

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
CIVIL

SAINT LUCIA

CLAIM NO.: SLUHCv2019/0483

BETWEEN:

[1] MARIGOT VIEW PROPERTY LIMITED
[2] IAIN JAMES FIELDER

Claimants

And

[1] WINSTON HINKSON trading as
WINSTON HINKSON & ASSOCIATES
[2] TONJAKA HINKSON

Defendants

Appearances: Natalie Glitzenhim-Augustin for the Claimants;
No appearance for the First Defendant; and
Jahn Sifflet for the Second Defendant.

2021: June 24,
June 29.

DECISION

(Claimants application for summary judgment)

[1] **PARIAGSINGH, M. (Ag.):** Before the Court is the Claimants' application for summary judgment against the First Defendant.¹ This matter first came up before this Court on May 19, 2021. On that day, the First Defendant was represented by counsel. Counsel sought permission for the First Defendant's absence to be excused and this request was granted. It was indicated that the Claimants wished to proceed to have their application heard. The Court gave directions for the First Defendant to file and serve an affidavit in opposition, permission to the Claimants to reply, if necessary and directions for the exchange of submissions between the Claimants and the First Defendant. The First Defendant has not complied with any of these directions. In effect, at the hearing on June 24, 2021 save for the Claimants submissions,

¹ Filed on May 05, 2021

the Court was in no better position than it was on May 19, 2021. The entire period of the adjournment was met with silence by the First Defendant.

[2] When this matter came on for hearing on May 19, 2021 the Court enquired of all counsel if the date proposed for the hearing was convenient, to which all parties indicated it was. The Court also indicated to all parties that because the application was being fixed for hearing a specific time was being scheduled. The application was scheduled to be heard at 11:00 am on June 24, 2021. All parties indicated that the time fixed was convenient. When the matter was called at 11:17 am it was stood down as there was no appearance of the First Defendant's counsel neither did the First Defendant appear. None of the other counsel in the matter had any word from counsel for the First Defendant. The matter was again called at 11:21 am and again there was again no appearance for the First Defendant neither did he appear. No communication was sent to the Court indicating any difficulty of counsel. The Court also enquired of the other counsel in the matter and they too had not received any communication from counsel. The First Defendant himself did not appear and no explanation for his absence was advanced.

[3] Given that the matter was fixed to proceed in the presence of counsel for the First Defendant after consulting his diary, none of the directions having been complied with, no appearance of the First Defendant or his counsel and the Court allowing a further twenty one (21) minutes for any appearance or communication from the First Defendant, the Court proceeded to hear submissions on the application and reserve decision. The events which transpired since the last hearing have been recited with specificity as the conduct of the First Defendant and his counsel is relevant to the orders for costs below.

SUMMARY JUDGMENT:

[4] The facts in support of the application is based as contained in the affidavit in support of Iain James Ker Fielder filed on May 05, 2021. These facts were not disputed by the First Defendant. Indeed, the matter was adjourned on the last occasion for the First Defendant to do this having regard to his defence however, no affidavit was filed by the First Defendant. In the interest of fairness, the Court carefully considered the First Defendant's defence as any evidence filed by the First Defendant had to be consistent with his defence in light of CPR Part 8.

[5] This claim was originally commenced against the First Defendant only. The Second Claimant is the sole Director and Shareholder of the First Claimant. The First Defendant is an Attorney at Law. The Claimants claim is that the First Defendant's firm was retained in **August 2008** almost 13 years ago, to provide certain services in relation to the incorporation of the First Claimant and the purchase of a property in the name of the First Claimant, up to and including concluding the sale and registering a Deed of Transfer in its name. The Claimants contend that despite receiving its monies, the terms of the retainer were not fully performed. The deed in favour of the First Claimant remains unregistered to date. The Claimants claim damages against the Defendants.

[6] The Claimants contend that the First Defendant received from the Second Claimant by way of direct deposit into his account a certain sum of money. Receipts for the wire transfer of these sums were exhibited to the affidavit in support. These receipts evidence wire transfers to an account in the name of the First Defendant only. The receipts provided are bear dated in **2008** and all verify deposits into the account bearing the name "Winston Hinkson & Associates". The First Defendant in his defence admitted receipt of these sums.² He however contends that "..... the said funds were paid on demand to the vendor, appropriate or relevant persons,.....".

[7] The Claimants also heavily rely on an email (also exhibited to the affidavit in support) received from the First Defendant on March 25, **2015** which states:

"My apologies for the delay. No disrespect meant. Your title shall be registered in the coming 2 -3 weeks and I can now without further difficulty correct Tonjaka's irresponsible conduct. I will email you as soon as the transaction is complete. I am afraid that I am saddled with unexpected financial burdens because of his failures. Rest assured that your matter will be concluded within the time I have promised. Winston Hinkson."

[8] The First Defendant did not deny this email or sending it to the Claimants in his defence. The First Defendant admits the email but contends that "The email referred to by the claimant was by way of offering some assistance to the Claimant."

² Paragraph 7 of the Defence of the First Defendant.

[9] The essence of the First Defendant's defence is that the Tonjaka Hinkson, who would later be joined as a Second Defendant, was in fact the Claimants' Attorney. The First Defendant contends that Tonjaka Hinkson operated as an independent contractor from the [First] Defendant's Chambers and he was delinquent in executing the Claimants work.³

[10] The First Defendant contends in his defence that he is not responsible for any loss and damage caused to the Claimants as he was never retained to provide any legal services to the Claimants either as a Notary Public or Legal Practitioner or in any other capacity.⁴

[11] Subsequent to the defence of the First Defendant being served, the Claimants amended their claim to join Tonjaka Hinkson as the Second Defendant. The extent of the amendment to the case was simply, that the Second Defendant is an associate of the First Defendant along with another Attorney who was also an associate.

[12] In his defence filed on February 12, 2021, the Second Defendant denied that he is liable for any damage suffered by the Claimants. He contends that he left the employ of the First Defendant in **2009**. He contends that it was the First Defendant's firm that was retained and not him personally. He contends that he was an associate of the First Defendant and had no control over the bank account of the First Defendant into which the Claimants money was deposited.

[13] The affidavit in support to a large extent mirrors what is set out in the amended statement of case. Noteworthy is the fact that the Claimants admit that the person they dealt with in the main was the Second Defendant. They contend that the Second Defendant represented to them that he had the full authority to act on behalf of the First Defendant's firm.

[14] **Rule 15.2(b) CPR** states that the Court must be satisfied that the Defendant has no realistic prospect of successfully defending the claim or issue to grant summary judgment. The 'real prospect of success' must be something more than a fanciful prospect of success, it must be a realistic prospect.

³ Paragraph 10 of the First Defendant's defence.

⁴ Paragraph 15 of the First Defendant's defence.

[15] In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste HCVAP2009/008**, Pereira CJ stated that the Court should only grant summary judgment where it is clear that a claim or (defence) on its face obviously cannot be sustained or is in some other way an abuse of the process of the court.

[16] The principles applicable to an application for summary judgment had been conveniently set out in the **Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437** where at paragraph 4 it is stated:

- a. The court must consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success: **Swain v Hillman [2001] 1 ALLER 91, [2000] PIQR p. 51**;
- b. A “realistic” defence is one that carries some degree of conviction. This means that is more than merely arguable: **ED & F Man Liquid Products v Patel [2003] EWCA Civ. 472 at 8**.
- c. In reaching its conclusion the court must not conduct a “mini trial”: **Swain v Hillman**;
- d. This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: **ED&F Man Liquid Products v Patel at 10**;
- e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA civ. 550 [2001] Lloyd’s Rep PN 526**;
- f. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial,

even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd. [2007] FSR 63;**

- g. Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: **Wrexham Association Football Club Ltd. v Crucialmove Ltd. [2006] EWCA Civ. 237 at 57.**

[17] The First Defendant's defence is that the Second Defendant is liable as he was the person retained to perform the works and further that the Second Defendant operated as an independent contractor. In resolving whether this defence carries a degree of conviction and is more than merely arguable or fanciful the Court found the admissions in the defence of the First Defendant, the contemporaneous documents and the defence of the Second Defendant to be relevant.

[18] Firstly, the First Defendant has not denied that he received the sums of money the Claimant says he did by direct deposit into his bank account. In fact, he admits receipt of these sums. He goes on to say that the sums were then paid to a third party, the Vendor with whom the Claimants contracted for the sale to the First Defendant, at his demand.

[19] Secondly, the First Defendant has put forward nothing to explain how the fact that the money was paid to him can be reconciled with his defence that the Second Defendant was an independent contractor. Certainly, the admission that the money was received by the First Defendant does not support the First Defendant's defence of independent contractor or the Second Defendant being the person retained. In fact it is inconsistent with same. These are material facts the First Defendant would have had to put in his defence in order to lead evidence of it at a trial. There are no facts in the First Defendant's defence to explain the money being deposited into the First Defendant's account but the Second Defendant being the person retained.

[20] Thirdly, the email written by the First Defendant on March 25, 2015 which on any construction does not support the defence of independent contractor or the Second Defendant being the person retained. The First Defendant did not say that the Second Defendant was an independent contractor. He gives a firm commitment to have the works which he now says he was not retained to do performed within a specific time. The First Defendant speaks about being saddled with bills as a result of the Second Defendant's 'irresponsible' conduct. This again, does not support the defence of independent contractor but rather supports the defence of the Second Defendant that he was an associate of the First Defendant. Interestingly, although this email is penned eight (8) years after the retainer, no mention of the First Defendant not being retained by the Claimants or that the Second Defendant was the person responsible as he was an independent contractor was made.

[21] Fourthly, the cheque payable to the Accountant General for the stamp duty is telling. The funds to pay the stamp duty comes from the First Defendant. This cheque is dated December 01, **2009** this is long before the email of the First Defendant of March 25, 2015. It is even after the Second Defendant ceased working with the First Defendant. This again is inconsistent with the defence of independent contractor or the Second Defendant being the person retained.

[22] Fifthly, the letter dated October 23, 2008 enclosing the draft licence is signed by the Second Defendant for and on behalf of "Winston Hinkson & Associates". On the letterhead the Second Defendant is listed as an associate. This does not support the First Defendant's defence.

[23] Sixthly, on the email from the Second Defendant to the Second Claimant outlining the fees for work to be done it is signed at the bottom by the Second Defendant under the firm's name "Winston Hinkson & Associates". This is inconsistent with the First Defendant's defence and consistent with the Second Defendants' defence.

[24] Seventhly, the unregistered instrument executed by the Vendor in favour of the First Claimant dated November 19, 2007 is signed by the Second Claimant at a time the Second Defendant contends he was an associate of the First Defendant and before the letter with his name appearing on the First Defendant's letter as an associate.

[25] Having analysed the First Defendant's defence, it is clear that there is no real substance in the factual assertions made since they are grossly contradicted by contemporaneous documents and the admissions made by the First Defendant in his defence. Further, considering that material facts on which evidence can be led by the First Defendant has to be contained in his defence, it can reasonably be expected that at the trial no new material facts other than what is already stated in the defence or documents which have not already been identified or annexed will be forthcoming. It is unlikely that the evidential complexion of the First Defendant's defence is likely to change at trial.

[26] For the reasons above, the Court finds that the defence of the First Defendant is in fact fanciful and does not disclose a realistic prospect of success.

[27] At the hearing counsel for the Claimant indicated that certain matters have transpired since the filing of the claim including the grant of an injunction in relation to the property in other proceedings. For this reason, Counsel submitted and invited the Court, if it was minded to grant summary judgment, to grant summary judgment for a sum to be decided by the Court. The Court accepts this invitation.

COSTS:

[28] This matter was adjourned on May 19, 2021 to give the First Defendant the opportunity to file an affidavit in opposition and to file submissions. He has not complied with this order nor did he or his Attorney attend at the hearing. No explanation was given for the absence of the First Defendant or his Attorney at Law.

[29] The Court's precious resources are not to be treated in such a flippant manner. Counsel has a duty to the Court to ensure that its orders are complied with. If for some reason the First Defendant was unable to comply with the orders made, he had an obligation to inform the Court. This obligation also extended to the other Attorneys in the matter. Further, even if counsel had a difficulty in attending the hearing, the First Defendant ought to have been present at the hearing.

[30] For these reasons, the Court is minded to make an order for wasted costs against the First Defendant and/or his Legal Representative for non-compliance with the orders made on May 19, 2021.

[31] The Court finds the conduct complained of by the Claimants against the First Defendant to be of grave concern. Legal Practitioners have a duty not only to their clients but also to the Court to ensure that the profession and administration of justice is not brought into disrepute. These obligations must be taken seriously to ensure continued confidence in the profession and the judiciary.

[32] These allegations are sufficiently serious in nature to warrant further investigation by the Disciplinary Committee. The Court intends to refer the conduct of the First Defendant to Committee for further investigation and proceedings if deemed necessary.

ORDER:

[33] In the circumstances, it is hereby ordered that:

- a. Summary judgment is granted for the Claimants against the First Defendant for a sum to be decided by the Court;
- b. The First Defendant is to pay the Claimants' costs of the application filed on May 05, 2021 to be assessed by this Court in default of agreement;
- c. The First Defendant and his Legal Representative, Mr. Sandy John are to both personally attend on the next occasion to show cause why an order for wasted costs ought not to be made against either or both of them in relation to the non-compliance with the Court's order of May 19, 2021; and
- d. Pursuant to Section 37 (3) of the Legal Profession Act, Chapter 2:04 of the Laws of Saint Lucia, the First Defendant is referred to the Disciplinary Committee. The Registrar of the Supreme Court is directed to forward a copy of this decision together with a copy of the Court's file to the Committee for its consideration.

Alvin Shiva Pariagsingh
Master (Ag.)