IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

Claim No: ANUHCV2019/0434

BETWEEN:

JOSE RICARDO SIGALA

Claimant

and

BOI BANK CORPORATION

Defendant

Appearances:
Dane Hamilton Jr holding papers for Dane Hamilton QC, Counsel for the Claimant
Talia DaCosta, Counsel for the Defendant

2022: January 13th;
March 25th.

DECISION

[1] **GARDNER HIPPOLYTE, M.:** This is an application for summary judgment by the Claimant against the Defendant. The claim is for the return of the sum of US$3,607,232.00 which represents monies deposited in accounts at the Defendant Bank.

Background

[2] The Claimant is a businessman residing in Miami, Florida. The Defendant is an off-shore international bank registered under the **International Business Corporation Act**. The defendant's office is located in St. John's Antigua. The Claimant maintains several off-shore US accounts with the Defendant bank as follows[1]:

"The company named SERVICIOS DEL ARGO CA of which the Claimant is the director

Account number	**Account type**	**Principal balance (USD)**
xxxxx8505	Certificate of deposit	$376,461.49
xxxx2800	Current	$0.00
xxxxx0240	Savings	$2,553.51

Table 1

[1] Paragraph 3 and 4 of the Defence

And three accounts in the name of JOSE RICARDO SIGALA

Account number	**Account type**	**Principal balance (USD)**
xxxxx0007	Certificate of deposit	$45,000.00
xxxxx0000	Current	$0.00
xxxxx0027	Savings	$3,299,723.72

Table 2

[3] The Defendant does not dispute the money referred to above has been deposited at the bank. The main factual issues which the Parties differ on are as follows: (1) the right of the Claimant to bring a claim on behalf of the company Servicios del Argo CA in his personal capacity; (2) that the money in his personal name is only one savings account and one certificate of deposit in the account numbers reflected in table 2 above; (3) whether a demand in accordance with the bank's General Terms and Conditions and the Terms and Conditions of First Deposit Certificates has been made for the monies to be returned to the Claimant; and (4) the Defendant alleges the money is proceeds of crime.

[4] The Claimant avers that he has been requesting for his money to be returned since June 2017 and that despite repeated requests the Defendant has not transferred the funds. The last demand was on the 26th July, 2019. This demand was made by the Claimant's attorney. It was made in writing, addressed to the bank requesting the return of US$3,279,302.00 on behalf of the Claimant and the company. As a result of the failure of the Defendant to return the Claimant's money, the instant claim was filed in August 2019 and served on the Defendant on the 20th August, 2019.

[5] An acknowledgement of service was filed on the 27th August, 2019 and thereafter the Defendant requested two extensions to file a defence and a defence was filed on the 22nd July, 2020. In the defence, the Defendant has not denied the money is being held at the Bank but has repeatedly argued they are not liable to pay out due to the main factual issues in dispute referred to above at paragraph three (3).[2]

[6] The grounds of the summary judgment (amended) application are:

(a) that it is uncontroverted that the Claimant has made the said deposits,
(b) no proper grounds or reason has been advanced by the Defendant for withholding payment,
(c) by letter dated 5th March, 2020 the Defendant unconditionally acknowledged that the Claimant's deposits were at least US$45,000.00 in account number xxxxx0007 and US$3,275,150.93 in account number xxxxx0027.

[7] The Claimant provided two affidavits in support of the application through Alejandro Torrealba of Torrealba & Co, Attorneys of Miami Florida. The Claimant is a client and Mr. Torrealba sets out

[2] Paragraph 3 of the affidavit of Joel Santos filed 11th November, 2020 in response to the summary judgment application.

in the affidavit the following information: the history of the case in relation to the filings and applications; that the Defendant has not denied receipt of the money; that the Defendant has been unable to obtain any Court order from the Republic of Venezuela on any criminal proceedings in connection to the deposit sued for by the Claimant; and the Defendant has failed to produce any criminal record of the Claimant.[3] Additionally the affiant deposes at paragraph 7, 8 and 9 that the Claimant was cleared by the 18th Court of First instance Exercising State Supervision of the Criminal Judicial Circuit of the Judicial Circumscription of the Metropolitan Area of Caracas on the 25th March, 2019.

The Law on Summary Judgment

[8] The Civil Procedure Rules (Amended) indicates:

> "15.2The court may give summary judgment on the claim or on a particular issue if it considers that the –
>
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
> (b) defendant has no real prospect of successfully defending the claim or the issue."

[9] Blackstone's Civil Practice 2017 set out at rubric 34.10 the test for entering Summary Judgment. The test is "whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly." Additionally, Blackstone's Civil Practice goes on to state:

> "In Swain v Hillman [2001] 1 All ER 91 Lord Woolf MR said that the words 'no real prospect of succeeding' did not need any amplification as they spoke for themselves. The word 'real' directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is 'bound to be dismissed at trial'.
>
> Nor does it require compelling evidence, but simply enough evidence to raise a real prospect of a contrary case (Korea National Insurance Corporation v Allianz Global Corporate and Specialty AG [2007] EWCA Civ 1066)
>
> In Bee v Jenson [2006 EWHC 2534, the court adopted the approach explained by Potter LJ in ED and F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472, [2003] CPLR 384 at [8]:

[3] Paragraph 5 of the affidavit of A. Torrealba filed on the 20th March, 2020

I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in [Alpine Bulk transport Co Inc. v Saudi Eagle Shipping Co. Inc [1986] that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable….

A claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based (Three Rivers District Council v Bank of England (No. 3)). The judge should have regard to the witness statements and also to the question of whether the case is capable of being supplemented by evidence at trial (Royal Brompton Hospital NHS Trust v Hammond [2001] BLR 297). Where the respondent's evidence, taken at its highest, does not raise a possibility of a defence, but is in the realm of a mere (and distinctly improbable) possibility, it is right to enter summary judgment (Akinleye v East Sussex Hospitals NHS trust [2008] EWHC 68 (QB)"

[10] The burden of proof falls on the Applicant and it is not necessary to consider which Party has the stronger case.[4] Blackstone's Civil Practice[5] also refers to **Director of the Assets Recovery Agency vs Woodstock**[6] and says that the onus is on the Applicant and once there is a prima facie case established, there is an evidential burden on the Respondent to show a case answering.

[11] The Respondent in a summary judgment application can highlight that the claim or defence has a real prospect of succeeding by setting up one or more of the following:[7] A substantive defence; a point of law destroying the Claimant's cause of action; a denial of the facts supporting the Claimant's cause of action; or further facts answering the Claimants.

Discussion and Analysis

[12] Halsbury's Laws of England/Financial Institutions (Volume 48 (2021))/1. Banks/(5) Business of Banking/(i) Relation of Banker and Customer/116 states "the receipt of money by a banker from or on account of his customer constitutes him the debtor of the customer. The banker is normally liable to repay only the person from whom he received the money. The bank borrows the money and undertakes to repay it or any part of it at the branch of the bank where the account is kept, during banking hours, and upon payment being demanded." This is a basic principle.

[4] ED & F Man Liquid Products Ltd vs Patel and another [2003] EWCA Civ 472
[5] 2017 Rubric 34.11
[6] [2006] EWCA Civ 741
[7] Blackstone's Civil Practice 2017 rubric 34.13 page 587

Claim on behalf of the Company

[13] It is not disputed that the Defendant has the money belonging to the Claimant. The first area of dispute is whether the Claimant has the capacity to bring a claim by and on behalf of the company Servicios del Argo CA. I agree with the argument of the Defendant that a company has its own legal capacity to sue and to be sued. In the affidavits provided by the Claimant there is no nexus provided to allow the Court to address this issue in a fuller manner. The statement of claim does not reference the capacity of the Claimant to bring a claim on behalf of this company. Accordingly, the application to enter summary judgment on behalf of the company Servicios del Argo CA is refused as the Applicant has not established a prima facie case.

Certificate of Deposit Demand

[14] The second area of dispute is whether the Claimant made an appropriate demand for the monies to be paid. I agree with the Defendant that the Claimant has not established in the affidavits that there was compliance pursuant to the Terms and Conditions of the certificates of deposit. At clause FIVE: AUTOMATIC RENEWAL[8] it is quite clear the steps that must be followed for the cancellation of the certificate of deposit. There is no documentary evidence submitted to the Court to show the Claimant cancelled the certificate of deposit between the 24th and 29th of August in any given year.

[15] There are documents provided by the Claimant at AT3 of the bundle but none of the dates correspond with the dates provided by the Defendant as to when a demand can be made. Accordingly, it cannot be said that a formal demand has been made. Therefore, the Court is handicapped to enter summary judgment on the **certificate of deposit** as claimed since the demand was not made in compliance of the terms and conditions.

Saving Account xxxxx0027 Demand

[16] In relation to the savings account in the name of the Claimant, it has been submitted in his representative's affidavit that by letter dated 26th July, 2019 under the hand of the Claimant's attorney a demand was made for the payment of US$3,279,302.00 and this letter is exhibited as AT2. The letter references the following accounts:

Name	**Account number and type**	**Amount**
Servicios Del Argo CA	xxxxxx0244	$2,500.00 USD
Servicios Del Argo CA	Deposit certificate - xxxxxx5505	$318,689.00 USD
Jose Ricardo Sigala	xxxx0027	$46,965.00 USD
Jose Ricardo Sigala	Deposit certificate – xxxxx8394	$211,119.00 USD
Jose Ricardo Sigala	Deposit certificate – xxxxx9269	$2,700,000.00 USD

[8] FIVE: AUTOMATIC RENEWAL states – Regular or flexible certificates of deposit will be automatically renewed under the same terms and conditions, unless the client notifies his wish not to renew the regular or flexible certificate of deposit within a minimum period of five (5) business days and a maximum period of ten (10) business days prior to the date of expiration.

[17] The letter refers to three accounts for Jose Ricardo Sigala. The Claimant in his first affidavit in support for summary judgment referred to the same account numbers and type that the Defendant references as the accounts being held for the Claimant. However, the demand letter issued by the attorney for the Claimant does not reference these numbers, especially the savings account number xxxxx0027. There is another account with a similar number ending in 0027 but the beginning numbers are different. Therefore, the account numbers in this demand do not correspond.

[18] I wish to re-emphasize the account number of the savings account xxxxx0027 with the sum of US$3,299,723.72 is not the same one referred to in the demand letter dated 26th July, 2019. The Claimant at AT3 has provided in evidence a copy of a statement saying the balance as of 12/31/18 in the sum of US$3,244,924.64 with the said savings account number - xxxxx0027. This would suggest that the Claimant has had the account number since 31st December, 2018.

[19] A demand for a savings account does not appear to follow the same requirement/procedure as the certificates of deposit. There is a procedure referred to in the affidavit of Joel Santos at paragraphs 7-10. The Court does not have the formal documentation to support that this procedure was complied with by the Claimant. It would appear there has been no formal demand issued for account number – xxxxx0027. The Claimant has failed to prima facie establish a case that a valid demand was issued for the onus to shift to the Defendant.

Costs on the Application

[20] The general rule is that the unsuccessful Party will be ordered to pay the costs of the successful party.[9] However, the Court may order a successful Party to pay all of the costs of an unsuccessful Party.[10] Part 64.6(6) highlights the factors the Court should take into consideration when making an order for costs. The Court must have regard to the following:

> (a) the conduct of the parties both before and during the proceedings;
>
> (b) the manner in which a party has pursued – (i) a particular allegation; (ii) a particular issue; or (iii) the case;
>
> (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
>
> (d) whether it was reasonable for a party to – (i) pursue a particular allegation; and/or (ii) raise a particular issue; and

[9] Civil Procedure Rules 64.6(1)
[10] Civil Procedure Rules 64.6(2)

(e) whether the claimant gave reasonable notice of intention to issue a claim.

[21] The application for summary judgment was filed in March 2020, the Claimant filed an amended application in July of 2020. The Parties filed their submissions and affidavits and whilst there has been some delay in getting the application heard, it is important to note that this is a simple case which can be dealt with effectively if the Parties communicated on what the next steps are in relation to facilitating the return of the Claimant's money. The Defendant was only successful because the Claimant had not presented the demands in accordance with the terms and conditions. It is not disputed that the Defendant has the Claimant's money and the Defendant should make immediate strides to assist the Claimant with the return of his funds.

[22] I will therefore make no order as to costs.

Conclusion

[23] For the above-mentioned reasons the order of the Court is as follows:

1. The Claimant's application to enter summary judgment is refused;
2. No order as to costs;
3. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte

High Court Master

By the Court

Registrar