

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

Civil Division

**SAINT LUCIA**

**Claim No: SLUHCV2018/0194**

**BETWEEN:**

**DENNIS BOITNOTT**

Claimant

and

**[1] COCONUT BAY MANAGEMENT LIMITED**

**[2] COCONUT BAY BEACH RESORT & SPA ST. LUCIA**

Defendants

**Appearances:**

Maureen John – Xavier for the Claimant

Ramon R. Raveneau for the Defendants

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2021: September 24;  
October 18 – via email  
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**DECISION**

Defendants' application for security or costs

[1] **PARIAGSINGH M. (Ag.):** - Before the Court is the Defendants application for the Claimant to provide security for costs in the sum of \$34,250.96.<sup>1</sup>

**THE APPLICATION:**

[2] The Defendants rely on six (6) grounds in their application. They contend that:

- a. The Claimant is ordinarily resident outside of the jurisdiction and has no affiliation with this island;

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<sup>1</sup> Filed on March 25, 2021

- b. The Claimant did not personally sign the Claim Form or Statement of Case;
- c. The Claimant has no assets within the jurisdiction;
- d. The Defendant would have a difficult time enforcing any costs order made against the Claimant.
- e. The Defendant fears that it will be left without recourse if it ultimately obtains a judgment against the non-resident claimant; and
- f. In the circumstances it is just to make such an order.

[3] In support of these grounds the Claimant relies on two affidavits of Zachary Frangos, General Manager of the Defendants. The first is his affidavit in support of the application <sup>2</sup> and the second affidavit is in reply to an affidavit in opposition filed on behalf of the Claimant.<sup>3</sup>

[4] An affidavit in opposition was filed on behalf of the Claimant.<sup>4</sup> This affidavit is sworn by a Legal Clerk in the employ of the Claimant's Counsel. It gives substantial details of the Claimant's financial position and asset holdings in the United States of America and his expenses.

#### **THE EVIDENCE:**

[5] The Defendants' evidence in support of the application is that the Claimant is a permanent resident of the USA. He has no affiliation or association to or with Saint Lucia and only came here to take up the employment opportunity with the Defendants. Since his termination, he has never returned to Saint Lucia. Nothing in the form of any documents is relied on in proof of any of these assertions.

[6] The Defendants refer to a search carried out at the Land Registry which shows that the Claimant has no assets whether moveable or immovable within the jurisdiction.

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<sup>2</sup> Filed on March 25, 2021

<sup>3</sup> Filed on July 16, 2021

<sup>4</sup> Filed on June 23, 201

The Claimant has no address or place of abode in Saint Lucia and that he has moved within the last 2 -3 years from Florida to South Dakota and now Arizona. Again, nothing in the form of documents is relied on in proof of any of these assertions.

- [7] In the affidavit in opposition filed on behalf of the Claimant the deponent states that the Claimant has had an opportunity to review the application and that he is duly authorized by the Claimant to depose to the affidavit.
- [8] The deponent states that the Claimant's claim will be stifled if the order sought is made as he does not have the means to pay the security at present nor is he able to source the funding for the security at present. The Claimant is currently unemployed. He was last employed with a hotel in Arizona, USA as their Executive Chef. His contract of employment came to an end on May 15, 2021 and he was not renewed. His letter of termination is also exhibited.
- [9] The deponent gives a list of the assets of the Claimant in the United States and the value of same. The deponent does not exhibit any documents to show how these values quoted were arrived at.
- [10] The deponent goes on to provide a statement of monthly expenses of the Claimant. In support of these expenses several documents are exhibited. From these documents I have noted that; the Wage and Tax Statement is for the year 2020. It reflects the Claimant's Arizona address and reflects an annual wage of over \$50,000.00 USD. There is a letter dated December 29, 2020 from Harley – Davidson Financial Services addressed to the Claimant at his Arizona address which states that the Claimant holds an account with that institution and his standard payment due is \$607.19 in respect of a motorcycle.

[11] There is a statement from Bank of America addressed to the Claimant at this Arizona address which reflects the loan status of the Claimant. The loan referenced has a maturity date of February 02, 2029. As of the date of the statement there was an amount past due and a current payment due indicating that the loan is in arrears.

[12] There is a letter from Capital One addressed to the Claimant at this Arizona address referencing a first payment due on February 15, 2021 on account of refinancing on the Claimant's car.

[13] There is also a series of correspondence between both counsel in the matter. In relation to these correspondences, the Claimant claims that they evidence a concluded agreement on a portion of this claim. The Claimant submits that based on the concluded agreement he is entitled to certain funds from the Defendants. The Claimant contends that on the basis of this agreement, any costs ordered against him can be set off as against any sums due to him.

[14] The Defendants contend that these documents ought not to be before the Court as they evidence "without prejudice" discussions between the parties. I treat with these documents late in this decision.

[15] The deponent also complains about the delay in making the application in the context of the sums already expensed by the Claimant in prosecuting this matter thus far. It is also contended that enforcement of any order for costs will not be difficult. Finally, it is contended on behalf of the Claimant that he has a realistic prospect of success on his personal injury claim.

[16] In reply, the Defendants' manager contends that the disclosure of the correspondence between the attorneys ought not to be considered as they are covered by the without prejudice rule.

[17] The Defendants also contend that it will suffer undue hardship if it is successful in defending the matter and are unable to recover costs. Reference is made to significant financial hardship caused by the pandemic on the Defendants' operations.

#### **THE LAW ON SECURITY FOR COSTS:**

[18] The test for granting an order for security for costs is a two-pronged test. The Defendants must satisfy the Court that, (1) having regard to all the circumstances of the case that it is just to make such an order and (2) one of the grounds set out in Rule 24.3 CPR apply. The latter is not disputed by the Claimant. The Claimant accepts that he is ordinarily resident out of the jurisdiction.

[19] The guiding principle in determining this type of application was stated by the Court of Appeal in **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd SLUHCVP2017/0051** it was stated that:

As a general rule, if the court is satisfied that there is a significant risk of a defendant suffering an injustice by having to pay to defend proceedings, with no real prospect of being able to recover costs if successful, the court may, if it is just to do so, order a claimant to put up security for the defendant's costs.

[20] In **Nasser v United Bank of Kuwait [2001] EWCA Civ 556** it is stated that:

...the discretion has to be exercised applying the overriding objective, and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in the case in question

[21] The factors to be taken into account in determining whether it is “just” to order security are set out in **Pan Am World Airways Dominicana SA v Carlos Bentiez and Anor, ANUHCV2016/0131**. These are:

- a. The risk of not being able to enforce a costs order, and /or the difficulty or expense of being able to enforce a costs order, if the defendant is awarded costs.
- b. The merits of the claim. This has an impact on the risk of needing to enforce a costs order against the Respondent.
- c. Whether the Defendants may be able to recover costs from someone other than the Claimant
- d. The impact on the Claimant of having to give security.
- e. Delay in making the application.

#### **WITHOUT PREJUDICE CORRESPONDANCE:**

[22] **Blackstone’s Civil Practice 2008 page 683** states that:

- 48.54 Without-prejudice communications, whether oral or in writing, which are made with the intention of seeking a settlement of litigation, are privileged from disclosure. The policy is to encourage litigants to settle their differences rather than litigate them to the finish (see Lord Griffiths in *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280). Privilege does this by removing the potential embarrassment of concessions made in the course of negotiations being used at trial against the party who made them. So, on an application for costs, it is not permissible to adduce without-prejudice communications, without the joint consent of the parties, to establish whether a party unreasonably refused a proposal for ADR. Further, it is impermissible to draw adverse inferences from a party’s reluctance to waive the joint privilege (*Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 887, [2004] 1 WLR 3026).

The privilege applies even if the words ‘without prejudice’ are not used, provided the purpose was to seek a settlement (*Chocoladefabriken Lindt & Sprungli AG v Nestlé Co. Ltd* [1978] RPC 287).

### **Proof of settlement**

48.55 Without-prejudice negotiations **which result in a settlement are admissible to prove the terms of the settlement** (Walker v Wilsher (1889) 23 QBD 335). Where the terms of settlement reached in without-prejudice communications are relevant in determining the extent of the liability of another person who is then sued by one of the parties to the settlement for a contribution towards the original liability, the privilege will not prevent inspection of the without prejudice communications (Gnitrow Ltd v Cape plc [2000] 1 WLR 2327).

[23] The Claimant has exhibited a letter dated January 15, 2021 from the Defendant's Attorney making an unconditional offer in settlement of the Claimant's claim for wrongful dismissal. This letter indicated that the offer is open until Friday February 05, 2021. Whilst the letter is not marked "without prejudice" it is clear from the learning in Blackstone's above, that this was a without prejudice offer.

[24] By letter dated January 22, 2021 the Claimant's Attorney responded to the offer and unconditionally accepted same. This acceptance was made within the time set for acceptance. This letter is also not marked "without prejudice" but flows from the without prejudice offer.

[25] By email sent on March 21, 2021 the Defendants' Attorney wrote to the Claimant's Attorney and apologized for the sums agreed not being paid due to his late request for same. In the said email counsel indicated that the Claimant should receive his settlement within 'the coming week or two' and thanked counsel for her kind indulgence. This email was in response to an email from the Claimant's attorney on March 20, 2021 inquiring when the Claimant should expect his cheque regarding the settlement of the employment matter.

[26] The correspondences which I have set out in detail in my respectful view demonstrate a concluded agreement with respect to the Claimant's claim for wrongful dismissal as the Claimant submitted.

[27] Counsel for the Defendants argued at the hearing that until the agreement is finalized through the Court the agreement is not concluded. I respectfully disagree. Parties can and have settled matters whilst their claims are pending most notably in mediation. What is clear from the correspondence is that there was a clear offer, an unequivocal acceptance and steps towards securing payment.

[28] For these reasons, I am of the view that the correspondence disclosed by the Claimant is admissible as they fall within the exception to the without prejudice rule. They prove a concluded agreement between the parties.

[29] The relevance of this concluded agreement is that the Defendants have agreed to pay to the Claimant a certain sum in settlement of a part of his claim. This sum has not been paid over to the Claimant as yet. I agree with Counsel for the Claimant that this agreement to pay the Claimant a certain sum in settlement of his claim ought to be taken into account in determining this application as it can give rise to a set off.

#### **ANALYSIS OF GROUNDS AND EVIDENCE:**

[30] There is always a risk of enforcing an order for costs. In this case that risk is heightened by the fact that the Claimant has no assets in this jurisdiction. In my view what makes this risk lesser and reduces the difficulty or expense of enforcing an order for costs if the Defendants are successful is the fact that the Defendants have agreed to pay the Claimant a sum less than \$4,000.00 than the figure the Defendants are seeking in security for costs. This factor must be resolved in favour of the Claimant in my view.

[31] The remaining part of the Claimant's claim is a claim for damages for personal injuries. The negligence alleged is in relation to a slip and fall accident by an

employee against an employer for an accident that occurred during the course of employment.

[32] Subsequent to the alleged accident the Claimant left the jurisdiction and sought medical attention in the USA. Upon submitting a medical report from a medical practitioner in the USA he was informed that the same could not be accepted. The Claimant was subsequently terminated. This gave rise to his claim for wrongful dismissal. The Claimant has not been back in the jurisdiction since.

[33] The Defendants defence in a nutshell is that the Claimant reported his fall to the Restaurants Manager. The Restaurants Manager went to the location where the Claimant said he fell and saw no signs of a wet floor.

[34] The Defendant further contends that there was an internal investigation. This investigation involved the viewing of CCTV footage which didn't show the Claimant in the area where he alleged, he fell on the day and time he said he fell. The Defendants have disclosed the video footage in its list of documents filed on December 10, 2020.

[35] On the issue of liability, the Court will have to make findings of fact based on different version of facts being asserted by both parties. Further, the Court will have benefit of considering the contemporaneous documents and the video footage at a trial.

[36] Ultimately, liability will be determined by a finding. In my view at this stage, it is difficult to weigh the merits of either party's case suffice to say that parties have compelling cases on paper.

[37] In this application it is important to consider that the Defendant may be able to recover costs from someone other than the Claimant. The Defendants have the

security of being able to set off any costs against any sums they have agreed to pay the Claimant in settlement of this claim for wrongful dismissal.

[38] The impact of the Claimant having to give security from his evidence will stifle his ability to further prosecute his claim. The Claimant's evidence is that he has no means to provide security now and no means to secure the funds now.

[39] I accept the evidence that the Claimant has assets in the United States of America, albeit that these assets may be charged or encumbered. There is no evidence to dispute the assets he says he has or the value of it. I also considered that the sum being sought as security is approximately \$4,000.00 less than what the Defendants have already agreed to pay the Claimant. Further, the sum sought as security is approximately 25% of what the Claimant says is the value of his assets not taking into account the sums agreed to pay be paid to him.

[40] On the issue of delay, this matter has had a meandering case management history before directions were eventually given on November 09, 2020. In particular, the Defendants filed an application on June 04, 2018 seeking to have this claim struck out. A decision on that application was given by Smith J (as he then was) on December 12, 2018. There was then an application on December 28, 2018 by the Defendants for an extension of time to file its defence, an application by the Claimant to appoint an expert filed on June 07, 2019 and the instant application which as filed by the Defendants on March 25, 2021 after full case management direction were given.

[41] Whilst this matter was commenced since 2018 considerable time was spent on the aforementioned applications. The delay in making the application must be taken in the context of this history.

[42] The benefit of an application for security for costs being made early is that the litigant will know his costs exposure and his ability to prosecute his claim. The rules do however provide that this application can be made at case management or at a pre-trial review.

[43] In my view therefore, the delay in the context of the case management history is not inordinate and causes no prejudice to the Claimant. Further, the rules permit the application to be made at this stage.

[44] The Defendants have also taken issue with the fact that the Claimant has not signed the claim himself. I do not see this as an issue. It is accepted that the Claimant is resident in the USA. The rules make provision for a certificate of truth to be signed by a party's legal practitioner where it is impractical for the litigant to sign same personally. That option was used in this case. There is no allegation or reason to doubt that the Claimant is in the driver's seat of the litigation vehicle. In my respectful view, there is no merit in this ground.

## **CONCLUSION:**

[45] In resolving whether it is just to make an order for security in this case, I am mindful of the following:

- a. The Claimant is not resident in this jurisdiction nor has he been since the accident;
- b. The Claimant didn't leave the jurisdiction at the end of his contract, he left whilst on injury leave and sought medical attention in the USA;
- c. The Claimant's employment was terminated after he left the jurisdiction;
- d. The Claimant has assets in the USA and from the evidence on his behalf these assets are subject to charges and liens;
- e. The Claimant's address in Arizona has been the same since 2020;

- f. Substantial resources and time have already gone into the case management of this matter including the determination of a strike out application on jurisdiction by a judge;
- g. The Claimant is not now employed his evidence is that he is not in a position to now provide security nor will he be able to source same from any third party;
- h. All case management directions have now been issued and complied with;
- i. The Defendants themselves have agreed to settle a portion of the claim thereby making their argument about the merits unattractive;
- j. The Defendants have not paid over the sums agreed on the settled part of the claim to the Claimant.

[46] In considering all the circumstances of this case, for the reasons set out above, I do not consider it just to order the Claimant to provide security for costs. The greater prejudice lies in granting the application as the Claimant's ability to prosecute his claim would be stifled. The Defendants are not prejudice as they have agreed to pay the Claimant certain sums approximately \$4,000.00 less than the security they seek. The agreed sum has not as yet been paid and this money is still with the Defendants to the Claimant's credit. They can therefore set off any costs as against this sum as they have not as yet paid it over to the Claimant as the Claimant's Counsel has submitted.

**ORDER:**

[47] In the circumstances it is hereby ordered that:

- a. the Defendants application filed on March 25, 2021 is dismissed; and
- b. the Defendants shall pay the Claimant's costs of this application to be assessed by this Court in default of agreement.

**Alvin Shiva Pariagsingh  
Master (Ag.)**

**BY THE COURT**

**REGISTRAR**