



[2020] JMSC Civ 59

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 01759**

<b>BETWEEN</b>	<b>ANDRE SMITH</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>STEWART'S MOTORS LTD</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ATL AUTOBAHN LTD</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Robert Collie and Ms Dionne Samuels for the Claimant/Respondent

Mr. Christopher Dunkley for the First Defendant

Mr Charles Piper Qc and D'angelo Foster instructed by Charles E. Piper and Associate for the Applicant/Second Defendant

Khara East – Attorney for Second Defendant

Heard: March 3, 2020 and March 18, 2020

**Application to Strike Out Claim – Application for Summary Judgment – Question of Liability – Breach of Contract – Duty of Care**

**T. HUTCHINSON, (AG.)**

**Introduction**

[1] The application before me is an amended notice of application filed on the 20th of December 2019 by the 2nd Defendant, hereinafter referred to as the Applicant in which they seek the following orders;

1. That the Claimant's statement of case be struck out against the 2nd Defendant.
2. Alternatively, that Summary Judgment be entered for the 2nd Defendant against the Claimant.
3. The costs of this Application and costs thrown away be the 2nd Defendant's to be agreed or taxed.
4. That there be such further order as to the Court may seem just.

**[2]** The orders are sought on a total of 5 grounds;

- a. The Claimant's FACF and FAPOC filed October 10<sup>th</sup>, 2016 disclose no
- b. reasonable grounds for bringing the claim against the 2<sup>nd</sup> Defendant.
- c. Even when requested by the 2<sup>nd</sup> D, the Claimant has failed to demonstrate any grounds for bringing the claim against the second D.
- d. The Claimant has no real prospect of succeeding on the claim against the 2<sup>nd</sup> Defendant.
- e. This application is made pursuant to R 15.2(a), 15.6(1)(a) and 26.3(1)(c) of the CPR as amended.
- f. The overriding objectives of the CPR will be best served if this application is granted.

## **LAW**

### **Striking Out**

**[3]** In asking the Court to strike out the claim brought, the Applicant has placed reliance on the powers outlined at Part 26.3(1) of the rules with specific reference to 26.3(1)(c) and (d) which provides;

26.3 (1) *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*

*(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*

*(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

- [4] It is clear that R 26.3(c) requires that if a cause of action discloses no reasonable grounds for bringing the claim the Court should act to have the matter struck out. This principle was stated in ***Sebol Ltd et al v Ken Tomlinson et al SCCA 115/2007*** by Dukharan Ja at page 13 paragraph 28 as follows:

*“The focus of the new rules is to deal with the matters expeditiously and to save costs and time, if there are no reasonable grounds for bringing an action, then the Court ought to strike it out.”*

- [5] This provision was also examined by Batts J in ***City Properties Limited v New Era Finance Limited 2013 JMSC Civ 23*** where he stated;

*“On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.”*

## **SUMMARY JUDGMENT**

- [6] It was submitted by Mr Piper Q.C. that in the event the Court did not agree with the submissions in respect of the striking out of the claim, the Applicant's position in the alternative, is that summary judgment should be entered in their favour as the Claimant's case has no reasonable prospect of success against it. In making this submission, Mr Piper has relied on the powers of the Court as contained at Rule 15.2(a) which provide, that the court may give summary judgment on the claim or on a particular issue if it considers that a Claimant or Defendant has no real prospect of succeeding on the claim or the issue.

- [7] Apart from the rules, he also referred to and relied on the authorities of ***Swain v Hillman etal [2001] 1 All ER 91, Doncaster Pharmaceuticals Group Ltd etal v Bolton Pharmaceutical Co [2006] EWCA Civ 661, Sagicor Bank Jamaica Ltd v Taylor-Wright [2018] UKPC 12 and Eureka Medical Limited v Life of Jamaica Ltd 2003HCV1268*** all of which have been reviewed by the Court and the principles stated therein have been noted.
- [8] In respect of this application, I have also reviewed the decision of ***S&T Distributors Ltd etal v CIBC Jamaica Ltd etal S.C.C.A Civ App 112/04*** which has been cited by Mr. Collie in respect of the approach and principles which should be followed by the Court

## **ANALYSIS AND DISCUSSION**

- [9] The thrust of this application for striking out or summary judgment is that the cause of action outlined in the Claim against the Applicant finds no support in the evidence or on the pleadings.
- [10] To this end reference has been made to paragraph 4 of the Claimant's Further Amended Particulars of Claim where it is stated that the Claimant delivered the vehicle to the first Defendant thereby entering into a contract with them to have repairs effected to same. The Particulars of Breach of Contract by the Applicant states 'that they materially breached the contract between themselves and the Claimant by taking a deliberate course of action with the 1<sup>st</sup> defendant by not returning the vehicle fully repaired as set out in the pro-forma invoice tendered to the Claimant by the 1<sup>st</sup> defendant'. There are however no specifics provided as to the deliberate course of action taken.
- [11] It was contended on behalf of the Claimant that the evidence discloses that there was a contract with the Applicant by virtue of the latter having taken over the dealership from the 1<sup>st</sup> Defendant as this included the assignment of any contracts and/or liabilities from the 1<sup>st</sup> defendant pursuant to this sale/transfer. In support of this position reliance was placed on a number of factors with special emphasis on

a letter of intent signed between Stewarts Autos and ATL Autobahn which was provided as a part of the Applicant's list of documents.

- [12]** In response to this submission, it is the Applicant's position that the BMW dealership was not acquired from or transferred to it by the 1<sup>st</sup> defendant. They also deny that they were party to any contract with the Claimant or the 1<sup>st</sup> Defendant. It is also denied by them that they owed any duty of care to the Claimant in respect of the claim for negligence.
- [13]** Now it is clear from the authorities, which have been referred to above, that in order for the Claimant to prevail on an application for its statement of case to be struck out, the pleadings must disclose reasonable grounds for bringing the action. On a careful review of the pleadings filed herein, it is undisputed that the Claimant entered into a contract with the 1<sup>st</sup> Defendant to have his motor vehicle repaired. Paragraph 4 of the Amended Particulars of Claim outlines that the vehicle was delivered for repairs to the 1<sup>st</sup> Defendant on the 30<sup>th</sup> of November 2015 pursuant to discussions and/or arrangements made.
- [14]** At paragraph 3 of the Claimant's witness statement he provides more details on the background which led to his vehicle being delivered as he stated that on the 29<sup>th</sup> of October 2015 he received a pro-forma invoice from the 1<sup>st</sup> Defendant setting out the cost for work to be done on his vehicle. It was subsequent to receiving same that the vehicle was handed over.
- [15]** Additional details on the contract and parties involved are provided between paragraphs 5 and 16 of the Claimant's statement as he outlined his dealings in respect of having the repairs done, all of which it is noted were with the 1<sup>st</sup> Defendant.
- [16]** At paragraph 17 of this statement the Claimant stated that having become aware of a change in the company that held the dealership, he made contact with the 1<sup>st</sup> defendant in order to receive information as to what this meant, specifically in

relation to his vehicle. It was the 1<sup>st</sup> defendant that then presented him with a bill which he refused to pay and which promised to get back to him but never did.

- [17]** At Paragraph 21 of the Claimant's statement it is revealed that he subsequently made contact with the service manager for the Applicant who informed him that he had no idea what was happening with the vehicle as it was just parked in a corner and then directed him to contact Stewarts which he did. This was the extent of the communication.
- [18]** At paragraph 23 of his statement the Claimant disclosed that having contacted the first defendant pursuant to these instructions he later spoke to a Mr Fitt who he described as a Customer Relations Manager who had previously been employed to Stewarts. This individual extended apologies for the mix up and promised to have the situation sorted but never did.
- [19]** At Paragraphs 25 through to 28 of his statement, the numerous efforts made by the Claimant to have the matter resolved with the 1<sup>st</sup> Defendant are all outlined including the dispatching of a letter of demand for the vehicle, this was sent to the 1<sup>st</sup> Defendant only. It was also outlined that pursuant to an agreement at mediation the Claimant paid the bill which was presented by the 1<sup>st</sup> Defendant and paragraph 32 states that it was personnel attached to the 1<sup>st</sup> Defendant who handed the vehicle over to him.
- [20]** In respect of the cause of action for breach of contract, it was noted earlier that there are no specifics provided as to the deliberate course of action taken by the Applicant that resulted in this breach and the Claimant's loss. Additionally, a detailed review of the Claimant's statement clearly shows that while he was persistent in following up with the 1<sup>st</sup> Defendant he makes no mention of the Applicant being involved, save and except for them being the new dealers for BMW and the advice given to him by their Service Manager to check with Stewarts.
- [21]** In light of the foregoing, it is clear that no evidence has been provided, neither is outlined in the pleadings, that the car was ever worked on by personnel attached

to the Applicant. Additionally, there have been no documents provided to show that the vehicle had become the responsibility of the Applicant on a change in dealership. This is so, as although Mr Collie has referred to and relied on the contents of the Letter of Intent, a careful review of same reveals that it contains no reference to the assumption or transfer of liability in respect of outstanding service contracts.

- [22]** It is interesting to note however that it makes specific reference to situations where deposits are held by the 1<sup>st</sup> Defendant for vehicles which have been ordered but not yet delivered. According to this document, the written consent of the customers must first be obtained before any deposit can be handed over to the Applicant for the completion of the order. In circumstances where there had been specific reference to the procedure to be followed for pending sales it would follow that the same would have obtained for outstanding service contracts if indeed this had been agreed to.
- [23]** This was not the case however and the circumstances revealed that the car clearly remained the responsibility of the 1<sup>st</sup> defendant given their on-going involvement as detailed in the Claimant's statement. The 1<sup>st</sup> Defendant continued to shoulder this responsibility in spite of the fact that the vehicle had been left by them on the premises which was now occupied by the new dealers.
- [24]** In light of the fact that this action was brought on the basis of the assignment of contracts and/or liabilities pertaining to the motor vehicle from the 1<sup>st</sup> Defendant to the Applicant, the onus is on the Claimant to provide evidence in support of this assignment. In this regard I took careful note of the contents of DGF 3 which was exhibited to the affidavit of D'Angelo Foster where Counsel for the Claimant acknowledged that there was no information in the possession of the Claimant or his Counsel to show that any such transaction/assignment had in fact occurred.
- [25]** In respect of what has been termed the implied cause of action of detinue which was outlined in the affidavit of Dionne Samuels, it is noted that not only is the

assertion that a demand/request had been made of the Applicant totally contrary to what the Claimant stated, but there is also no mention by the Claimant that the Applicant withheld the vehicle from him. In fact, it is the Claimant's account that he was assisted by the service manager of the Applicant in respect of where he should direct his enquiries.

- [26] Additionally, while this claim of unlawful detention is outlined in the affidavit of Ms. Samuels it does not appear in the Particulars of Claim as required by R 8.9(1) which provides;

*"8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies."*

- [27] The imperative nature of this provision is clear as a sanction for the failure to follow suit is outlined at R 8.9A.

- [28] In respect of the cause of action for negligence, while negligence is alleged against the Applicant, there are no particulars of same outlined in the Particulars of Claim, a situation which stands in sharp contrast to that in respect of the 1<sup>st</sup> Defendant.

- [29] On the Claimant's account he had been informed that the 1<sup>st</sup> Defendant had simply left the car on the premises. There is no evidence that the Applicant had taken possession/custody of same which would place them in a position of responsibility for it. In the absence of any such evidence there is nothing before the Court to show that the Applicant had entered into any relationship with the Claimant in which they would have owed a duty of care to him. It is not sufficient to say that because the vehicle had been left on premises occupied by them that this duty had evolved.

## **DISPOSITION**

- [30] Having arrived at the conclusions outlined above, it remains for me to consider whether there is an appropriate basis to grant the relief sought by the Applicant. In light of my findings, I am satisfied on a balance of probabilities that there are no

reasonable grounds for the bringing of this action against the Applicant. Accordingly, the Claim against them is struck out.

**[31]** In relation to the alternate application for summary judgment, although the claim has been struck out, I can indicate that having reviewed the evidence presented on the Claimant's statement of case, I was also satisfied on a balance of probabilities that the Claimant would have had no reasonable prospect of succeeding against the Applicant.

## **ORDERS**

1. Claimant's Statement of Case against the Applicant/Second Defendant is struck out.
2. Costs of this Application is awarded to the Applicant/Second Defendant to be taxed if not agreed.
3. Applicant's Attorney to prepare, file and serve order herein.