with the power given by the Bill of Sale.

[17] It is therefore in order for summary judgment to be granted. I have had regard to the affidavit evidence filed by the Defendants in that the defence and acknowledgement were filed in time. In any event as regards the overriding objective this court would if necessary have extended time given to file Defence. The acknowledgement and defence were in fact filed and no judgment had as yet been entered by the Registrar. The terms of the Bill of Sale are clear and its legal consequence well settled. The Defendants case on the merits is overwhelming.

[18] It was in light of the above circumstances that I made the orders stated in paragraph 1 of this judgement.

David Batts

Puisne Judge

29th June 2015