[2016] JMSC Civ. 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV05712

BETWEEN	**Zavia Mayne**	**CLAIMANT**
AND	**Radhika Sankar Rothery**	**1st DEFENDANT**
	Nandcare Pharmacy Limited	**2nd DEFENDANT**

Mr. Phillip Bernard for applicant

Mr. Jalil Dabdoub for the respondent

Heard: May 4, 6 and 13, 2016

Application for summary judgment - reasonable prospect of the defendants successfully defending the claim - proper defendant to the proceedings - automatic annual increase in rent - security deposit.

Carolyn Tie, J (Ag.)

[1] This is an application by the claimant for summary judgment pursuant to part 15.2(b) of the Civil Procedure Rules 2002 (CPR). The grounds contained therein are that:-

i. the defendants have no real prospect of successfully defending the claim.

ii. any attempt to defend the claim will be a waste of the court's time and result in additional costs and severe prejudice to the claimant; and

iii. time is of the essence as the claimant is unable to meet his mortgage and maintenance obligations and has been threatened with legal proceedings to recover amounts due and outstanding in respect of the said property occupied by the defendant.

[2] The claim against the defendants, as set out in the claim form, is for the sum of three million ninety two thousand and twenty six dollars and fifty cents ($3,092,026.50) being monies owing for rent pursuant to a written agreement dated August 7, 2013. The particulars of claim assert non-payment of rent during certain periods of the tenancy and at other times either non-compliance with the terms of the agreement as regards the timely payment of rent; or at other times payments which disregard the scheduled yearly increases as outlined in the agreement.

[3] The defence, in denying that money is owed, essentially raises the following issues:-

i) that contrary to what was agreed, the claimant failed to adjust the written agreement for it to reflect Nandcare Pharmacy as the tenant, the agreement having been prepared solely in the name of the first defendant to facilitate an application to the Pharmacy Council of Jamaica for the operation of a pharmacy.

ii) that payments were made in accordance with the terms of the agreement as regards the first year of the tenancy. That the annual increases in rental thereafter contravene the Rent Restriction Act and as such the rental amounts claimed after the first year are illegal, hence no rent is due and owing to the claimant.

[4] The defendants also counter claim in the sum of one million two hundred and one thousand, five hundred dollars ($1,201,500) as well as interest, on the grounds that the claimant failed to provide tax invoices for the rental sums

charged in a timely manner and thereafter provided invoices that were non-compliant with the provisions of the General Consumption Tax Act. As a consequence, the second defendant was unable to claim for tax credits as regards General Consumption Tax (G.C.T.) paid over to the claimant.

[5] The affidavits filed in support of the application for summary judgment reflected the essence of the claim as set out in the particulars of claim and further declare that the claimant has been unable to honour his mortgage and maintenance obligations.

[6] In response thereto, the affidavit of the first respondent asserts that there was never an agreement that she would pay the rent. She contends that despite repeated requests, the claimant refused to furnish tax invoices for the rental sum as he is obliged to do under the Income Tax Act and the General Consumption Tax Act, and that when he eventually did, they were at diverse times and in a tardy fashion. Furthermore the tax invoices could not be used and applied as input tax credits on its G.C.T. returns as they failed to comply with the provisions of the said Act and did not reflect the true and correct rental. The respondent indicates that the inability to claim back G.C.T. paid over to the claimant, which totals one million two hundred and one thousand, five hundred dollars $1,201,500.00, has forced the 2nd defendant to enter into a borrowing relationship with a financial institution.

The Law as regards applications for summary judgment.

[7] Part 15.2 of the CPR states;

"The court may give summary judgment on the claim or on a particular issue if it considers that-

(a) …….

(b) The defendant has no real prospect of successfully defending the claim or issue."

[8] In order to succeed in its application, the applicant must establish that the defendants have no real prospect of successfully defending the claim. The test as to whether there is a real prospect of success is well established. There must be "a 'realistic' as against a 'fanciful' prospect of success." (**Swain v. Hillman;** (2001) 1ALL ER 91). Lord Woolf therein made it clear that it is not meant to dispense with the need for a trial where there are issues that should be investigated at trial and warned against the application for summary judgment becoming a mini trial.

[9] Applying the words of Lord Woolf, has the claimant herein established that he is 'bound to succeed' given the issues raised in the defence and on the affidavit of the defendant?

The Applicant's Submissions

[10] Counsel for the applicant made oral submissions, relying primarily on the pleadings, which submissions can be summarised as follows:-

i) that in response to the application for summary judgment, the defendants filed an affidavit and included deposit slips as a result of which the claimant 'did a reconciliation and we estimate that the shortfall is in the amount of $2,493,069.50 up to today's date.' He further submitted that the defendants having filed an acknowledgment of service indicating that they admit no part of the debt, then paying the sum of$1,058,200 in March 2016 amounts to an admission of the claim.

ii) that the defendants, having participated under the written agreement, cannot properly argue that the 10% increase as provided for therein, is contrary to the Rent Restriction Act. In response to the respondents' submission, he suggested

that if it is so deemed, the rate of 71/2% could be utilised by the court to calculate the yearly allowable increase in rental.

[11] As regards the counter claim, he submitted that it is without merit as the defendants could have relied upon the lease agreement to recover General Consumption Tax paid. He pointed out that it was not pleaded that the tax authorities had an issue with the receipts presented.

The Respondents' submissions.

[12] Counsel for the respondents submitted that the application for summary judgment ought to fail since the defendants have a real prospect of succeeding. To this end the following issues were raised by way of written skeleton submissions which were supplemented with oral submissions:-

i) That the claimant failed to amend the lease, placing it in the name of the second defendant only.

ii) that the collection of a security deposit as contained in the lease agreement is contrary to the dictates of the Rent Restriction Act and as such the two months rental collected for this ought to be refunded along with interest. In support thereof he relied on the authority of **Albert Simpson v Island Resources Limited** Claim no. 2005HCV0102.and in particular the words of F. Williams J. (Ag) (as he then was), that *"the first and immediate point is that the charging of a security deposit or a premium in respect of the said premises is in contravention of the Act"*

iii) that the yearly rental increases as stipulated in the lease agreement are in contravention of the Rent Restriction Act. Further that the Rent Restriction Act does not allow for an automatic annual increase in rental. Counsel referred to section 17 of the Act which deals with standard rent pending determination by an assessment officer as well as to section 21 which addresses the manner in which

increases in rents may be allowed or restricted. Reliance was also placed on the Rent Restriction (Percentage of Assessed Value) Order, 1983, which is made under section 19 of the Act. To this end the authority of **Annie Lopez v Dawkins Brown et al** [2015] JMCA Civ. 25 was relied on.

Analysis

[13] For convenience, I find it prudent to consider firstly the issue of the merit of the submission as regards the legality of a 10% annual increase in rent, as per the agreement, since this goes to the heart of the defence and consequently, the merit of the claim. Indeed, if the issue of the monthly rental is not settled, summary judgment cannot be entered. Furthermore the argument raised as regards the General Consumption Tax is inextricably connected to the issue of the monthly rental as this will determine the correct G.C.T. that ought to be paid and consequently the appropriate sum that can be claimed as a tax credit.

[14] The issue of the appropriate annual increase requires a review of the Rent Restriction Act. Section 17 of the Act deals with the standard rent pending determination by an assessment officer and provides that until such determination, the standard rent is the rent at which the premises were let 'plus any increases sanctioned pursuant to this Act.' Section 21 addresses the issue of the manner in which increases in rent may be allowed or restricted. That section allows for the landlord to make an application for an increase in rent where he has incurred expenses in effecting improvements to the premises, or where there has been an increase in certain rates and taxes subsequent to the assessment by the assessing officer as regards the standard rent. It further deals with increases as a result of orders made by the Minister and essentially provides that the Minister may sanction an increase of rent by such percentage as he may specify.

[15] The concept of an annual increase in rental arises from the Rent Restriction (Percentage of Assessed Value) Order 1983, section 3(1), which states as follows *'The standard rent as determined for any premises pursuant to the schedule shall be increased on each anniversary of the application date by such amount as shall be necessary to increase, by 71/2 per cent, the standard rent payable immediately prior to such increase.'* This order is made under section 19 of the Act which deals with the determination of standard rent by the assessment officer.

[16] Given that the premises in issue are not exempted, the annual rate of increase imposed in the instant case of 10% is clearly in contravention of the Act. In fact section 20(1) stipulates that where the rental exceeds the standard rent by more than the amount permitted under the Act, notwithstanding any agreement to the contrary, it is irrecoverable from the tenant and if paid by the tenant is recoverable by the tenant.

[17] Does this mean however that the court can simply substitute the rate of 71/2% into the contract? Furthermore would the claimant be entitled to an automatic annual increase or is it, as the respondents urge, that this figure of 71/2% and its automatic application are misconceived?

[18] The applicant has presented no legal grounding for his urging that the figure of 71/2% should be applied in the stead of the current terms of the contract, if the latter were to be deemed in contravention of the Rent Restriction Act. Furthermore, even if had been established that this percentage ought to be inserted into the contract, it is apparent that the issue of the appropriate application of the annual increase is unsettled.

[19] It is apparent from a review of the Court of Appeal ruling in **Jamaica Cottage & Motels Association Limited v Carl Campbell** (SCCA No. 53 of 2003),that an annual increase of 71/2% has been endorsed as acceptable.

[20] However, a brief statement by Morrison JA (as he then was) in the decision of **Annie Lopez v Dawkins Brown** (supra), seems to put a spin on this approach and appears to suggest that there is no automatic right to impose an annual 71/2% increase. This case involved a rental agreement with an option to purchase. An interim order had been made for the tenant to pay a certain sum each month as rent. In response to the landlord's assertion that she was entitled to a 71/2% annual increase in rent, the learned Judge of Appeal noted '…*the appellant's claim to a 71/2% annual increase in rent is, in my view, misconceived. Where the standard rent of any premises subject to the provisions of the Rent Restriction Act has been assessed pursuant to section 19(1) of the Act, the rent of any such premises may be increased by such percentage of the standard rent as may be sanctioned by ministerial order (section 21(2)(a). Section 3(1) of the Rent Restriction (Percentage of Assessed Value) order 1983 provides for the annual increase in the standard rent of 71/2% in the circumstances stated in the Act and the order. In this case, there is absolutely no evidential basis to support the annual increase in rent under these provisions that is contended for by the appellant.'*

[21] Prima facie, an automatic annual increase of 71/2%, without regard to the circumstances justifying same, appears incongruous with the various provisions of the Rent Restriction Act which set out the instances in which a landlord may apply for an increase, and particularly when considered in the context of the broad objective of the Act as evident from its title.

[22] I am of the view that the applicant has not satisfied the court that the defendants have no real prospect of successfully defending the claim. I am further of the view that summary judgment cannot be entered as there are a number of unresolved issues on the claimant's case.

[23] I find that the issue of the correct monthly rental is not settled, in light of the flawed provisions in the lease agreement as regards rental increases. The monthly rental being unresolved, prima facie lends credence to the defendants' contention as regards inability to claim a tax credit on G.C.T. since this hinges on the amount of rental paid.

[24] It is my view that the appropriateness of substituting the figure of 71/2% into the contract, as well as the legality of an automatic increase in rent, require full ventilation. I am further satisfied that a trial is necessary given the apparent uncertainty as to the exact figure that the claimant contends is outstanding. The claimant's reconciliation and 'estimate' that the shortfall is in the amount of two million four hundred and ninety three thousand and sixty nine dollars and fifty cents ($2,493,069.50) up to the date of hearing is mathematically unsound given that the claim was filed in the sum of three million and ninety two thousand and twenty six dollars and fifty cents ($3,092,026.50) and the sum of one million and fifty eight thousand two hundred dollars ($1,058,200) was subsequently paid. In any event an estimate is evidentially unacceptable. I cannot accept the submission by the applicant that the defendants, having filed an acknowledgment of service indicating that they admit no part of the debt, and thereafter paying the sum of one million and fifty eight thousand two hundred dollars $1,058,200 amount to an admission of the claim. This cannot be regarded as an admission to the claim in its entirety or as claimed.

[25] Uncertainty also exists as regards the period of time to which this outstanding figure relates. Counsel for the applicant indicated that this was the amount owing as at the date of hearing. The claim form however claims for rent owing for the period ending November 2015.

[26] I find also that there is conflict as regards the proper defendant to these proceedings. The defence asserts that the lease ought to have been placed in

the name of the second defendant whilst the claimant, as per the reply to the defence, maintains that it was always intended for the lease to be in the name of the first defendant. I am of the view that the resolution of this issue will rest primarily on the credibility of the parties which invariably is within the purview of the trial judge.

[27] Whilst I have already determined that the application for summary judgment cannot succeed, I will nonetheless comment briefly on the issue of the legality of the security deposit given that fulsome submissions were made by both counsel for the applicant and for the respondent.

[28] The respondent contends that the taking of a security deposit is contrary to the terms of section 24(1) of the Rent Restriction Act and places reliance on the dicta of Williams, J (Ag.) (as he then was) in the case of **Albert Simpson v Island Resources Limited** as stated above. Section 24(1) stipulates that 'A person shall not, as a condition of the grant....of a tenancy of any controlled premises....require the payment of any fine, premium or other like sum or the giving of any consideration in addition to the rent…...'

[29] In response, counsel for the applicant argued that the **Albert Simpson** case is distinguishable as there was no lease therein and presented the authority of **R v Ewing** [1979]2 EGLR 72, for consideration. This involved an appeal against conviction under the Theft Act where the defendant paid a security deposit by way of a cheque which allowed him access to the premises and thereafter he cancelled the cheque. Counsel for Ewing argued that there could be no conviction in light of the fact that the security deposit was illegal. The security deposit provision therein read as follows, *"a returnable deposit of £45 to be paid by the tenant shall become due upon the signing hereof ....to be held by the landlord against service accounts, gas, electricity, telephone etc. and further against breakage or damage in or to the property and will be fully returned to the*

tenant on satisfactory discharge of such accounts and providing there be no breakage or damage." Lawson J stated *'In our judgment the payment of the returnable deposit, as it is described in the agreement, was not a premium. It was not either a fine or other like sum, and it was not 'another pecuniary consideration in addition to rent.' It was what it was specified to be, that is to say a deposit as against the tenant's obligation to pay various accounts such as electricity, telephone and service accounts and other matters in respect of any dilapidations, bearing in mind that this was a furnished tenancy."*

[30] It is evident that the learned judge in **Albert Simpson v Island Resources Limited** may not have been seeking to lay down any pronouncement of general application as regards the legality of security deposits. His words appear to be carefully chosen. He states thus, *'It seems to me that the sum required by the landlord and paid by the tenant **in this case** amounts to "the giving of ...consideration in addition to rent."* (emphasis mine). Unfortunately the terms of the security deposit payment are not contained in the decision.

[31] It seems to me that a determination of the legality of a security deposit must depend upon the construction of the particular provision in issue and the purpose associated with collecting the sum.

[32] The provision as contained in the agreement in issue does not seem to bear any resemblance to a premium, fine or consideration in addition to the rent. In fact it bears some similarity to the provision contained in the authority of **R v Ewing** (supra), which the court of appeal therein regarded as consistent with the provisions of the Rent Act which provisions closely mirror those in the Jamaican Rent Restriction Act.

[33] In the circumstances, for the reasons previously stated, the application for summary judgment is refused. Costs of this application are awarded to the defendants.