



[2023] JMSC Civ 257

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV04830

BETWEEN

RICHARD REITZIN

CLAIMANT

AND

**JACQUELINE THOMAS & SONS DEVELOPERS
LIMITED**

1st DEFENDANT

AND

THOMAS & SONS DEVELOPERS LIMITED

2nd DEFENDANT

AND

JOSEPH THOMAS SNR.

3rd DEFENDANT

AND

JAHKEEM THOMAS

4th DEFENDANT

IN CHAMBERS

Richard Reitzin instructed by Reitzin and Hernandez for the claimant /respondent

**Seyon Hanson instructed by Beecher Bravo Hanson and Associates for the 2nd
and 3rd Defendants**

Heard: September 27 and November 9, 2023

***Civil Procedure - Application for Summary Judgment - Affidavit in support -
Reasonable prospect of succeeding on the claim.***

MASTER T. DICKENS (AG.)

ORAL JUDGMENT

BACKGROUND AND INTRODUCTION

[1] The instant claim arose out of a motor vehicle accident at the intersection of

Norbrook Acres Drive, in the parish of St. Andrew, on October 30, 2015 at about 8:20 a.m., between a Honda XR 125L motorcycle registered No. 6682 operated by the claimant and a 2004 Toyota Tundra Pick-up truck registered No. 2811 EC driven by the 4th defendant.

- [2]** The claimant filed the instant claim against Jacqueline Andrea Thomas, Thomas & Sons Developers Limited, Joseph Thomas Snr. and Jahkeem Thomas, seeking damages for injuries, loss and damage he suffered and continues to suffer, as well as interest and costs, on account of the alleged negligence of the 4th defendant in relation to the said accident on October 30, 2015.
- [3]** The claimant contends that at all material times the 1st defendant was the registered owner of the 2004 Toyota Tundra Pick-up truck registered number 2811 EJ and the 3rd defendant's mother (sic). The claimant also contends that the 2nd defendant is a company duly incorporated in Jamaica and that the 3rd defendant is the 1st defendant's husband, the 2nd defendant's managing director and the 4th defendant's father. The claimant further alleges that the 4th defendant was, at all material times, the servant and/or agent of the 1st, 2nd and 3rd defendants.
- [4]** On January 20, 2021, the 2nd and 3rd Defendants filed their defence to the claim. They both deny liability on the basis that they had no connection to the accident and as such are not vicariously liable. They further assert that the claim should be struck out against them and judgment entered in their favour.

THE INSTANT APPLICATION

- [5]** In keeping with their denial of liability and the pleadings outlined in their defence, on April 26, 2022, the 2nd and 3rd defendants filed an application to strike out the claim form and particulars of claim and for summary judgment to be entered for them against the claimant.
- [6]** An affidavit sworn to by the 3rd defendant on April 25, 2022, was filed in support of the application on April 26, 2022. It is apposite for the court to outline the contents

of the affidavit as it is the subject of the instant dispute before the court. The affidavit of the 3rd defendant reads as follows:

- (1) That I am a Businessman, the 3rd Defendant herein, and a Director of the 2nd Defendant which is a company duly incorporated under the Laws of Jamaica, and I am duly authorized to depone to this Affidavit on behalf of the 2nd Defendant and myself, and my address for the purpose of this Affidavit is 2 Norbrook Acres Drive, Kingston 8 in the parish of Saint Andrew.
- (2) That the contents of this Affidavit are from my personal knowledge, and are true to the best of my knowledge, information and belief, and where not from my personal knowledge are from the source/s stated where applicable which I believe to be true to the best of my information, knowledge and belief.
- (3) That at all material times I was father of Jahkeem Thomas the 4th Defendant herein, and at the date of the accident with the Claimant on October 30, 2015 Jahkeem was an adult and he was driving the Toyota Tundra bearing registration number 2811 EJ on his personal business, and not as my servant and/or agent, or on my direction, and he has advised me and I do verily believe to be true, that at the time of the accident which was approximately 8:20 a.m. in the morning he was returning from a friend's house at which he had spent the night, and I had not spoken to him for that day prior to the accident, nor was I the owner of the Toyota Tundra being driven by Jahkeem.
- (4) That at the time of the accident the 4th Defendant was not an officer of the 2nd Defendant company, nor did the 2nd Defendant company own the Toyota Tundra, nor was the 4th Defendant engaged in any business for the company, as at time as he was on his personal business, and I have been advised that in such circumstances the 2nd Defendant

would have no liability to the Claimant for any loss, injuries or damage sustained as a result of the accident.

(5) That my Attorney has by email requested that the Claimant discontinue the claim against myself and the 2nd Defendant, however to date my Attorney has not received any Notice of Discontinuance, or an indication that the Claim will be discontinued against myself and the 2nd Defendant, and the Claimant has applied for summary judgment against the 4th Defendant solely.

(6) That based on the contents of the Defence filed on behalf of myself and the 2nd Defendant I have been advised that the Claimant's claim has no real prospect of success against either of us, and that summary judgment should properly be entered against him, and in favour myself and the 2nd Defendant, and I hereby apply for same.

PRELIMINARY OBJECTION

[7] The 2nd and 3rd defendants application came on for hearing before me on September 27, 2023, at which time, the claimant raised a preliminary objection to the affidavit of the 3rd defendant sworn in support of the application.

[8] The claimant submitted that paragraph 6 of the affidavit of the 3rd defendant contains no statement of belief that the claimant has no real prospect of succeeding on the claim. The claimant argued that this is a fatal omission as it is a mandatory requirement under the rules and at common law for an applicant on an application for summary judgment against the claimant to state his belief that the claimant has no real prospect of succeeding on the claim. The claimant relied on the authority of **ASE Metals NV v Exclusive Holiday Elegance Limited** [2013] JMCA Civ 37, in which Phillips JA applied the authority of **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, at paragraphs 14 and 15.

- [9] The claimant further argued, that at paragraph 6 of his affidavit, the 3rd defendant merely deponed that he is advised that the claimant has no real prospect of succeeding on the claim but failed to give the source of this advice. The claimant submitted that the 3rd defendant's failure to state who advised him that the claimant has no real prospect of succeeding on the claim is fatal to the application and as such the application is to be dismissed. The claimant submitted that in this regard, the 2nd and 3rd defendants are in breach of rule 30.3(2)(b) of the Civil Procedure Rules ("the CPR").
- [10] Counsel for the 2nd and 3rd defendants, Mr. Hanson, conceded that the 3rd defendant failed to identify who advised him that the claimant has no real prospect of succeeding on the claim. He however submitted that at paragraph 2 of his affidavit, the 3rd defendant deponed that the "contents of this affidavit are from my personal knowledge, and are true to the best of my knowledge, information and belief", therefore the contention that the claimant has no real prospect of succeeding on the claim is covered by paragraph 2 as being to the best of the 3rd defendant's belief.
- [11] Mr. Hanson further argued that the affidavit of the 3rd defendant is not to be treated as a "pedantic exercise of semantics". He noted that paragraphs 3 and 4 of the affidavit of the 3rd defendant are a restatement of the defence of the 2nd and 3rd defendants and as such there is sufficient evidence before the court upon which it can be determined that the claimant has no real prospect of succeeding on the claim.

ISSUE(S)

- [12] Whether the application of the 2nd and 3rd defendants should be dismissed on account of the 3rd defendant's failure to depone in his affidavit that he is advised and verily believe that the claimant has no real prospect of succeeding on the claim.

- [13] Whether the application of the 2nd and 3rd defendants should be dismissed on account of the 3rd defendant's failure to depone in his affidavit who advised him that the claimant has no real prospect of succeeding on the claim.

THE LAW AND ANALYSIS

- [14] The jurisdiction of the court to grant summary judgment is provided for in Part 15 of the CPR. Rule 15.2 provides that:

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

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

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

- [15] Rule 15.5 of the CPR governs the evidence for the summary judgment hearing.

Rule 15.5 (1) provides that:

"(1) The applicant must –

file affidavit evidence in support with the application; and

serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application" **Whether the application of the 2nd and 3rd defendants should be dismissed on account of the 3rd defendant's failure to depone in his affidavit that he is advised and verily believe that the claimant has no reasonable prospect of succeeding on the claim.**

- [16] Rule 15.5 of the CPR makes no requirement for an applicant for summary judgment to depone specifically in the affidavit in support that he believes that the claimant has no real prospect of succeeding on the claim. There is also no such stated requirement in all of Part 15. It is however noteworthy, that the Practice Direction to Part 24 of the UK Civil Procedure Rules, the equivalent part governing

applications for summary judgment, has a specific requirement for the application notice or evidence to state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue.

[17] Inasmuch as our rules make no such specific requirement, it is my considered view that the 3rd defendant's failure to specifically state same in his affidavit is not fatal to the application.

[18] The claimant also relied on the case of **ASE Metal** (supra). In **ASE Metal**, Phillips JA, applied the English decision of **ED & F Man Liquid Products Ltd v Patel and Another** and stated that:

"[14] The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that the respondent's case has no real prospect of success. In ED & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment: "...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..."

[15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of ED & F Man). The defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".

[19] It is my view that the Court here, per Phillips JA, was outlining the burden of proof on an application for summary judgment and was not seeking to establish a mandatory requirement that the applicant must specifically state "I believe the respondent has no real prospect of succeeding on the claim or successfully defending the claim", as they case may be. I equally am of the view that the Court was not seeking to give a prescription or a formula as to the specific construction of the assertion or the exact words to be used in establishing that the respondent has no real prospect of succeeding on the claim.

- [20] It is clear that on an application for summary judgment, the applicant must provide credible and sufficient evidence to establish that the respondent has no real prospect of succeeding on the claim or of successfully defending the claim. If the 3rd defendant had instead deponed that “I take the view that the claimant has no real prospect of succeeding on the claim”, should the court treat this expression as failing to meet the mandatory requirement and automatically dismiss the 2nd and 3rd defendants’ application? I daresay that such an approach would not be in keeping with the overriding objective.
- [21] If I am wrong in this regard and there is a mandatory requirement for the 3rd defendant to depone specifically in his affidavit that he believes that the claimant has no real prospect of succeeding on the claim, I take the view that that requirement is met by reading paragraph 6 in the context of the five (5) foregoing paragraphs of the 3rd defendant’s affidavit and in particular, paragraph 2.
- [22] The affidavit is a legal document and the several paragraphs that comprise the affidavit cannot be read in isolation and divorced from each other. When the 3rd defendant’s affidavit is examined as a whole and when paragraph 6 is read in light of paragraph 2, this court takes the view that the 3rd defendant is asserting his belief that the claimant has no real prospect of succeeding on the claim.
- [23] There is therefore no basis to dismiss the 2nd and 3rd defendants’ application on this account.

Whether the application of the 2nd and 3rd defendants should be dismissed on account of the 3rd defendant’s failure to state or name the source by which he is advised that the claimant has no reasonable prospect of succeeding on the claim.

- [24] Rule 30.3 (1) and (2) of the CPR govern the contents of affidavits and provide as follows:

“(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However an affidavit may contain statements of information and belief –

(a) where any of these Rules so allows; and

(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates -

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source for any matters of information and belief.”

[25] In the case of **Sally Ann Fulton v Chas E Ramson Limited**, [2022] JMCA Civ 21, McDonald-Bishop JA, in examining rule 30.3(2) of the CPR stated at paragraph 72 that:

“As is seen rule 30.3(2) allows for hearsay statements to be adduced in certain situations. However, for hearsay to be admissible, the affiant is obliged to state in his affidavit the source of any such information or belief (rule 30.3(2)(b)).”

[26] Further, in the case of **Jamaica Public Service Limited v Charles Vernon Francis and Anor**, [2017] JMCA Civ 2, Edwards JA (Ag), as she then was, stated at paragraph 21 that:

“Hearsay evidence is generally inadmissible and can only be admitted based on the exceptions that exist at common law, by statute or by virtue of the CPR. Rule 30.3(2) of the CPR sets out the conditions that must be satisfied before a judge may admit hearsay evidence contained in an affidavit. If these conditions are not satisfied the court should not exercise its discretion to admit such evidence.”

[27] In examining paragraph 6 of the affidavit of the 3rd defendant, I take the view that the assertions contain therein are not statements of facts but rather statements of a legal opinion. Accordingly, the evidence of the 3rd defendant contain in paragraph 6, is not hearsay evidence and is therefore not inadmissible. There is therefore no need to resort to the exceptions provided for in rule 30.3(2) of the CPR. Since the

3rd defendant was merely asserting an opinion that the claimant has no real prospect of succeeding on the claim, there is no requirement for him to state the source of that opinion.

[28] I am further fortified in this view, when one considers the purpose of rules such as rule 30.3(2). It has long been established that the requirement to disclose the deponent's sources, is to provide identification of those sources, sufficient to enable the party against whom the evidence is adduced to investigate, assess and, where appropriate, challenge the evidence, (see **Consolidated Contractors International Company SAL and Others v Munib Masri** [2011] EWCA Civ 31, para 32 and **A-G v Watego** [2003] QSC 376, para 26).

[29] The 3rd defendant has outlined the facts upon which he relies to contend that the claimant has no real prospect of succeeding on the claim at paragraphs 3 and 4

of his affidavit and he has stated the sources of these factual contentions. The claimant is free to investigate, assess and challenge those portions of the 3rd defendant's affidavit as he deems appropriate. This court can however see no benefit in investigating, assessing and challenging the source of the contention that the claimant has no real prospect of succeeding on the claim.

[30] As aforementioned, the 3rd defendant has outlined the applicants defence at paragraphs 3 and 4 of his affidavit and he concludes at paragraph 6 that the claimant has no real prospect of succeeding on the claim. It is now for the court to determine whether the applicants have discharged their burden of proof on the application for summary judgment.

[31] There is therefore no basis upon which to dismiss the application on account of this ground of the objection.

DISPOSITION

[32] In all the foregoing circumstances I make the following orders:

- (i) The claimant's preliminary objection on the 2nd and 3rd Defendants' application for summary judgment and to strike out claim filed April 26, 2022 is dismissed.
- (ii) The 2nd and 3rd Defendants' application for summary judgment and to strike out claim is scheduled for January 19, 2024 at 10:00 a.m.
- (iii) Leave to appeal is refused.
- (iv) Costs to the 2nd and 3rd defendants on the claimant's preliminary objection.
- (v) The claimant's attorneys-at-law to prepare, file and serve this order.