

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2019/0101

BETWEEN:

GRENADIAN GENERAL INSURANCE COMPANY LIMITED

Claimant

and

AREEN LEWIS

Trading as '**GOLDEN PROMOTIONS**'

Defendant

Appearances:

Ms. Sheriba Lewis for the Claimant

Mrs. Celia Edwards QC and Mr. Deloni Edwards for the Defendant

2021: May 12; 25

(Re-Issued on 9th June 2021)

JUDGMENT

(On the Claimant's application to strike out / obtain summary judgment)

[1] **PARIAGSINGH, M.:** Before the Court is the Claimant's application, filed on September 25, 2019, seeking an order striking out the Defendant's defence filed on April 17, 2019 or alternatively summary judgment against the Defendant.

[2] The delay in this application being treated with is because the parties were referred to mediation and the claim was stayed. Regrettably, the parties were not able to settle this matter at mediation and directions were given for the hearing of this application on December 23, 2020. The application was heard by this Court on May 12, 2021.

STRIKING OUT:

- [3] The power of the Court to strike out a party's statement of case and the circumstances in which that power ought to be exercised is now well settled. One of the most recent statement of the law was set out by Thom JA in **Agnes Danzie et al V Cecil Anthony SLUHCVP2015/0009** at paragraph 13 where it is stated:

“13. It is a well-established principle that the court's power to strike out a statement of case should only be used sparingly (*Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6). Also, in *Salfray Hussain v Birmingham City Council and Others* the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: 'it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective'. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

- [4] In exercising the discretion to strike out, the Court is required to consider the appropriate response to the alleged breach having regard to all of the circumstances, including whether there are alternatives available that would be just in the circumstances in accordance with the overriding objective.
- [5] The central complaint of the Claimant is that the Defendant has not admitted or denied material facts in her defence. The Claimant contends this breach of Part 10 Rule 10.5(3) of the Civil Proceedings Rules 2000 as amended (CPR) is fatal to the defence. This rule imposes a duty on the Defendant in setting out his case to say which allegations are admitted, are denied, are neither admitted nor denied because the Defendant does not know whether they are true and the defendant wishes the Claimant to prove.

[6] It is common ground that the Defendant has not specifically admitted or denied certain paragraphs of the Statement of Case. It is undisputed however, that the Defendant did plead at paragraph 4 of her defence a version of facts inconsistent with those pleaded by the Claimant. Paragraph 4 begins with the words “The Defendant replies to paragraph 7 to 14 as follows” and then proceeds to set out the inconsistent version of facts.

[7] To this Court, it seems therefore a question of how is the Court to approach a defence which, in breach of the rules has not specifically admitted or denied facts but has put forward a version of fact inconsistent with the Claimant’s case.

[8] In resolving this issue, the Court considered the decision of the Court of Appeal of Trinidad and Tobago in **M15 Investigations Limited v Centurion Protective Agency Limited, Civil Appeal Number 288 of 2008**. In this case the Defendant pleaded a bare defence which was struck out. In delivering the judgment of the Court of Appeal at paragraph 7, Mendonca JA stated:

“In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. Where there is a denial it cannot be bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version. **I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5(4)(a) without a specific statement of the reasons for denying the allegation.** Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5(5)). The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved.”

[9] The purpose of a defence is to put facts in issue. In this claim no doubt can be entertained that the effect of the facts pleaded in reply to paragraphs 7 to 14 are a denial of the matters stated by the Claimant. By asserting an inconsistent version of facts, the Defendant has put the facts pleaded at paragraph 7 to 14 in issue. The Defendant has even gone further and introduced a third party as the person responsible for the alleged use of the Claimant's work. The Defendant's version of facts as pleaded raises several issues of fact.

[10] This denial can only be construed as plainly obvious to the Claimant since in its reply filed on May 02, 2019 the Claimant answers the facts pleaded by the Defendant.

[11] During the course of the oral arguments, the Court frontally asked Counsel for the Claimant to address on whether the statements of law in the Claimant's Statement of Case were proper in the first place and whether there was a need at all for the Defendant to admit or deny a statement of law. Counsel quite correctly accepted that matters of law are not for pleadings. This is not a case where either party's pleadings may be without some critique but the material facts of both the claim and the defence are clearly articulated on both sides.

[12] Counsel for the Claimant was asked to address on the prejudice to the Claimant if the Defendant was allowed to amend and whether an amendment can cure the breach. The Claimant quite correctly indicated that an amendment may cure the breaches but the Defendant has not made such an application. Whilst the Claimant has not made an application, the Court can allow the Defendant to make the necessary amendments and resolve any prejudice to the Claimant with an order for costs.

[13] The Court is of the view that the omission of the word "denied" in paragraph 4 and the use of the words "replies to" is not material for the purpose of the intention of the rule or the Defendant's defence. The intention of the rule is for the Claimant to know which facts are denied. This is clear from the inconsistent version of facts asserted at paragraph 4 of the defence to which the Claimant has replied to.

[14] The overriding objective would not be served by denying the Defendant the opportunity to defend this claim in circumstances where the material facts, nature and tenure of the defence is ascertainable in the defence itself.

[15] For these reasons, the Court refuses to strike out the Defendant's defence.

SUMMARY JUDGMENT:

[16] 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.

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

[18] The Claimant has submitted that the Defendant has no defence in law as it is an undisputed fact that the Defendant extracted or caused to be extracted a clip of the Claimant's work. This factual assertion is simply incorrect.

[19] There are several facts in issue which have to be resolved before the Claimant can make such a factual assertion. Firstly, the Claimant has to prove that the advertisement was created and/or owned by the Claimant. No admission is made that the Claimant is the owner or the publisher of the advertisement [para 1 of the defence].

[20] Secondly, the Claimant pleaded at paragraph 5 that the advertisement was created by an employee of the Claimant in 2016. The Defendant puts the Claimant to proof of this [para 3 of defence].

[21] Thirdly, the Claimant submits that the Defendant at paragraphs 4 (iv) to (vi) accepts that there was an extraction from the audio-visual work which the Claimant alleges belongs to it. Paragraph 4 (iv) to (vi) introduced a third party who the Defendant says it hired to create a promotional video for the said event [para 4 (II) of defence]. This raises the issue of whether the third party was an employee, agent or independent contractor. All of these are triable issues.

[22] In the instant case the word “deny” is not used. The words “in reply to” is used and a diametrically opposed version of facts to what the Claimant asserted is pleaded. The Court does not accept that on the facts of this case it can be said that material facts were not denied when the defence is considered as a whole.

[23] The grounds asserted by the Claimant on its application for summary judgment all rely on findings the Court has to make on disputed facts. On an application for summary judgment unless it is so plainly obvious that the Defendant’s defence disclose no grounds for defending the claim, is an abuse of process or has no prospects of success, summary judgment would be refused.

[24] In the Court’s view the defence does disclose grounds for defending the claim. There are several issues of fact which if resolved in the Defendant’s favour will afford him a statutory defence as provided for in **Section 40 (2) of the Copyright Act**, Chapter 67 of the revised laws of Grenada. This in the Court’s view the Defendant does have a realistic prospect of success. This defence is highly fact dependent and cannot be summarily determined at this stage.

[25] For these reasons, the Court refuses to grant summary judgment to the Claimant.

[26] It must be emphasized that the function of the Court is not to decipher which facts are denied and admitted from the Defendant’s defence. The Defendant ought to properly indicate which facts are admitted and denied in her defence. The inconsistent facts

asserted should be properly referenced to the paragraphs and facts in the statement of case. This is what the rules mandate the Defendant to do.

[27] The Court finds that the Claimant's application was not frivolous in the circumstances. The Court proposes to give directions for amended pleadings to be filed. The crystallization of each party's case is as a direct result of the Claimant's application. The Claimant would have incurred costs in making this application, filing submission and making oral arguments before the Court. In this regard, the Defendant shall pay one half of the Claimant's costs of the application.

DISPOSITION:

[28] The Claimant's application filed on September 25, 2019 is dismissed;

[29] Permission is granted to the Defendant to file and serve an amended defence, such amendment is limited only to comply with Part 10 .5(3) CPR on or before 4:00 pm on June 11, 2021;

[30] Permission is granted to the Claimant to file and serve an amended Reply, if necessary, on or before 4:00 pm on June 30, 2021;

[31] The Defendant shall pay on half of Claimant's costs of the application filed on September 25, 2019 to be assessed by this Court in default of agreement;

[32] The Case Management Conference fixed for October 04, 2021 is vacated;

[33] This matter is fixed for a further Case Management Conference on July 12, 2021 at 9:00 am virtually.

Alvin Shiva Pariagsingh
Master (Ag.)