[2016] JMSC Civ. 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV03841

BETWEEN	**MERELL MITCHELL**	**CLAIMANT**
AND	**LYNDON B.N. JOHNSON**	**DEFENDANT**

IN CHAMBERS

Mr. Kent Gammon for the Claimant.

Mr. Stuart Stimpson and Mr. Hasani Haughton instructed by Shields Law for the Defendant.

Civil Procedure – Application to withdraw admission – whether an admission was made – whether admission should be withdrawn – whether judgment on admission is to be set aside – Civil Procedure Rules 1.1, 1.2, 14.1(6)

HEARD: March 8th and 15th, 2016

V. HARRIS, J

[1] There are two applications before me. The first is filed by the Claimant on March 04, 2015. It is for the sale of land pursuant to rule 55.2 of the Civil Procedure Rules 2002 (CPR) to satisfy a judgment on admission that was entered for the claimant on September 19, 2014. That judgment is for the sum of US$138,049.32 and J$24,000.00 inclusive of interest and costs with interest on the US$138,049.32 at the rate of 10% per annum from the date of judgment to the date of payment and/or execution.

[2] The second application is made by the Defendant in which he is seeking permission to withdraw an admission that was made in his statement of case filed on September 19, 2014. This application was filed on October 01, 2015. He is also asking

that the judgment on admission that was entered in the claim be set aside and that the application for sale of land made by the Claimant be dismissed.

[3] To best utilize the time and resources of the court and in keeping with what I hope is common sense I heard the latter application first as I am of the view that should the Defendant succeed the former will fall away.

Background

[4] On August 08, 2014 the Claimant, Ms Merrell Mitchell, the aunt of the Defendant Dr. Lyndon Johnson, filed a claim against him for:

(1) Damages for breach of contract.

(2) The principal sum loaned to the Defendant of USD $60,000.00/JMD $6,780,000.00.

(3) Interest at 10 per cent per annum on the principal sum loaned to him of USD $91,909.43/JMD $10,385,765.59 in excess of 12 years and continuing.

The total that is being claimed is JMD $17,177,765.59 with interest at such interest rate as the court deems just.

[5] In paragraphs 1 and 2 of the Claimant's particulars of claim she avers that she had loaned to the Defendant, the sum of USD $60,000.00 or JMD $6,780.000.00 to purchase land at Victoria Park, Brompton in St. Elizabeth and that the loan was subject to an annual interest rate of ten percent (10%). She states that she would rely on the various correspondences between the parties which dealt with the loan and applicable interest to it at the trial.

[6] On August 18, 2014 Dr. Johnson filed an acknowledgement of service in person. In that document he denied the entire claim and stated his intention to defend it.

[7] On September 19, 2014 Dr. Johnson filed his defence, again in person. In that document it is stated:

> I dispute the claim on the following grounds:
>
> (1) There exists NO LOAN agreement for the sum of US$60,000.00 between the parties
>
> (2) The Claimant INVESTED the sum of US$60,000.00 with the Defendant towards the purchase of 32 acres of the said land
>
> (3) The Defendant is willing to return the US$60.000.00 or to transfer the 32 acres to the Claimant

[8] Based on this document the Claimant filed a request for entry of judgment on admission on September 19, 2014. The learned Registrar entered judgment on admission on the same date for the amounts and on the terms stated in paragraph 1. There is no evidence that Dr. Johnson was aware of this judgment until he was served on August 08, 2015 with the Claimant's application for sale of land.

The application by Dr. Johnson

[9] This application is supported by an affidavit which sets out the terms of the arrangement between the parties. In short there was an agreement for a loan of US $32,000.00 with interest at ten per cent (10%) per annum (which the Court was informed has been repaid) and an investment of US$60,000.00 which was to be used to purchase property for housing development. Thirty-two (32) acres of this property is to be transferred to the Claimant as a return on her investment. A letter from the Defendant to the Claimant dated September 15, 2001 which is signed by both parties is exhibited with Dr. Johnson's affidavit and sets out clearly the terms of their agreement.

[10] Two properties measuring eighty-five (85) acres and registered at Volume 1345 Folio 972 and Volume 1454 Folio 431 of the Register Book of Titles were acquired by

the Defendant. These titles are also exhibited. The registered proprietors are Ms Paulette Johnson and the Defendant.

[11] Dr. Johnson has stated that the loan and investment amounts have always been treated as separate arrangements by the parties. What he is saying is that the US$60,000.00 was never loaned to him at ten per cent (10%) interest per annum and there was no obligation for him to repay this amount at any time and with any interest. Rather, this amount was to be used to acquire land for housing development of which the Claimant was to receive thirty-two (32) acres.

[12] There were problems with the development as the land was zoned for agricultural use and the attempts made by the Defendant to change the zoning have failed so far.

[13] The Defendant has given evidence that when he filed his acknowledgement of service and defence, he was unrepresented. However, he disputed the claim and paragraph 3 of his defence was not intended to be an admission of the claim. When he stated in that document that he was willing to return the US$60,000.00 or transfer the thirty-two (32) acres of land to the Claimant, this was an indication of his willingness to settle the matter with her.

Submissions

[14] Learned counsel Mr. Stimpson for Dr. Johnson has submitted that neither the acknowledgement of service, nor the defence filed, contains an admission pursuant to CPR 14.1. He further submitted that the Defendant did not admit the claim in full or in part in his acknowledgement of service. The defence also expressly denied the claim Mr. Stimpson said. He continued that what was contained in paragraph 3 of the defence was a willingness on the Defendant's part to settle with the Claimant by returning the US$60,000.00 without interest which was invested or transferring the thirty-two (32) acres of land as agreed for the investment.

[15] Mr. Stimpson went on to say that an ordinary and purposeful interpretation of this statement ought not to have been construed as an admission of the claim, when read in the context of the entire defence that was filed. Dr. Johnson, he stated, had shown a clear intention to defend the claim and has made this application to rectify an incorrect interpretation of his statement of case. Therefore, he further submitted, if the Court finds that there was no proper admission the judgment on admission is irregular and should be set aside.

[16] However, if the Court find that the Defendant made an admission then he should be permitted to withdraw it in keeping with CPR 14.1(6) and the overriding objective of the CPR to deal with matters justly.

[17] He pointed the court to the authority of **Continental Baking et al v Super Plus Food Stores Limited et al** [2015] JMSC Civ 169, a decision of Sykes J, as providing useful guidance when considering an exercise of its discretion in matters of this nature.

[18] Mr. Stimpson put forward that in light of the evidence in support of the application, it is only fair and just that the Defendant be permitted to withdraw his admission, if it is so deemed, and be allowed to amend his defence because:

(i) His application is made in good faith. The Defendant stated his willingness to settle the claim with his aunt. This he did without legal representation and this was not intended as an admission of the claim having regard to his defence and acknowledgement of service;

(ii) The balance of prejudice rests with granting the application. Justice demands that further litigation may be required to resolve the claim because the Defendant only became aware of the judgment when he was served with the application for sale of land and he applied to the court as soon as it was reasonably practicable;

(iii) His admission was inadvertent and should not be construed that he is the author of the prejudice he suffers from the judgment being entered;

(iv) The Defendant has a realistic prospect of defending the claim. His statement of case is that the monetary sum claimed was an investment. There was no agreement that he would repay this sum as a loan with interest and there is no evidence to the contrary;

(v) The circumstances confirm no strategic manoeuvring by the Defendant or waste of the court's resources as the Claimant is proceeding to enforce a procedural judgment which has not been determined on the merits; and

(vi) The Claimant would benefit unjustly if the Defendant is not permitted to withdraw his admission because there was never a loan for the amount claimed with interest. What was agreed was that this sum was to be used as an investment in exchange for a parcel of land. Additionally, the Claimant having decided that she no longer wants the land that has been demarcated for her, this does not mean that there is a breach of contract by the Defendant.

[19] Learned counsel for the Claimant Mr. Gammon has vigorously opposed the application. He has asserted that on a careful consideration of the circumstances of the case, there was in fact an admission of the claim made by the Defendant. As a result, the Defendant would not have a realistic prospect of defending the claim and his application should be dismissed. To grant the Defendant's application would result in a waste of the court's time and resources, he further posited.

The Law

[20] Rule 14.1 (6) of the CPR provides that where an admission is made the court may allow a party to amend or withdraw it. There are no provisions in the rule setting out how to approach an application of this sort. However, it is now settled that, "in the absence of specific guidance in a particular rule the court is to have regard to the overriding objective in applying that rule." (per Brooks JA in **The Attorney General of Jamaica and Western Regional Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ 16 at paragraph 14).

[21] The overriding objective of the CPR is that the courts are to ensure that cases are dealt with justly and the courts are to give effect to the overriding objective when interpreting the rules or exercising any powers under them. (See rules 1.1 (1) and 1.2 of the CPR).

[22] In **Continental Baking** (supra) Sykes J after considering a number of authorities, approved and applied the judgment of Brooke VP in **Braybrook v Basildon & Thurrock University NHS Trust** [2004] EWHC 3352. Both of these authorities provide useful guidance on the approach to be taken when considering an application to withdraw an admission after a claim has commenced. The principles that are to be applied, as I understand them to be, are as follows:

(1) The court is to consider all the circumstances of the case and seek to give effect to the overriding objective.

(2) Amongst the matters that are to be considered are:

a. the reasons and justification for the application which must be made in good faith;
b. the balance of prejudice to the parties;
c. whether any party has been the author of any prejudice they may suffer;

d. the prospect of success of any issue arising from the withdrawal of an admission;
e. the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring;
f. how close the application is to any final hearing. The nearer the application is to a final hearing the less the chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is before the hearing.
g. in exercising its discretion the court will have regard to the facts of the particular case before it and the words "will consider all the circumstances of the case" have particular resonance in this context.

Analysis and Disposal

[23] Having considered the acknowledgement of service and defence filed by the Defendant, I find the argument made by learned counsel Mr. Stimpson, that there was no admission made by the Defendant and that what was stated in the defence (at paragraph 3) was an indication of the Defendant's willingness to settle the matter with his aunt, quite persuasive and compelling.

[24] The claim is clearly one for a loan of US$60,000.00 with interest at ten per cent (10%) per annum. The particulars of claim further support this.

[25] The Defendant's acknowledgement of service clearly indicates that he did not admit the claim and that he intended to defend it.

[26] In his defence the Defendant denied or disputed that there was a loan agreement for this amount on the terms advanced in the claim and particulars. He stated that the money was to be used for investment purposes with the return on the Claimant's investment being the transfer of thirty-two (32) acres of land to her and not interest.

[27] I am also inclined to the view, when the Defendant's entire statement of case is considered, that what was stated in paragraph 3 of the defence accords more with a settlement than an admission of the claim.

[28] I have found therefore that paragraph 3 of the defence was misconstrued as an admission of the claim and have come to the conclusion that the judgment on admission entered as a result of it must be set aside as having been irregularly obtained.

[29] However, in the interest of justice, I have gone on to consider what would be the outcome of this application, if it is deemed that the Defendant had in fact made an admission.

[30] It is my decision that even if this had been the case, I would have exercised my discretion and allowed him to withdraw it, based on the principles enunciated in **Baybrook** and which were applied in **Continental Baking**. I will now give my reasons for reaching this conclusion.

[31] The Defendant's application, in my view, has been made in good faith. The Defendant's acknowledgement of service and defence were both filed by the Defendant in person and without the advice of an attorney. I find that what was stated as paragraph 3 in his defence, that he is willing to return the US$60,000.00 or to transfer the thirty-two (32) acres of land to her, was made in the context of settling the matter with the Claimant who is his aunt. This was not intended, in my view, as an admission to the claim for a loan of US$60,000.00 with interest at ten per cent (10%) per annum.

[32] The balance of prejudice rests with the granting of this application for two reasons.

[33] Firstly, there is no evidence that the Defendant was aware of the judgment on admission being entered as a result of his defence until he was served on August 12, 2015 with the application for sale of land. That is, there is no evidence that the judgment on admission was served on the Defendant before the application for sale of land. There is no evidence that the Defendant was represented by an attorney at the time he

was served with the Claimant's application. The Defendant's application, however, was filed by an attorney on October 01, 2015. No doubt he would have needed time to retain his attorney and to instruct her. In the circumstances, therefore, I find that his application was filed as soon as it was reasonably practicable. The delay of approximately seven weeks after being served with the judgment on admission is not considered by me to be inordinate.

[34] Secondly, based on the agreement between the parties, if the application is not granted the Claimant may well reap unjust benefits.

[35] The Defendant's admission, if so deemed, conflicts with paragraphs 1 and 2 of his defence. It also contradicts the responses he gave to the questions in his acknowledgement of service. At the time of the filing of his defence Dr. Johnson was unrepresented and it is not far-fetched that this purported admission may have been made inadvertently. Understandably, as a lay person, he would not appreciate the possible legal implications of what he stated in paragraph 3 of his defence. Therefore in the circumstances I find that this is not to be interpreted that he is the author of the prejudice that he suffers from on account of the judgment on admission being entered.

[36] The Defendant has a realistic prospect of defending the claim. In the first instance, the evidence is that there is a written agreement between the parties comprising of two parts - an investment amount of US$60,000.00 without any interest, involving the transfer of land to the Claimant as the return on her investment and a loan of US$32,000.00 at ten per cent (10%) interest per annum. No evidence to the contrary has been presented by the Claimant. The parties, it seems to me, would be bound by the terms of their agreement.

[37] Secondly, concerning the claim for breach of contract, the evidence presented reveals that in keeping with the agreement between the parties, the land has been purchased. The thirty-two (32) acres to be transferred to the Claimant was demarcated. She took objection to the quality of the land and as a result decided that she wanted the return of her money. There are also other issues that have arisen in relation to the

properties in question. However, investments, by their very nature, are accompanied by certain risks. It is, therefore, not necessarily the case, that when certain events transpire during the course of an investment venture that this automatically means that a breach of contract has occurred.

[38] There is no strategic manoeuvring on the part of the Defendant or waste of the court's resources. The claim has not been determined on its merits and the Claimant is proceeding based upon a procedural judgment. Additionally, in light of paragraphs 1 and 2 of the defence, it is not conclusive that the Defendant made an admission in paragraph 3. It is in fact open to the interpretation that the Defendant was indicating his willingness to settle the matter with the Claimant on precisely the terms he stated and not admitting the claim as pleaded.

[39] In the end, having carefully examined the circumstances of this case, I have no difficulty in arriving at the conclusion that the justice of the case demands that the Defendant's application succeeds.

Orders

(1) The judgment on admission entered on September 19, 2014 is set aside.

(2) The Defendant is permitted to file and serve an amended defence on or before the 30th March, 2016

(3) The application for sale of land is dismissed

(4) Costs to be costs in the claim

(5) Defendant's attorneys-at- law to prepare, file and serve the orders made.