[2013] JMSC Civ 174

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 02902

BETWEEN	**AUDREY SHARP**	**CLAIMANT**
A N D	**CHRISTINE HUDSON**	**1ST DEFENDANT**
A N D	**K. CHURCHILL-NEITA & CO.**	**2ND DEFENDNAT**

Kevin Page, instructed by Page and Haisley for the Claimant

Garth McBean, instructed by K. Churchill Neita and Co. for the Defendants

Heard: September 27 & October 4, 2013

In Chambers

DEFENDANTS' APPLICATION FOR SUMMARY JUDGMENT – WHETHER CLAIM HAS A REAL PROSPECT OF SUCCESS – CLAIMANT NOT JOINING ISSUE WITH THE DEFENDANT ON AN IMPORTANT ISSUE OF FACT – SUMMARY JUDGMENT APPLICATIONS NOT TO BE MINI-TRIALS

Anderson, K., J.

[1] In respect of this claim, the defendants have filed an application for court orders primarily seeking, by means of same, an order pursuant to **rule 15.2 of the Civil Procedure Rules (CPR)**, for summary judgment on the claim, to be granted in favour of the defendants. That application for court orders was filed on November 30, 2012 and is supported by an affidavit which was deponed to by the 1st defendant, who is a practicing attorney-at-law who was, at the material time and still is, a member of the law firm which operates its legal business in the name: K. Churchill Neita & Co., with offices at 61-63 Barry Street in the parish of Kingston. The said law firm is the 2nd defendant in respect of this claim.

[2] The affidavit of the 1st defendant was filed on November 30, 2012 and attached to it are various correspondence, to which, this court will make reference from time to time, in these reasons for ruling.

[3] In response to the defendants' application for summary judgment, the claimant has filed an affidavit which was deposed to by her current attorney-at-law – this being the attorney-at-law who has, at all times represented her for the purposes of this claim. That affidavit was thus, deposed to by attorney – Kevin Page and was filed on June 17, 2013. Attached to that affidavit as exhibits, are the claim form and the particulars of claim as were filed by the claimant in a separate claim which she had instituted against Doctors Olivia P. McDonald and Douglas G. McDonald and Nuttall Memorial Hospital Trust Ltd. This court will make reference to those exhibits, as part and parcel of these reasons for ruling.

[4] Furthermore, in response to the defendants' application for summary judgment, the claimant has deposed to an affidavit which was filed on June 21, 2013. Attached to that affidavit are three exhibits, one of which is a composite of the same claim form and particulars of claim referred to earlier in this ruling. Another of those exhibits is a letter written by the claimant to the 1st defendant and reference will be made to same, in these reasons for ruling. There is a third exhibit attached to that affidavit, which is a medical report dated April 23, 2003, pertaining to the claimant. That exhibit cannot assist the court in resolving the application for court orders now under consideration and therefore, no further reference to same, will be made herein.

[5] In the claimant's claim against the defendants, she has sought damages for negligence as a consequence of that which she has alleged was the careless and/or negligent failure of the defendants to commence and/or prosecute a claim within the time limited by the Limitation Act. It is further alleged that the claim which was negligently/carelessly not commenced and/or prosecuted within the time limited by the Limitation Act, was that claim which had previously been instituted by the claimant

herein, as against Dr. Olivia P. McDonald and Dr. Douglas G. McDonald (hereinafter referred to as Drs. McDonald) and Nuttall Memorial Hospital Trust Ltd., seeking damages for negligence in respect of their medical 'care' for the claimant in terms of surgery performed by those doctors on her and also in terms of their post-operative 'care' of her. That surgery was performed at the Nuttall Memorial Hospital (hereinafter referred to as 'the hospital'), on or about December 21, 1998. That claim against Drs. McDonald and Nuttall Memorial Hospital Trust Ltd. (hereinafter also referred to as 'the hospital') was filed on December 14, 2005 and is, in court records, recorded as Claim No. 2005 HCV5499.

[6] In the present claim, which is recorded in court records as Claim No. 2009 HCV 02902, as per the particulars of claim, which was, along with the claim form, filed on June 5, 2009, the claimant has contended that on or about July, 2004, she consulted with the 1st defendant, who was, at all material times, employed to the 2nd defendant, at their offices. It is also alleged by the claimant, that the 1st defendant advised the claimant that she had a reasonable chance of success in her then proposed claim against Drs. McDonald and the hospital. Further, the claimant alleges that she then instructed the 1st defendant to act for her in connection with a claim to be made by her against Drs. McDonald and the hospital, which the 1st defendant agreed to do. It is further contended that the said retainer is evidenced by the claim form and particulars of claim filed by the defendants on behalf of the claimants, as against Drs. McDonald and the hospital. (See paragraph 3 of the claimant's particulars of claim).

[7] It is in fact, 'the evidence of the retainer' which is of critical importance for the purposes, not only of this claim, but also, of the defendants' application for summary judgment in respect thereof. This is so because, the claimant is contending in this claim, that the defendants were negligent in having failed to make claim for damages for negligence as against Drs. McDonald and the hospital within the period of time which is prescribed by the Limitation Act, for such to be done, this being, as it concerned a claim for damages for negligence as per the law of tort, a six year period.

[8] From the affidavit evidence which has been provided to this court, both by the applicant and by her current attorney, it is clear that the only documentary 'evidence' of a retainer agreement having existed as between the claimant and the defendants in respect of Claim No. 2005 HCV5499, which has been provided to this court, would be the claim form and particulars of claim in respect of Claim No. 2005 HCV5499. From the date of filing of that claim form, it can undoubtedly be inferred by this court, that at latest, as of that date, there existed a lawyer-client retainer agreement for the pursuit of that claim, on the claimant's behalf. This court is prepared to and does indeed draw the inference, that since the claim form was filed on December 14, 2005, the defendants were at least as of that date, under retainer by the claimant to pursue that claim, on her behalf, as against Drs. McDonald and the hospital.

[9] The non-existence of any other documentary proof, separate and apart from that which the claimant and the 1st defendant respectively, have deponed to in their respective affidavit evidence filed either in support of, or in opposition to the claimant's application for summary judgment, creates a major difficulty for the claimant, insofar as the said application is concerned. This is so because, it is being alleged in the present claim, by the claimant, that the defendants in this claim, were negligent in having failed to file Claim No. 2005 HCV5499, before the limitation period of six years, as was pertinent to that claim, had expired. It is therefore, for the purposes of the present claim, of importance for this court to know when the defendants were retained by the claimant for the purpose of filing and generally pursuing the earlier claim brought against Drs. Malcolm and the hospital, by the claimant. This is important for not only this court to know, but also indeed, for the defendants herein to know exactly what it is that the claimant is alleging in this claim as being the date when she retained their services for the purposes of pursuing, on her behalf, Claim No. 2005 HCV5499, as against Drs. McDonald and the hospital. This is important to know because, it is being contended in this claim, that the defendants herein were negligent/careless, in having failed to file that earlier claim before the applicable limitation period had expired. This court can only properly make such a determination, if this court at least, knows the date when such retainer commenced and if it ended, then also, the date when that retainer

was terminated. Of course, this is because, a claim for damages for negligence must always be considered in a context. The primary context to be considered by this court for the purposes of the present claim, must of necessity be, the date when the relevant retainer agreement commenced and when it terminated, since without that knowledge, neither party can properly either succeed in proving or resisting the claim and this court would be unable to make a final adjudication on this claim, if this matter were to proceed to trial.

[10] The defendants have contended, by means of the affidavit evidence which has been provided to this court by the 1st defendant, that the claimant first consulted the defendants in about March to April, 2005, for the purpose of filing a suit against Drs. McDonald and the hospital, for damages for negligence, arising out of surgery performed upon her by Drs. McDonald on December 21, 1998. This contention of fact, as to when the claimant's first 'consultation' with the defendants, for the purposes of the pursuit of said claim occurred, has been expressly disputed by the claimant. In that regard, for the purpose of fully understanding, not only the precise nature of that dispute of fact, but also, the steps taken by the claimant and the defendants respectively, after that first consultation between the claimant and the defendants had taken place, it is useful to quote that which the claimant has deposed to, in paragraphs 3 to 8 of her affidavit. The same is quoted as follows:

> *'As a result of the injuries I sustained on December 21, 1998 during medical procedure conducted by Dr. Olivia McDonald, Dr. Douglas McDonald and the Nuttall Memorial Trust Limited, I consulted the 1st defendant at the offices of the 2nd defendant on or about July 2004 for the purpose of filing a suit against Dr. Olivia McDonald, Dr. Douglas McDonald and Nuttall Memorial Hospital Trust Limited. That at the time of consultation the limitation period for filing the said suit had not expired and I was advised by the 1st defendant that there was a reasonable chance of success in a claim against Dr. Olivia McDonald, Dr. Douglas G. McDonald and Nuttall Memorial Hospital Trust Limited. On November 18, 2005 I wrote a follow-up letter to the 1st defendant questioning the status of my matter as well as the statutory limit of my case and I exhibited hereto for identification marked 'AS–1' a copy*

> *of the letter dated November 18, 2005. That the defendants subsequently advised me that they were unable to proceed with the original action on the grounds that the same was statute barred. That the defendants were negligent in instituting the captioned action and caused or permitted my claim against Dr. Olivia McDonald, Dr. Douglas G. McDonald and Nuttall Memorial Hospital Trust Limited to become statute barred.'*

[11] What is clear from that which has been deposed to by the claimant/applicant herein in the paragraphs of her affidavit as quoted above, is that whilst the claimant/applicant herein has specific knowledge as to when it was that she allegedly first 'consulted' with the defendants herein, she certainly has not provided this court with any information whatsoever, from which it can even as much as reasonably be inferred by this court as to when exactly it was that the defendants herein were retained by the claimant for the specific purpose of pursuing the claim which they ultimately did pursue on her behalf, as her attorneys-at-law, seeking damages for negligence arising out of and following upon the surgical operation which has been conducted upon her by Drs. McDonald at the hospital on December 21, 1998.

[12] Equally, it is clear from that which has been certified as true by the claimant in paragraph 3 of the particulars of claim herein, that the claimant is, to put it simply, unable to provide to this court and to date, has thus far, not provided to this court by any means whatsoever, any information other than such limited information as is set out in paragraph 13 of these reasons for ruling, as to the precise date upon which she retained the legal services of the defendants for the purpose of pursuing her then intended claim against Drs. McDonald and the hospital.

[13] The claimant has, it appears to this court, thus, literally been forced to state, as she specifically has, in her particulars of claim herein, that the retainer between the parties is evidenced by the claim form and particulars of claim filed herein. This has been echoed by her present attorney – Mr. Kevin Page, in paragraph 5 of the affidavit which he has deposed to for the purposes of the claimant's present application.

[14] The issue now at hand though, for the purposes of the claimant's present application, is whether the claimant had retained the defendants' legal services, for the purpose of pursuing her claim against Drs. McDonald and the hospital, before or after the relevant limitation period for the purposes of that claim, had expired. If of course, such retainer did not come into being until after the relevant limitation period had already expired (this being the contention of the defendants herein), then clearly the claimant's claim against the defendants for damages for negligence, in having failed to institute her prior claim, which was brought as against Drs. McDonald and the hospital, before the limitation period pertinent to that claim had expired, clearly would have no real prospect of succeeding. This is why, reference to the filing by the defendants, on her behalf, of the claim form and particulars of claim, as regards the claim against Drs. McDonald and the hospital, as evidencing her retainer of the defendants for the purpose of the pursuit of that claim on her behalf, cannot assist the claimant whatsoever, for the purpose of either enabling her response to the present application to be successful in resisting that application, or enabling her to have any real prospect of success in respect of the present claim.

[15] Indeed, it can be and has in fact readily been recognized and accepted by this court, that since the claimant cannot go further than pointing this court to the filing of the claim form and particulars of claim, as regards her prior claim, as evidencing her retainer of the defendants herein, for the purposes of the pursuit of that prior claim, such contention actually, pointedly supports the defendants' contention as per the affidavit evidence of the 1st defendant, referred to earlier on in these reasons for ruling, that the claimant, in essence, retained the defendants to pursue her claim against Drs. McDonald and the hospital, after the relevant limitation period applicable to that prior claim, had already expired. It also supports the defendants' contention, as per paragraph 4 of their defence as filed in respect of the present claim, that no retainer fee was paid to the defendants and/or contingency agreement executed between the claimant and the defendants. Furthermore, the claimant has not at all contended that she ever paid any retainer fee or executed any contingency agreement with the defendants. This is no doubt, the reason why the claimant has specifically stated in her

affidavit evidence for the purposes of her response to the defendants' present application, that evidence of her having retained the defendants is to be found in the very claim form and particulars of claim which were filed out of time.

[16] In this court's considered view therefore, there actually only exists one dispute of fact which is worthy of any consideration whatsoever, for, the purposes of the defendants' present application. That is the dispute of fact as to when it was that the claimant had first consulted with the defendants, for the purpose of moving towards their pursuit, on her behalf, of her claim against Drs. McDonald and the hospital.

[17] The consultation with an attorney is not though, to be equated with the retainer of that attorney. In the present claim, the essence thereof, is not that during consultation by the claimant with the defendants, the claimant got from the defendants, negligently issued advice, but rather, that having retained the defendants to pursue, on her behalf, that prior claim against Drs. McDonald and the hospital, they (the defendants) negligently failed to file that claim within the prescribed period of time as per the Limitation Act. That being the essence of her claim, it is essential for the claimant to be able to establish at trial, precisely when it was that she retained the defendants' legal services for that purpose. Regrettably for the claimant however, taking into account all of the documentation presently before this court, along with the respective parties' statements of case, it is abundantly clear that she will be absolutely be unable to prove at trial, that she retained the defendants' legal services at any time prior to the date when the relevant limitation period expired.

[18] This court should not be misunderstood as suggesting or even implying that there did not exist any retainer agreement as between the claimant and the defendants herein. There can undoubtedly be inferred by this court, that there must have existed such an agreement, since otherwise, the defendants could not properly and would not likely have filed claim on her behalf. Indeed, if such had been done without a retainer agreement existing between the claimant and the defendants, as at the date when the defendants, with the claimant's undoubted consent and knowledge, as evidenced by her

certificate of truth, which forms part and parcel of that claim form and particulars of claim, that would, in and of itself, have constituted negligence on the part of the attorneys, not to mention, also a serious ethical violation on their part. Why though, would the claimant knowingly have had a claim filed on her behalf seeking damages for negligence, from Drs. McDonald and the hospital, if she had not retained the defendants for that particular purpose? To this court, it seems highly unlikely, either that the defendants would have filed that prior claim, without having been retained for that purpose, even if so on a '*pro bono'* ('for the good of') basis, or that the claimant would have knowingly permitted the same to have been filed on her behalf, without having first reached agreement ('this being the essence of a retainer') with the defendants, for such to be done.

[19] The insurmountable difficulty now existing for the claimant insofar as her efforts to resist the defendants' present application as concerned, is that she is unable to establish exactly when that retainer of the defendants commenced, other than to the extent that she and her present attorney have suggested that the said retainer is evidenced by the very claim form and particulars of claim, which, when filed, were filed out of time! On the other hand, since the defendants are not at all suggesting, nor have even inferentially suggested when it was that they were retained by the claimant and further, since, in any event, the defendants are insisting that they were initially consulted by the claimant in about March to April, 2005, there can be no doubt that the defendants are contending, for the purposes of their defence, that even if they were retained by the claimant, such retainer undoubtedly came into effect, only after the relevant limitation period had already expired. It must be borne in mind, that it would be, at trial, the claimant who exclusively bears the burden of proof as to precisely when it was that, she retained the defendants' legal services. It is clear to this court, that despite her best efforts at trial, even if upon a trial, this court were to accept as being truthful, not only all that has been placed before this court, as affidavit evidence on her behalf in respect of this application, as well as all that has been put forward in her particulars of claim (assuming all of same was duly set out in a witness statement from her), nonetheless,

the claimant's claim against the defendants, has no real prospect of success whatsoever.

[20] The claimant has exhibited to her affidavit filed in response to this application, as exhibit 'AS 1' a letter dated November 18, 2005. It is important to note that the relevant limitation period for the purpose of the pursuit of any claim against Drs. McDonald and/or the hospital, had expired from as of six years post December 21, 1998 (date of claimant's surgical operation as conducted at Nuttall hospital by Drs. McDonald). This therefore means that the said limitation period had expired as of December 20, 2004. Interestingly enough, that letter refers to an earlier letter written to the defendants by the claimant to which there had, it seems, been no response and also, to telephone calls made prior to the date – November 18, 2005. The earlier letter therein referred to, was also dated on a date after the relevant limitation period had expired, that being September 30, 2005.

[21] The said letter's wording makes it pellucid, that even up until the date of same (November 18, 2005), the claimant had not yet retained the defendants for the purposes of pursuing, on her behalf, her then proposed claim against Drs. McDonald and the hospital. That letter is addressed to attorney Christine Mae Hudson – K. Churchill 'Nieta' (sic) & Co., 61-63 Barry Street, Kingston. The caption of that letter, reads as follows: Re: My letter dated September 30, 2005 and subsequently telephone calls.' The body of the letter is worthy of complete repetition in these reasons for ruling. The wording in that body, is as follows:

> *'Dear Ms. Hudson, to date I have not received any response from you as it relates to the statutory limit of the mater mentioned in the above-captioned letter. I am still unsure of the following:*
>
> *(a) Are you willing to negotiate on my behalf with the relevant party/s?*
>
> *(b) When will the statutory limit on the file (**Sharp v. McDonald**) expire? I am asking you to kindly respond one way or another as to this stage. I cannot continue to be left without any answers, my physical condition has seriously deteriorated over the past months*

and if not addressed, I do not believe I could face the consequences.'

That wording speaks volumes, in and of itself, as to there having been no retainer agreement between the claimant and the defendants herein, in respect of the then proposed claim against Drs. McDonald and the hospital, in place, even as of November 18, 2005 – this of course having been quite some time subsequent to the relevant limitation period having elapsed.

[22] This court thus recognizes and accepts that which has been placed before it by counsel for the defendants/applicants, as regards the claimant's present claim having, 'no real prospect of success.' As that counsel has termed it, the claimant's present claim is 'dead in the water.' Of course, **rule 15.5 (a) of the CPR**, makes it clear that – '*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*.' On an application for summary judgment, this court is empowered to, in exercise of its discretion, give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.

[23] Whilst this court is not expected to and should not conduct a mini-trial for the purpose of adjudicating upon an application for summary judgment, this court does not accept the submission which was made to it by counsel for the claimant herein, that in respect of the matter at hand, there exists, as between the parties, an important and disputed issue of fact, this being as to whether or not the defendants were retained, for the purpose of the pursuit by them, on the claimant's behalf, of her action against Drs. McDonald and the hospital, prior or subsequent to the relevant limitation period having expired.

[24] The case of **Swain v. Hillman** – [2001] 1 All E.R. 95, makes it clear and indeed this court does accept that the hearing of an application for summary judgment is not to be equated with a summary trial. Thus, this court, when considering a summary judgment application is only expected to consider the merits of the respondent's case,

to the extent necessary to determine whether it has sufficient merit, such that it ought to be permitted by the court, to proceed to trial. Jamaica's Court of Appeal has approved of the England Court of Appeal's Judgment in **Swain v Hillman** (op.cit.) and also approved of another England Court of Appeal judgment as regards similar legal issues, that being: **Ed and F Man Liquid Products Ltd. v Patel and another** – [2003] EWCA Civ. 472. That Jamaican Court of Appeal case, which is one of recent vintage, is **ASE Metals NV and Exclusive Holiday of Elegance Ltd.** – Supreme Court Civil Appeal No. 142/2012.

[25] This is exactly what and no more, that this court has done in respect of the present application, when analyzing the case of the claimant – who is the respondent to the defendants' summary judgment application. In her statement of case and indeed, even in her affidavit evidence as filed, in response to the defendants' application for summary judgment, as earlier herein stated and now reiterated for emphasis, the claimant has not at all specified exactly when it was that she retained the defendants' legal services. The closest she has come to specifically so stating , as indeed also, her attorney for the purposes of this claim – in the affidavit evidence which he has deposed to in response to the claimant's present application, is that her retainer of the defendants is evidenced by the claim form and particulars of claim. If this is so and indeed, it has not been disputed by anyone, then this unmistakably means that the claimant should be considered by this court, as having retained the defendants after the relevant limitation period had expired. This must be so, since both the claim form and particulars of claim were not only filed after the relevant limitation period had expired, but also, were both certified by K. Churchill, Neita and Co., on the claimant's behalf – the claimant having then been out of the jurisdiction, on the same date when those court documents were filed (December 14, 2005). As such, the claimant's claim against the defendants herein, in this court's considered opinion, has no realistic prospect of success. It has no realistic prospect of success because, in order for the claimant's claim herein, against the defendants, to succeed, it must be proven by the claimant at trial, that the defendants were negligent in having failed to institute the claim on her behalf, against Drs. McDonald and the hospital, prior to the relevant limitation period

having expired. A condition precedent for the success of this claim at trial, must therefore be that the defendants were retained by the claimant for the purpose of the pursuit of said claim on her behalf, at least from as of a reasonable time in advance of the relevant limitation period having expired, such as to have made it unreasonable for the defendants having been then so retained, to have failed to file the claim form and particulars of claim, prior to the relevant limitation period having expired. The claimant is unable to even so much as 'join issue' with the defendants, as regards her having retained them after the relevant limitation period had expired. Furthermore, even if this court were to consider that she had so 'joined issue' with the defendants as regards the date when she retained them, nonetheless, the claimant's 'joining of issue' with the defendants in that regard, even if it had been done, would have been expressly contradicted by the letter written by the claimant to the 1st defendant herein. This court would be entitled to take that letter into account, as then contradicting the claimant's statement of case on that, 'joined issue'. See in that regard: **Three Rivers District Council v. Bank of England** (No. 3) – [2003] 2 AC 1 and **Glaxo Group Ltd., v. Dowelhurst Ltd.** – [1999] All E.R. (D) 1288 and **ED and F Man Liquid Products Ltd. v Patel** (op.cit.). In any event thought, for the reasons given above, this court concludes that no issue has been joined between the parties herein, in that specific respect and that as such, the claimant's claim, has no real prospect of success.

[26] There only remains one other matter worthy of mention at this juncture, as regards the present claim and the defendants' application for summary judgment. It is that this court is extremely disappointed to note that attorney Christine Hudson (the 1st defendant herein), has, in her affidavit evidence filed in support of the present application, deposed to having known and fully recognized that the claimant's claim form and particulars of claim as against Drs. McDonald and the hospital were filed out of time, as per the Limitation Act and that she knew that from the time when she filed the claim form and particulars of claim, since by then, the said limitation period had already expired and she had so advised the claimant. She further deposed though, that she nonetheless filed the claim anyway, in the hope that the claimant would have thereby recovered an *ex gratia* payment.

[27] This court wishes to now make it clear that the filing of a claim on behalf of a client, whether upon the client's insistence or not, in circumstances wherein one knows as an attorney, that the claim has absolutely no merit and should not even have been instituted, since, under Jamaican law, a court, in the claim such as was brought against Drs. McDonald and the hospital, has no discretion to proceed with such a claim, if that claim has been filed outside of the relevant limitation period. Such filing therefore, in and of itself, if it had resulted in loss to the claimant, such as, for example, an order by the court for her to pay the costs of that claim, that being an order which she would then be obliged to comply with, could form a proper basis for a claim against both Ms. Hudson and the law firm to which she was then attached, this being – K. Churchill Neita & Co., for damages for negligence, not to mention, the institution of proceedings for breach of ethics. This court trusts that conduct of such a nature will not raise its 'ugly head' before this court ever again, whether such is the conduct of Ms. Hudson, or of any other attorney.

[28] In the circumstances, summary judgment is awarded in favour of the defendants and as was made known to the court by the defendants' counsel, the defendants are seeking no costs in respect of this claim. Accordingly, no order as to the costs of this claim is made. Those are the orders of this court, arising from the defendants' application for summary judgment.

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Hon. Kirk Anderson, J.