[2015] JMCC COMM 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2014CD00006

BETWEEN	**LLOYD POMMELLS**	**FIRST CLAIMANT**
AND	**TONI ANN POMMELLS**	**SECOND CLAIMANT**
AND	**DONALD KERR**	**FIRST DEFENDANT**
AND	**CHRISTOPHER KERR**	**SECOND DEFENDANT**

IN CHAMBERS

Carol Davis for the claimants

Georgia Buckley instructed by Ballantyne Beswick and Co for the defendants

November 26 and December 10, 2015

CIVIL PROCEDURE – APPLICATION UNDER SECTION 11.18 OF THE CIVIL PROCEDURE CODE TO SET ASIDE ORDER MADE IN ABSENCE OF CLAIMANT – WHETHER SUMMARY JUDGMENT CAN BE ENTERED WHEN AMENDED STATEMENT OF CASE FILED AND SERVED AND TIME FOR FILING DEFENCE HAS NOT PASSED

SYKES J

[1] When the claimants' summary judgment application came on for hearing on October 20, 2015 before Sykes J neither the defendants nor counsel was present and the court made the following orders: (a) defendants file and serve a defence to the further amended particulars of claim filed by the claimants; (b) file and serve submissions and authorities and (c) application for summary judgment was adjourned to January 18, 2016. Costs of JA$50,000.00 were awarded to the defendants.

[2] The defendants wish to have these orders set aside. The application is made under rule 11.18 of the Civil Procedure Rules ('CPR'). Under that rule if a party was absent when an order was made he can apply to have the order set aside and the grounds that (a) there was a good reason for not attending the hearing and (b) it is likely that had he been present some other order **might** have been made (emphasis added).

[3] This application is supported by an affidavit. The affidavit in support is to the effect that counsel for the claimant was summoned to attend the Court of Appeal on the same day that the matter was set down for hearing. She received the notification late Friday, October 16 that her matter in the Court of Appeal would have been heard at 9:30 am on October 20, 2015. This was the long holiday weekend. She then called the attorney for the defendants and advised of the difficulty. The hearing in the Court of Appeal ended at 10:35 am and when she arrived in the Supreme Court this matter had already been adjourned to January 18, 2016. In the circumstances the court is of the view that first limb of rule 11.18 has been met. The contest between both sides is over the second part namely, had Miss Davis been present some other order might have been made.

[4] The essence of Miss Davis' submission is that rules 15.4 and 15.5 of the CPR contain the regime for litigants to apply for summary judgment. The regime establishes times lines for service and clearly say that the applicant for and the

respondent to a summary judgment application must put forward their respective cases by way of affidavit evidence. It is common ground that the claimant had filed an amended statement of case on October 1, 2015 and had served it on the defendants. It is also common ground that the defendant had not yet filed a defence to the amended statement case.

[5] Miss Davis' reasoning goes like this: rules 15.4 and 15.5 cover the field for making summary judgment applications by litigants themselves as distinct from the court acting on its own motion. Miss Davis referred to the actual terms of the rules. She asked the court to note that a claimant who applies for summary judgment against a defendant **before that defendant has filed a defence** then that defendant's time to file a defence is extended until 14 days after the hearing of the application (rule 15.4 (2)) (counsel's emphasis). Second, notice of the summary judgment application must be served at least 14 days before the date of the hearing (rule 15.4 (3)).

[6] In respect of rule 15.5 the summary judgment application must be supported by affidavit evidence and serve copies on each party (rule 15.5 (1)). Rule 15.5 (2) requires any respondent who wishes to rely on evidence in the summary judgment application must also file and serve affidavit evidence on the other parties at least 7 days before the summary judgment application. .

[7] Miss Davis submitted that from all the evidence in the case no issue has been raised concerning the time lines set forth in the rules and that being so the court need not be concerned about the time issue. This meant, it was submitted, that all affidavits were filed long before March 11, 2015 hearing date. From this standpoint all the affidavits were filed in compliance accordance with the requirements of rules 15.4 and 15.5. Importantly, she submitted, no new affidavits were filed by the claimant and all the defendants' affidavits were in.

[8] It was Miss Davis' considered opinion that a reading of rule 15.4 (2) leads to the inevitable conclusion that a summary judgment application can be made before

the defence is filed and in the event that the application is unsuccessful then the defendant has 14 days to file his defence. The implication of counsel's submission is that this provision means that it is not necessary for a defence to be filed before a summary judgment application may be heard. It is all done by affidavit. This means, according to counsel, that the fact that an amended statement of case was filed and served is of no moment since this is a summary judgment application on the claimant's motion and not the court's initiative and therefore there is no legal necessity for a defence to be filed before a summary judgment application is heard on initiative of the litigants themselves.

[9] According to counsel had the defendants wished to contest anything arising from the amended particulars of claim that should be done by affidavit and not by filing an amended defence since the filing of a defence would not be compliance with the specific directions given to respondents to summary judgment applications in rule 15.5 (2).

[10] Miss Georgia Buckley's response was two-fold. First, Miss Davis' application has not satisfied rule 11.18 (3) (b) because another order other than the one made was possible. Second, rule 15.4 governs the situation where a defence has not been filed. In addition, learned counsel submitted, rules 15.2 and 15.4 should be read together and when that is done it will be seen that the summary judgment application permitted under rule 15.4 applies where (a) the defendant has no realistic prospect of successfully defending the claim or the issue and (b) a defence has not been filed. In this case, it is said, a defence was filed to the initial statement of case and none yet has been filed in relation to this amended statement of case and the time for filing the defence to the amended statement of case has not expired. It was also submitted that unless the amended defence is filed the court cannot realistically determine whether the defendant has a reasonable prospect of successfully defending the claim.

[11] Miss Buckley relied heavily on the Court of Appeal's decisions in **Vendryes v Keane** [2011] JMCA Civ 15. The facts in **Vendryes** case were that claimant in

that case brought an action against the defendant for breach of contract. The defendant was served with the initial claim form, particulars of claim but not with the other documents that the relevant rule said must be served. The defendant did not file an acknowledgment of service. The claimant applied for judgment in default of acknowledgment of service. Eleven days after seeking default judgment, the claimant filed an amended statement of case in which another defendant was added. New particulars were added particulars to the claim. The amended statement of case was served on the additional defendant but not the original defendant. Eventually, the claim was discontinued against the added defendant.

[12] The judgment in default of acknowledgment of service was eventually entered against the defendant but it was entered on the first statement of case and not the amended statement of case. The defendant applied to set aside the default judgment. The first instance judge (Sykes J) set aside the default judgment on the basis that service of the other documents with the statement of case was mandatory. Having done that the judge went on to enter summary judgment on the same claim form and particulars of claim on which the default judgment had been entered and not the amended statement of case. The judge took the view that there was no real prospect of successfully defending the claim. This decision by the judge precipitated the appeal by the defendant. The claimant cross appealed on the basis that the holding by the judge that documents that were not served with the first claim form and particulars of claim was wrong.

[13] The Court of Appeal had to decide two things. First, whether the judge on his own initiative could have entered summary judgment on the initial statement of case in circumstances where the claimant had filed but not yet served the amended statement of case. Second, whether the documents not served must be served. In respect of the second issue, the Court of Appeal upheld the trial judge on that point and dismissed the cross appeal. The judge was reversed on the first point.

[14] It is therefore correct to say as Miss Davis has submitted that the Court of Appeal was not dealing with rules 15.4 and 15.5 where a summary judgment application may be made by a party before the defence is filed. Presumably, counsel is also saying that where the judge decides to act on his own initiative he is strictly bound by what was said in **Vendryes** but where the summary application is initiated under rule 15.4 by one of the litigants nothing said by the Court of Appeal should fetter the clear power conferred by the rules. Implicit in this submission is the proposition that where a clear power is conferred on a litigant then unless a the Court of Appeal has actually considered rule conferring that power and pronounced upon it then a decision on another part of the rule should not constrain the power unless the reasoning of the Court of Appeal, inescapably leads to that conclusion.

[15] Harris JA held that the filing of the amended statement of case albeit not served meant that the initial statement of case was no longer valid and any judgment entered upon it was a nullity because the amended statement of case stood in place of the initial statement of place for all purposes.

[16] Harris JA held that the judge had also erroneously concluded that the claim had been discontinued against the defendant when that was not so and the judge failed to recognise that the effective pleadings from the claimant that were before him were the amended statement of case albeit that they had not yet been served. In other words, the fact that the amended statement of case was not served did not mean that it had no legal efficacy; it did and the legal consequence was that the amended statement of case now stood in place of the initial statement of case and therefore the entry of judgment on the initial statement of case (which was the only statement of case served on the defendant/appellant) was wrong.

[17] Miss Buckley relied on paragraphs 28 to 31 of Harris JA's judgment in **Vendryes**. It is true to say that paragraph 28 is authority for the proposition that the amended statement of case stands as substitutes for the original pleadings.

Harris JA also stated that the right to defend the amended pleadings would not arise until the amended pleadings were served and since this had not happened there was no need for the defendant to apply for extension of time to file a defence since that could only have applied to the original pleadings and not the new one.

[18] Her Ladyship noted in paragraph 29 that when the defendant was served with the amended pleadings it was only at that point that he would be required to file a defence and had 42 days after service to do so. Until that time had passed no court is entitled to embark upon any analysis of the proposed defence or any case management prior to the passing of time within which to file a defence.

[19] In paragraph 31 Harris JA indicated that although rule 15.2 of the CPR authorises the court to grant summary judgment where a defendant has no real prospect of successfully defending the claim the circumstances of that case did not permit the judge to invoke that rule. The circumstances of that case were that an amended statement of case was filed; no summary judgment application was made by either party and it was the judge on his own initiative who sought to enter summary judgment.

[20] The learned Justice of Appeal noted in paragraph 31 that although 'a judge, under rule 26.2 is clothed with authority to make orders on his own initiative, the procedure adopted by the learned judge would not have accorded him a right to have proceeded as he had done.' Her Ladyship also stated that while 'it cannot be denied that rule 15.2 of the CPR empowers the court to award summary judgment where a defendant has no real prospect of successfully defending a claim .... the circumstances of this case did not allow the learned judge to have invoked his powers under that rule.'

[21] Miss Buckley derived **Vendryes** the following: when the claimants in this case filed an amended statement of case the clock for filing any defence was reset and time within which the defendants are to file their defence started from the

date of the service of the amended case and that time has not yet expired. This means, it was said, that when the matter came before the court on October 20, 2015, the time to file a defence had not yet passed and therefore any attempt to hear a summary judgment application without the defence being filed would be pointless since it would have been necessary to file a defence in order to know what the defendants' response is to the amended claim.

[22] Miss Davis sought to distinguish **Vendryes**. Learned counsel submitted that the facts there are very different from this. In that case there was no summary judgment application by any of the litigants and also it was the judge on his own initiative who sought to enter summary judgment. Learned counsel also submitted that at paragraph 27 in **Vendryes** it is clear that new matters were pleaded whereas here the core facts are not in dispute between the parties. The core facts here are that a contract was entered into between the claimant and both defendants for the sale of land and construction of a house. The first defendant would provide the land and the second defendant would construct the house. This is to be part payment for land sold by the claimant to the first defendant, part of the purchase price having already been paid in cash. To date the house has not been completed and so the full purchase price of the house has not been paid. Miss Davis also said that no new issue was raised in the amended statement of case. The amendments were in the nature of corrections. She submitted that all affidavits (both from claimant and defendant) had been filed in accordance rules 15.4 (3) and 15.5 and but for her necessary absence in the Court of Appeal the application would have been heard and summary judgment granted.

[23] This court agrees with Miss Davis that **Vendryes** is not applicable to circumstances where the summary judgment application is sought by claimant. The court also agrees that the reasoning of Harris JA does not compel the conclusion sought by Miss Buckley. It is this court's view that Harris JA's analysis applies to situations where it is the court in its own initiative is seeking to enter summary judgment. In those circumstances the court would not have the defence

to any amended statement of case unless the defendant indicates that there is no need to amend his defence. Whereas the rules give the claimant the power to initiate his own summary judgment application without waiting on the court's initiative. Where that is the case rule 15.4 and 15.5 say what must be done. It is by affidavit evidence that the case and counter case for summary judgment is put before the court. Rule 15.4 clearly contemplates that a claimant may apply for summary judgment before the defence had been filed and if this is so in relation to the initial statement of case then clearly the same process of reasoning must apply to any amended statement of case. The court therefore concludes that the filing of the amended statement of case did not require any new defence to be filed before the summary judgment application can be dealt with. Any response to the summary judgment application must be by way of affidavit evidence.

Disposition of case

[24] The order is set aside. This means that but for Miss Davis being summoned by the Court of Appeal the summary judgment application could have proceeded on October 20, 2015 which means that another order might have been made. Application granted. No order as to costs.