



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 02615

BETWEEN	GIRLENA WILSON	CLAIMANT
AND	DELROY CAMPBELL	1ST DEFENDANT
AND	DAVID GISCOMBE	2ND DEFENDANT
AND	AI CHEUNG LEE	3RD DEFENDANT
AND	SIV WAI KIN ALBERT	4TH DEFENDANT

Ms. Jacqueline Cummings instructed by Archer, Cummings & Co. for the Claimant.

Mr. Stuart Stimpson instructed by Ramsay Stimpson for the 2nd and 4th Defendants.

Heard: 24th and 25th November, 2010, and 23rd September, 2011

**WHETHER TENANT AT WILL, TENANT OR LICENCEE –
EXECUTION – WRIT OF POSSESSION – WHETHER AGENT OF
LANDLORD LIABLE WHEN EXECUTION SUBSEQUENTLY
PROVES WRONGFUL – NO PROOF GOODS TAKEN
PURSUANT TO WARRANT OF LEVY-TRESPASS TO GOODS –
MEASURE OF DAMAGES – DATE OF CONVERSION NOT DATE
OF JUDGMENT**

Mangatal J:

[1] This is a claim by the Claimant Girlena Wilson “Mrs. Wilson” against the Defendants for damages for trespass to property and goods.

THE PARTIES

[2] Mrs. Wilson is a businesswoman and she was the wife of Neil Wilson, now deceased. Mr. Wilson used to work for Mr. Chung Fo Hung “Mr. Hung”, who Mrs. Wilson called “Trevor”, for over ten years. She was the occupant of a section of 207A Constant Spring Road owned by Mr. Hung and complains of trespass to property and goods by the Defendants.

[3] The 1st Defendant “Mr. Campbell” at the material time worked at the Sutton Street Civil Resident Magistrates’ Court for the Corporate area. Mr. Campbell it was who filed Plaintiff Number 3839 of 2003, expressly as agent for the 2nd Defendant David Giscombe “Mr. Giscombe”, against Neil Wilson, claiming for rent and recovery of possession.

[4] Mr. Giscombe was the Accountant who worked for Mr. Hung and who authorised the commencement of court proceedings in the Resident Magistrates’ Court.

[5] The 3rd Defendant Wai Cheung Lee “Mr. Lee” and the 4th Defendant Wai Kin Albert Siu “Albert” operated a grocery in the name of “Walk in Grocery” on the ground floor at the premises 207A.

MRS. WILSON’S CASE

[6] In or about the month of April 2001, Mr. Hung gave Mr. Wilson a section of his complex at 207A Constant Spring Road, Kingston 8, St. Andrew to occupy without any charge. According to Mrs. Wilson, Mr. Hung gave this to Mr. Wilson “as a gift for his many years of service to him”. At no time did Mr. Hung request any rent from the Wilsons and Mrs. Wilson avers that this was Mr. Hung’s way of helping Mr. Wilson as he did not want to pay

redundancy or severance payment to her husband when Mr. Hung migrated. Mr. Hung migrated in or about May 2001.

[7] Mr. Wilson fixed up the section that he had received from Mr. Hung and both he and Mrs. Wilson operated a grocery shop from there. Mr. Wilson became ill and subsequently died in September 2002.

[8] When Mr. Hung migrated, he left some other persons at the complex. He left some other Chinese people, including Albert and Mr. Lee. Albert and Mr. Lee operated the supermarket and the wholesale adjoining Mr. Wilson's store.

[9] Mrs. Wilson spoke to Mr. Hung in or about October 2002 when he called her and enquired as to how she was doing without her husband there to help and she being pregnant.

[10] Sometime in the first week of November 2002, Albert telephoned Mrs. Wilson and said that Mr. Hung had instructed him that Mrs. Wilson should start paying rent. Mrs. Wilson says that she asked Albert for Mr. Hung's telephone contact because when she had spoken to Mr. Hung in October he had not mentioned anything about her being required to pay rent.

[11] In response, Albert told her that Mr. Hung had given him specific instructions not to give out his contact information to anyone. Mrs. Wilson left her cellular telephone number with Albert and asked him to have Mr. Hung contact her. However, Mr. Hung never did.

[12] While Mrs. Wilson was in the hospital preparing for delivery of her child, her sister operated the business for her and Mrs. Wilson gave her the rent to pay on November 5th, 2002. The receipt is dated 1st October 2002 and has the name of the payee as Neil's Variety Store.

[13] Mrs. Wilson states that it was Albert who wrote the receipt and she asked him to change the date as well as to rewrite the receipt in her name since she was now running the business. Albert refused her requests. The receipt also bears the name "T. Hung" as being the recipient of the rent, though it is Mrs. Wilson's evidence that Trevor Hung was not even in Jamaica at the time of the signing of the receipt.

[14] A friend of Mrs. Wilson called her in January 2004 and asked her if she had sent someone to her shop and Mrs. Wilson responded in the negative. The friend told her that there were some men in her shop.

[15] As a result, Mrs. Wilson immediately went to the business premises. She found that the locks had been changed and all of her grocery items, furniture and fixtures were missing from the shop.

[16] Mrs. Wilson states that she immediately went to Albert next door and he said to her, "I don't want to talk to you, I don't want to see you."

[17] Mrs. Wilson states that in October 2004 she again went to Albert and once again he refused to speak to her. This time she observed that her refrigerator which had been in the shop was being used by Albert in his business.

[18] In January 2005, Mrs. Wilson went back to Albert, accompanied by her Attorney-at-Law and Police officers, in an attempt to retrieve her items. However, at this time Albert produced Court Documents in relation to Plaintiff #3839 filed in the Sutton Street Civil Resident Magistrate's Court for the Corporate Area, which Albert relied upon as purportedly giving him a right to possession of the premises occupied by Mrs. Wilson.

[19] Mrs. Wilson made checks at the Sutton Street Court and learnt that Mr. Campbell, as agent for Mr. Giscombe, obtained an order for possession of the shop against Mr. Wilson, despite Mr. Wilson being dead, and Mrs. Wilson being in possession of the property at the material time.

[20] It is Mrs. Wilson's evidence that at no time did she or her husband have any relationship of Landlord and Tenant with Mr. Campbell or Mr. Giscombe.

[21] Prior to operating the shop, Mrs Wilson states that she and Mr. Wilson had spent money to fix it up and paint it and she claims for this work, including electrical and flooring work, along with certain items that she had in the shop and which she has not to date recovered.

[22] Mrs. Wilson claims that by reason of the trespass to property and goods by the Defendants she has suffered loss and damage and been put to expense as follows:

PARTICULARS OF SPECIAL DAMAGE

Loss of income from January 2004	
@ \$50,000.00 per week	\$1,600,000.00
Fan	\$ 1,100.00
Tape Recorder	\$ 8,000.00
Refrigerator	\$ 30,000.00
Fixtures	\$ 11,557.41
Labour for Electrical Work	\$ 20,000.00
Metal Locks/Labour	\$ 5,000.00
Locks	\$ 1,400.00
Bulbs	\$ 1,060.00

Paint Job	\$ 4,000.00
Flooring	<u>\$ 700.00</u>

NO DEFENCE FILED BY 1ST AND 3RD DEFENDANT

[23] Pursuant to an order made dispensing with personal service and permitting substituted service on the 1st and 3rd Defendant by way of advertisement in certain newspapers, an Affidavit of Service was filed indicating that service had been effected in the manner permitted by the court's order. Neither the 1st nor the 3rd Defendant has filed an Acknowledgment of Service or Defence and so Mrs. Wilson's Attorney-at-Law Ms. Cummings is seeking to obtain judgment against those two Defendants by Default, as well as against the 2nd and 4th Defendants, who have filed a Defence.

DEFENCE OF THE 2ND AND 4TH DEFENDANTS

[24] Mr. Giscombe and Albert deny that at all material times Mrs. Wilson and Mr. Wilson operated a grocery shop at 207A Constant Spring Road. They say that Neil Wilson in his sole capacity at all relevant times operated a small grocery shop by the name of Neil's Grocery at the premises. He did so as a Tenant of the registered owner of the premises, Mr. Hung, (now deceased), shortly before Mr. Hung migrated to Canada in the month of August 2001. The Defence states that Mr. Hung died on the 4th of June, 2004, and that Probate of his Last Will and Testament was granted to his widow, Pik Ching Hung on the 8th of November, 2005.

[25] In the Defence, Mr. Giscombe and Albert state that it was not until January 2004, when Mrs. Wilson attended the Defendants' premises that it was communicated to them that Mr. Wilson had died.

[26] Mr. Giscombe, who was Mr. Hung's Accountant, and handled his affairs, stated that the monthly rental was \$5,000 per month, and that Mr. Wilson paid the first month's rental. It is averred that no other rental was paid until the month of October 2002, when Mrs. Wilson attended on Albert and paid one further month's rent. She received a receipt and promised that the outstanding balance of unpaid rental would be liquidated.

[27] Mr. Giscombe and Albert also deny that there was ever any agreement for Mrs. Wilson to be substituted as tenant instead of her husband. Further, that the rent of \$5,000.00 that was paid by Mrs. Wilson in October 2002, was accepted as being paid on behalf of her husband Mr. Wilson.

[28] Padlocks suddenly appeared on the doors of the premises in April and May 2003 and that no further activity could be detected at the shop.

[29] The Defence states that a Notice to Quit dated 10th July 2003 was thereafter served on Neil Wilson, the Tenant at Neil's Grocery Shop.

[30] Legal proceedings were issued on the 29th of September 2003 at the Sutton Street Court House and on the 27th of October 2003, judgment was entered against Neil Wilson for \$55,000.00, being outstanding rental, and an order was also made for recovery of possession on or before the 23rd of November 2003.

[31] A warrant of levy in respect of goods and a warrant of possession were executed in December 2003 when Mr. Giscombe accompanied the Bailiff to the premises. The Bailiff removed the locks and entered the premises from

which a foul smell of rotting food emanated, and the only goods found in the premises, and upon which the levy was carried out were as follows:

a. One refrigerator in very poor condition, valued at	\$7,000.00
b. One old fan valued at	\$ 200.00
c. One used scale valued at	<u>\$1,000.00</u>
TOTAL	\$8,200.00

[32] The Defendants deny that the refrigerator was utilized by any of them and say that it was sold by the Bailiff pursuant to the Levy.

[33] These Defendants admit that at no time did the relationship of landlord and tenant exist between Mrs. Wilson and the Defendants, but they insist that the relationship of Landlord and Tenant existed between Neil Wilson and Mr. Hung.

[34] The Defendants also say that at no time did the relationship of Landlord and Tenant exist between Mrs Wilson and Mr. Hung who was never informed of Neil Wilson's death.

RESOLUTION OF THE ISSUES – STATUS OF MRS. WILSON

[35] In her submissions on behalf of Mrs. Wilson, Miss Cummings waived between saying that her client was a licensee, and then that her client was a tenant at will. In my judgment, Mrs. Wilson's occupation would appear to have been that of a tenant at will. I accept her evidence that Mr. Hung let her husband occupy the premises because of his many years of service to Mr. Hung and instead of paying Mr. Wilson any redundancy payments when Mr. Hung migrated. Mrs. Wilson was in my view, not a licensee because her occupation was not in the capacity of servant or agent, or any interest as

licencee. I accept her evidence that Mr. Hung called her on the telephone in October 2002 to ascertain how she was managing without her husband and did not raise any objection to her continued occupation of the premises nor ask her to pay rent. After considerable thought, I accept Mrs. Wilson when she claims that she only paid the sum of \$5,000 to Albert because now that her husband was out of the picture, it would not in her view have been unreasonable for her to now be charged rent. However, that arrangement was never finalized because Mr. Hung never confirmed that this was so, had not called her back after she left her number with Albert, and had not mentioned any requirement for the payment of rent when he had spoken to her shortly before Albert made the demand for rental. My findings on this issue may well have been different if Albert had given evidence, but he did not do so. Further, by the trial date Mr. Hung had long been deceased and so no evidence on the point would have been forthcoming from him.

AUTHORITY AND AGENCY

[36] I do not accept Mr. Giscombe's evidence, which he only proffered during cross-examination, that he was authorised by both Mr. Hung and Albert to recover possession of the premises. In his Witness statement, Mr. Giscombe only mentions receiving communications from Albert about difficulties he was allegedly having in collecting rent from the shop. I would have expected that he would have mentioned Mr. Hung in his Witness Statement if indeed he had received any direct communication from him about taking steps to recover possession. However, it appears that the proceedings commenced in the Resident Magistrate's Court were irregular in the form in

which they were brought and completed against Mr. Neil Wilson. Not only was Mr. Wilson deceased at the time, but Mr. Giscombe in cross-examination admitted that he knew that Mr. Wilson was dead before he arranged with Mr. Campbell to have the proceedings commenced. In cross-examination, Mr. Giscombe admitted that when Mr. Hung migrated, he only left Mr. Giscombe as his accountant; he did not leave him as his property agent for any of his properties here in Jamaica. In **Doe d Mann v. Walters** [1824-34] All ER 428 it was held that an agent who has authority to collect the rents of a landlord and manages the landlord's affairs during his absence abroad, does not, in the absence of any evidence in that behalf, have authority to give a notice to quit. Where an agent has given a notice to quit without authority ratification of his authority must, in order to validate the notice, be given before the moment at which the notice becomes operative. It follows in my view, that an agent who has authority to manage a landlord's affairs during his absence abroad, does not without more, have authority to bring or authorize proceedings to recover possession either. In my judgment, there is no credible evidence that Mr. Giscombe was authorized by Mr. Hung to bring proceedings against Mrs. Wilson for recovery of possession and there is no evidence of ratification of authority. In addition, even if Mr. Giscombe was himself an agent of Mr. Hung for the purposes of recovering possession, which I do not in any event accept, he would have had no power to further delegate to Mr. Campbell, to bring the proceedings or to deal with the matter on Mr. Hung's behalf. The proceedings pursuant to the Warrant of Possession were therefore irregular. However, I consider below the fact that these proceedings were never set aside in the Resident Magistrates Court.

[37] I do accept Mr. Stimpson's submission, that based on Mrs. Wilson's status as a tenant-at-will, she would not have been entitled to any protection as a rent-paying tenant would have been under the Rent Restriction Act.-See **Coombes v. Sampson** (1964) 7 WIR 463. Mr. Hung would have been entitled to exercise his right of self-help provided that no more than reasonable force was extended in compliance with the ancient English Forcible Entry Act which is in force in Jamaica – **R v. Stephens** (1888) S.C.J.B. Vol. 4, page 278.

**EXECUTION OF COURT PROCESS OF WARRANT OF POSSESSION –
WHETHER LIABILITY ATTACHING IF EVICTION SUBSEQUENTLY
PROVES WRONGFUL**

[38] However, at the commencement of this matter, Mr. Stimpson on behalf of Mr. Giscombe and Albert took a preliminary and fundamental point that Mrs. Wilson was estopped from making these claims against the Defendants as the acts carried out by the Defendants were not their own, but rather, they were the acts of the bailiff, pursuant to the valid orders of the Resident Magistrate's Court for the Corporate Area. These orders were never set aside for irregularity. I reserved the point and indicated I would prefer in the interests of time, to hear the entire matter and then rule on the point during the course of this judgment. Mr. Stimpson submitted that the eviction and seizure of goods took place pursuant to Warrants of Possession and of Levy, court processes, and that the Court could not look behind these acts.

[39] I have come across a very helpful unreported decision by Brooks J. in Claim No. C.L.S. 195 of 2001, **Sunrose Limited v. Othneil Martin and Felix**

Mitchell, delivered April 25, 2008, which was approved in application No. 160/2010 in Civil Appeal No. 55/2008, delivered by Panton P on the 22nd of November 2010. The learned President of the Court of Appeal indicated that no useful purpose would be served by overlooking the tardiness of the applicant's application for an extension of time, since there was no merit to an appeal against the judgment of Brooks J. In **Sunrose**, at the request of a landlord, a writ of possession had been issued against his tenant the Claimant Sunrose. The writ of possession was executed by the bailiff for the Parish of Manchester. The claim by Sunrose was to recover in trespass from the landlord and the bailiff for compensation for alleged losses. Brooks J. applied the time-honoured principle that bailiffs, and officers of the court, who are carrying out the orders of the court are immune from liability for the actions taken in obedience to those orders unless they act in excess of the authority given by the order or writ. My learned brother judge also held that the bailiff is not the agent of the landlord who seeks to recover possession, unless the bailiff, at the landlord's request takes some action outside the scope of the writ of possession. Reference was made to **Barclays Bank Ltd. v. Roberts** [1954] 3 All E.R. 107, where, as Brooks J. summarized, the sheriff acted on the advice of the landlord's solicitors in evicting a sub-tenant who was subsequently proved to be in lawful occupation of the premises. It was held that the sheriff's officers had acted in accordance with the writ of possession and did nothing beyond what they were authorised to do by the court. It was further held that the advice of the solicitors did not make the sheriff's officers the agent of the landlord and therefore the landlord was not liable for the wrongful eviction.

[40] In my judgment, therefore, the Defendants cannot be held liable for the acts flowing from the eviction or warrant of possession because in that regard, the Bailiff was simply carrying out the court orders and process and in so doing, the bailiff was not the agent of any of the Defendants. Therefore, although I am of the view that there is no evidence that the proceedings were properly authorized and that they were irregular in the sense that proceedings ought not to have been brought against a person who is deceased, these proceedings were never set aside on the ground of any irregularity or at all. None of the Defendants would therefore have been liable for any wrongful eviction. Since the eviction did take place as a result of these court proceedings, it is unnecessary for me to consider the question of the English Forcible Entry Act or whether any excess of force was used.

[41] The claim to recover the sums expended by Mrs. Wilson on the premises would therefore fail for this reason, as well as the fact that the evidence as to the circumstances, and for the benefit of whom this work was done, is too vague. In any event, such a claim, if it had any validity, which I find it does not, would have had to be made against the Landlord himself Mr. Hung, and not the Defendants who have been sued.

TRESPASS TO GOODS

[42] The claim for trespass to goods, is however, another matter. As regards the claim for trespass to goods, although the Defendants claim that the goods were seized by the Bailiff pursuant to a Warrant of Levy, I do not accept that on a balance of probabilities, because there is no evidence that the bailiff levied, or found any goods to levy. In cross-examination, Mr.

Giscombe said that he received cash from the bailiff, he never had to go to the Accountant or Accountant General's Department to collect money or a cheque as being money collected through the court execution processes. Further, the Warrant of Levy simply states: "Defendant remove from address given". It is dated 21/1/2004 and the Warrant of Possession states that possession was handed over to the Plaintiff on the 27/1/2004. Yet Mr. Giscombe's evidence was that the warrant of possession and the warrant of levy were executed at the same time. There are enough discrepancies to make the 2nd and 4th Defendants' Defence on this issue not credible. In my judgment, the Claimant has made out a claim for trespass to goods, the aggravation of which is really a conversion.

[43] In my view, Mrs. Wilson is not entitled to judgment against the 1st Defendant Mr. Campbell because the only evidence is that he was the disclosed agent for Mr. Giscombe, and therefore it is as against Mr. Giscombe that Mrs. Wilson has a claim. I am not satisfied that Mrs. Wilson has made out a claim against the 3rd Defendant or that he ought to bear any culpability. Mrs. Wilson claims that she saw her fridge in Albert's shop. It is regrettable that she did not tell me why she says that she knows it was her fridge. On the other hand, although there is a denial in the Defence, Albert has not given any evidence to contradict Mrs. Wilson on this score, and Mr. Giscombe's evidence has not convinced me, given a number of glaring inconsistencies between his evidence in chief and in cross-examination, that the fridge was not in Albert's store.

[44] In my judgment, Mrs. Wilson has dismally failed to prove the most significant aspect of her claim, which is a claim for loss of earnings at

\$50,000.00 per week, totalling \$1,600,000.00. Not one scintilla of evidence has been put before the court in that regard. No income tax returns, no accounting records, no evidence from customers. The bare figures were thrown at the court and clearly cannot constitute proper proof of a claim for special damages – **Robinson and Co. Ltd. and Jackson v. Lawrence** (1969) 11 J.L.R. 450.

[45] Mrs. Wilson's evidence was also non-existent in relation to the item of groceries which she had originally claimed. I am prepared to accept her evidence that she had a fan, tape recorder, and refrigerator in the shop and I draw the inference that these were removed by, or at the instigation of Mr. Giscombe and Albert. Mrs. Wilson produced a receipt in respect of a Hoover Refrigerator which was purchased for \$26,500.00, although the cost price was quoted as \$28,999.00. I accept Mr. Stimpson's submission that in respect of the claim for trespass to goods, the measure of damages would be the value of the goods at the date of conversion and not the value at the date of judgment. Nor ideally should the value at the date of purchase be taken since the value of such items as proved by Mrs. Wilson would likely decrease with usage and age. Taking the value at conversion date is consistent with the proper date of assessment being the date of the wrongdoing – **Solloway v. McLaughlin** [1938] A.C. 247, **McGregor on Damages**, 16th Edition, Chapter 31, paragraphs. 1384 -1389. However, I have not been much assisted by the evidence presented as to value and I intend to use the price at which Mrs. Wilson purchased the refrigerator.

[46] I am prepared to accept the values put forward by Mrs. Wilson for the following items:

Fan	\$1,100.00
Tape Recorder	\$8,000. 00
Refrigerator	<u>\$26,500.00</u>
TOTAL	\$35,600.00

[47] As I indicated at the time of trial, it is really surprising that this claim was brought in the Supreme Court when it seems obvious that the sums that could be proved as loss were well within the limits of the Jurisdiction of the Resident Magistrates' Courts.

[48] There will therefore be judgment for the Claimant against the 2nd and 4th Defendants, in the sum of \$35,600.00. Costs to the Claimants against the 2nd and 4th Defendants, being limited to the costs recoverable in the Resident Magistrates' Court for a two day trial, agreed at \$10,000.00.