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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B-137 of 1999

BETWEEN	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	PLAINTIFF
A N D	WALMAR TRADING COMPANY LIMITED	FIRST DEFENDANT
A N D	RUDOLPH ANTHONY WALCOTT	SECOND DEFENDANT
A N D	ANNETTE JOYCE ALLEN	THIRD DEFENDANT
A N D	LASCELLES ROBERT WALCOTT	FOURTH DEFENDANT

Miss Daniella Gentles instructed by Livingston, Alexander & Levy for the Plaintiff.

Mr. Norman Wright Q.C. and Mr. Heron Dale instructed by H. S. Dale & Company for the Second and Third Defendants.

Heard : July 5, 2001, November 13, 2001, December 18, 2001 and December 13, 2002.

RATTRAY, J.

By a specially endorsed Writ of Summons dated the 1st day of June, 1999, the Plaintiff brought an action against the four Defendants claiming the sum of $1,767,782.50, being monies loaned by the Plaintiff to the First Defendant, the payment of which was guaranteed by the Second, Third and Fourth Defendants by Instrument of

Mortgage by way of Guarantee and Instrument of Guarantee dated the 7th day of July, 1997.

In the alternative, the Plaintiff also claimed against the First Defendant as the maker of a Promissory Note dated the 8th day of July, 1997 for the sum of $1,500,000.00 together with interest thereon payable to the Plaintiff on demand, which note has not been paid despite demand having been made.

The Second Defendant in his Defence dated the 9th day of February, 2000, stated inter alia;-

1. The Second Defendant denies that he signed the documents purporting to be an Instrument of Mortgage by way of Guarantee or Instrument of Guarantee referred to in the Statement of Claim as therein alleged or at all.
2. Further and in the alternative, if (which is denied) the Second Defendant did sign the said documents or either of them, he did so in reliance upon the false and fraudulent representation made to him by the Fourth Defendant that it was in support of an application for a loan being made to the Plaintiff on his behalf by the Third Defendant whose signature was already on the said document(s) when the Fourth Defendant presented same to him and in the belief that it was for such an

application and not otherwise, without knowing that it was an Instrument of Mortgage by way of Guarantee or Instrument of Guarantee and without any negligence on his part.

3. The Second Defendant never intended to sign the said documents as an Instrument of Mortgage by way of Guarantee or as an Instrument of Guarantee and accordingly never became liable thereon.

4. In the premises, the said documents are unenforceable and void as against the Second Defendant.

In the Defence and Counterclaim filed on behalf of the Third Defendant and dated the 10th day of February, 2000, this Defendant denied owing the sum claimed or at all, as she stated that she did not receive a loan nor did she guarantee any loan by Instrument of Mortgage by way of Guarantee and Instrument of Guarantee dated the 7th day of July, 1997, or at any time at all.

She stated that she was not a party to any agreement between the Plaintiff and the First Defendant and denied that she had any obligation to pay the Plaintiff the sum claimed in this matter or any amount at all. By way of Counterclaim, she sought an Order for the removal of a caveat placed on her registered title by the Plaintiff and damages for loss incurred as a result of the said caveat.

In the face of these pleadings, the Plaintiff filed a Summons dated the 3rd day of March, 2000, for leave to enter Summary Judgment against the Second and Third Defendants in the amount claimed in the Writ of Summons, together with interest thereon at the rate of 32 ½ % per annum from the 13th January, 1999, to the date of Judgment pursuant to Section 79 of the Judicature (Civil Procedure Code) Act. That section reads as follows:-

> 79. (1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

The Affidavit filed in Support of the Summons for Summary Judgment was sworn to on the 1st March, 2000, by Pearline Chambers, a Manager of the Loan Recoveries Department of the Plaintiff. Apart from corroborating the allegations of a loan to the First Defendant which was guaranteed by the Second, Third and Fourth Defendants, attached to that Affidavit as exhibits were copies of Promissory Note, Mortgage by way

of Guarantee and the Instrument of Guarantee mentioned in the specially endorsed Writ of Summons.

The deponent stated that as security for the loan to the First Defendant, a Mortgage by way of Guarantee was executed by the Second, Third and Fourth Defendants with respect to premises at 15 Doncaster Drive in the Parish of Kingston being lands comprised in Certificate of Title registered at Volume 963 Folio 535 of the Register Book of Titles. She further stated that the mortgage was never registered at the Office of Titles, but a caveat was lodged on the 1st day of February, 1999, to protect and secure the equitable interest of the Plaintiff in the said property. On the advice of the Plaintiff's Attorneys-at-Law, this deponent stated that she believed that the Defence of the Second Defendant and the Defence and Counterclaim filed on behalf of the Third Defendant was a sham and that there was no Defence to this action.

The Second Defendant in an Affidavit sworn to on the 24th day of October, 2000 and filed in opposition to this application deponed, inter alia, as follows;-

> 3. That I am not in any way affiliated to or connected with the First Defendant Company herein and deny signing any of the alleged documents with the intention of guaranteeing any loan made to the said First Defendant or of granting a mortgage to the Plaintiff in respect of any loan made to the First Defendant.

4. Further, although the said documents were signed by me there was no consideration to support the alleged agreement of guarantee by instrument of mortgage or by instrument of guarantee, moving from the Plaintiff or the Fourth Defendant to myself in respect of either the alleged mortgage or guarantee.

5. That as a result of false and fraudulent representations made to me by the Fourth Defendant, I affixed my signature to the documents herein which were presented to me with what appeared to be the signature of my mother the Third Defendant and in the belief which was communicated to me by the Fourth Defendant, that my mother had signed the document and was requesting my signature in order to obtain a loan from the Plaintiff for the purposes of assisting the Fourth Defendant.

6. That at no time was my participation in the execution of either of these documents intended to benefit, be in favour of or be by way of a guarantee of any liability of the First Defendant or intended to provide security to the Plaintiff.

7. That I signed the said documents without any intention to

guarantee any mortgage or other liability herein and accordingly I deny being liable on any of the said documents.

8. That the said documents were brought to my home by my brother the Fourth Defendant who asked me to sign them in order to support our mother the Third Defendant, who was applying to the Plaintiff Company for a loan to assist the Fourth Defendant to purchase a business for himself.

9. That there was a practice among us as a family to help one another and we trusted each other in business matters and accordingly, once I saw what appeared to be my mother's signature on the documents, I signed them without asking too many questions or without reading them carefully.

10. That I did not sign the said documents in the presence of any Justice of the Peace or any other person besides the Fourth Defendant and at that time the signature of the Fourth Defendant and what appeared to be my mother's signature, were on the said documents but had not been witnessed by the Justice of the Peace whose name appears in the attestation clause or by any one else.

For her part, the Third Defendant in her Affidavit sworn to and filed on the 24th day of October, 2000, denied that she guaranteed any loan by Instrument of Mortgage by way of Guarantee or by Instrument of Guarantee to the Plaintiff or that she was indebted to the Plaintiff in any way. She further denied that she signed any mortgage pertaining to registered property at Volume 963 Folio 535 of the Register Book of Titles, which property was her home. She stated that she was in possession of the registered title to the said land and at no time did she offer the premises for any mortgage or guarantee of any mortgage. As a consequence, she contended that the caveat lodged against her property was improperly placed on her title.

The final Affidavit filed in this application is the Further Affidavit of Pearline Chambers sworn to on the 12th day of January, 2001, in which she stated that she was advised by the Branch Manager of the King Street Branch of the Plaintiff Company, Mr. T.V. Allen, that the Instrument of Guarantee and Instrument of Mortgage by way of Guarantee in this matter were given to the Fourth Defendant for execution by the Second and Third Defendants in the presence of a Justice of Peace and they were returned to the Plaintiff duly executed and witnessed.

To be successful in an application such as the present one, the Plaintiff must first satisfy the Court that the procedural requirements of Section 79 have been met. On behalf of the Defendants, learned Queen's Counsel Mr. Wright in effect submitted that

this hurdle had not been cleared as the Affidavits of Pearline Chambers did not satisfy the requirements of the section. He questioned why an affidavit was not obtained from Mr. T.V. Allen and queried the role played by this deponent, Pearline Chambers in this transaction. I do not agree with that submission. I am of the view that that deponent in light of her position with the Plaintiff Bank was duly authorized to swear to the affidavits on its behalf. I therefore find that procedurally, the Plaintiff has complied with those preconditions set out in the section.

The Court then has to go on to consider whether or not the Defendants have provided sufficient material to satisfy the Court that they have a good Defence on the merits or have raised such facts as may be deemed sufficient to entitle them to an order to defend this action generally.

An order for summary judgment is not and ought not to be made lightly. Its whole purpose is to award a speedy judgment to one party without there being a trial and without the other party having his day in Court, once the Court is satisfied on the evidence before it that there is clearly no defence to the Plaintiff's claim. As stated by **Lord Esher M.R.** in the case of **Roberts vs Plant** (1895) 1 QB 597 at page 603;-

> "That is a stringent power to give, and therefore the Courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within scope of the provisions of the order;..."

In that same case , **Lopez L.J.** at page 604 stated;-

> "The meaning of the order is, that in a certain class of cases, where the plaintiff has a clear case, he ought not to be subjected to the expense and delay of going to trial, but ought to be allowed to sign judgment summarily;..."

What then does a Defendant have to do to convince a Court to make an order in his favour in an application of this nature? If an examination of the Defence filed or affidavit deponed to by the Defendant in opposition to this application discloses no arguable or reasonable ground of defence, the Court ought to grant an order for summary judgment. Where however the Defendant has shown that he has a good defence to the action on the merits, reasonable grounds for a defence or that he has raised triable issues with respect to the claim against him, leave to defend ought to be given.

In the present case, the Second and Third Defendants have filed separate Defences to the action brought against them by the Plaintiff. The Court is obliged therefore and has the responsibility to carefully peruse the respective Defences to ascertain whether on the issues raised and on the facts of the particular case, the Plaintiff is entitled to proceed to judgment without trial.

From an examination of the pleadings, it is clear that the Defences relied on by the Second and Third Defendants are not identical, a position not apparently appreciated by the Plaintiff. In her written skeleton arguments, Counsel for the Plaintiff submitted "It appears that the Second and Third Defendants are relying on a Defence of non est factum ..." Strictly speaking, that was never the position taken by the Third Defendant.

In her Defence and Counterclaim, as well as in her Affidavit in opposition to this application, the Third Defendant consistently maintained that she did not guarantee any loan nor did she sign any mortgage in respect of the premises registered at Volume 963 Folio 535 of the Register Book of Titles. In fact, she asserted that she was still in possession of the Title to the said premises which at no time was offered as security as alleged by the Plaintiff. Simply put, this Defendant is alleging that any signature purporting to be hers on the documents relied on by the Plaintiff is a forgery. This is a matter for determination by a trial Judge and the Third Defendant ought not to be stifled by the order sought herein by the Plaintiff. I find therefore that on the material before this Court, the Third Defendant has disclosed such facts sufficient to entitle her to defend this action generally.

The issue of non est factum arose solely on the case put forward by the Second Defendant. Although categorically denying that he signed the alleged documents in his Defence, no such denial was included in his Affidavit in opposition to this application for summary judgment. Instead an explanation is given for the signing of the said documents, that is, that he was duped by the fraudulent representations of his brother, the Fourth Defendant, who led him to believe that the documents he was signing were in support of his mother's, (the Third Defendant's) application for a loan from the Plaintiff to assist the Fourth Defendant. When he saw what appeared to be his mother's signature on the said documents, he signed same without reading them or asking any questions. He

basically admits in his Affidavit that he was deceived into signing the said documents by his brother and does not advance in any way, the assertion that he did not sign the documents.

Additionally this Defendant in his Affidavit raised two (2) other contentions;-

(1) the absence of consideration for the transaction,

(2) that his allegation of fraud raised in this matter is supported by the fact that he did not sign the said documents before a Justice of the Peace, although they purport to have been so completed.

Neither of these two points were pleaded in his Defence nor has any indication been given of his intention to amend to have them added.

Are the contentions raised by the Second Defendant merely meant to delay these proceedings, to deny at this time the inevitable judgment in the Plaintiff's favour, or is there merit in the issues posed sufficient to enable him to defend the action generally? A careful examination of the points put forward by the Second Defendant is necessary to answer these questions.

The Second Defendant contended that he was induced to sign the said documents by the fraudulent representations of his brother, the Fourth Defendant and that he signed "without asking too many questions or without reading them carefully." He stated that he did not intend to sign any guarantee for the liability of the First Defendant but thought he

was signing so that a loan could be obtained by the Third Defendant to assist the Fourth Defendant.

The essence of the Defence sought to be raised by this Defendant is that he was mistaken as to the nature of the transaction to which he put his signature. In this regard, the learned authors of Halsburys' Laws of England, Fourth Edition, Volume 9 paragraph 284 at page 162 have stated the principle as follows;-

> "Now the general rule is that a man is estopped by his signature thereon from denying his consent to be bound by the provisions contained in that deed or other agreement. Where, however, the plea of non est factum is available, the promises contained in the document are completely void as against the signatory entitled to plead the defence into whoever's hands it may come. The reason is said to be that the mind of the signer did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity."

The plea of non est factum is rarely established by a person of full capacity and the burden of proving such a plea falls squarely on the shoulders of the signatory seeking to disown the document. For such a party to be successful, he must show that in signing the document, he acted with reasonable care. See **Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) vs Anglia Building Society (formerly Northampton Town and Country Building Society)** (1970) 3 ALL E.R 961.

Paragraph 9 of the Second Defendant's Affidavit amounts to an admission that he acted carelessly in signing the said documents. In commenting on the plea of non est factum in the above cited case, Lord Reid at page 963 stated:

> "... at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think that it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity. But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises when an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. **I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances; certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think that he can be heard to say that he signed in reliance on someone he trusted." (emphasis mine).**

In the same vein, Viscount Dilhorne at page 966 opined;-

> "Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care...
> A person may be precluded by his own negligence, carelessness or inadvertence from averring his mistake."

Further at page 967 the learned Law Lord stated;-

> "... I agree that a man at full age and understanding who can read and write cannot be allowed to repudiate his signature to a document which he knows will have legal consequences if he signs it without reading it, but with the greatest respect I think that this is more an example of a case where the plea will fail than a rule of general application."

And at page 969 he continued,

> "It is, I think clearly established that the plea of non est factum cannot succeed if the signer of the document has been careless."

On his own admission the Second Defendant was careless in signing the said documents. His carelessness then deprives him now of relying on this defence.

I am also not satisfied that the documents signed were fundamentally different in nature or effect from that which this Defendant intended to sign. He knew that the documents were required to obtain financing from the Plaintiff and in respect of which, on a default, he would be liable. It is not sufficient for him to say that he thought the loan

was for the Third Defendant, his mother or that he did not intend to guarantee any loan to the First Defendant, particularly where he did not read the papers put before him for signing. As **Lord Hodson** has stated at page 965 of the **Saunders v Anglia Building Society** case;-

> "... the identity of the transferee (i e Mr. Lee instead of Mr. Parkin) does not make the deed of a totally different character from that which she intended to sign."

Mr. Wright Q.C. valiantly argued that as fraud is alleged by the Second Defendant, fraud "opens any door" and this entitles him to have his day in Court. In looking at the pleadings as well as the Affidavit filed on behalf of the Second Defendant, it is immediately obvious that no allegation of fraud has been levelled against the Plaintiff. Yet Counsel for the Second Defendant in his submissions sought to implicate the Plaintiff when he argued that the bank contributed to the fraud by carelessly handing the documents to the Fourth Defendant. I find no merit in that contention, particularly where there is no allegation or particulars of such fraud in the Defence or Affidavit filed on behalf of this or any Defendant.

In Halsburys' Laws of England, Volume 32, Fourth Edition, paragraph 10, page 8, the learned authors stated;-

> "... In cases where the plea is not available, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken is not sufficient to give him the right to rescind, unless the belief has been induced by the representation, fraudulent or

otherwise of the other party to the contract."

The role of this Plaintiff is that of an innocent third party. I find that the issues raised by this Defendant do not amount to a good or reasonable defence on the merits.

The allegation that there was no consideration for the agreement admittedly signed by the Second Defendant in respect of which this action was brought raises a question of law. No argument was advanced by Counsel for this Defendant on this point and this purported defence, was never pleaded in the Defence filed on his behalf. The Mortgage by way of Guarantee and the Instrument of Guarantee signed by the Second Defendant and on which the Plaintiff relies speak clearly and unambiguously as to the issue of consideration. I am of the view that there is plainly no defence or no arguable defence to the Plaintiff's claim on this ground.

The Second Defendant admittedly signed the said documents at the request and in the presence of his brother, the Fourth Defendant. In handing them over to the Fourth Defendant signed in blank, the Second Defendant was well aware that they were to be completed and forwarded to the Plaintiff. In reliance on his signature the Plaintiff acted and incurred a loss. However this Defendant now attempts to raise as a ground of defence his own failure or omission to sign the documents before a Justice of the Peace . I am not satisfied that this argument raises any reasonable ground of defence to the Plaintiff's claim.

On the Second Defendant's case, the real culprit is the Fourth Defendant, his brother, whose fraudulent conduct led him to sign documents. The mere mention of the word 'fraud' is not sufficient to entitle this Defendant to leave to defend the action brought against him by the Plaintiff. It is to be noted that the Second Defendant has apparently not taken any proceedings to claim an indemnity against the Fourth Defendant in respect of his alleged conduct.

In the case of **Banque De Paris et des Pays-Bas (Suisse) S.A. vs. Costa De Naray & Christopher John Walters** (1984) 1 Lloyd's Law Reports 21 at page 23 Ackner L.J. stated:

> "It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence."

It must always be remembered in an application of this nature that this is not a trial of the action on affidavits. The function of the Court at this stage is to see whether on the affidavits filed this Defendant has a good defence to the action on the merits. In applying this principle and having looked at "the whole situation," this Court is satisfied that the issues put forward by the Second Defendant to counter the Plaintiff's claim amount to a sham defence intended merely to delay these proceedings.

The Plaintiff is therefore entitled to Summary Judgment against the Second Defendant in the sum of $1,767,782.50 together with interest thereon at the rate of 32 ½ % per annum from the 13th January, 1999 to the date hereof and costs to be agreed or taxed and I so order. Costs of this application are awarded to the Plaintiff against the Second Defendant to be agreed or taxed.

With respect to the Third Defendant, I hereby grant unconditional leave to defend for the reasons earlier outlined and the Plaintiff's application against this Defendant is refused. Costs are awarded to the Third Defendant against the Plaintiff to be the third Defendant's costs in the cause.

Leave is hereby granted to the Plaintiff to file and deliver its Reply and Defence to Counterclaim of the Third Defendant within fourteen (14) days of the date hereof.

Stay of execution of the judgment granted for six (6) weeks. Leave to Appeal refused.