

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

**GRENADA
CLAIM NO: GDAHCV 2017/0435**

BETWEEN:

Layne Houston

Claimant

and

~~[1] Mark Hardy~~
[2] Matthew Hardy

Defendants

Before:

The Hon. Mde Justice Agnes Actie

Appearances: (Via Zoom)

Ms. Sandina Date of counsel for the claimant

Mr. Ruggles Fergusson of counsel for the defendant

2021: May 20

RULING

[1] **ACTIE, J:** The issue for determination in this case is whether the court should enter summary judgment on its own volition pursuant to Part 15.2 (1) and Part 26.2 of CPR 2000.

Background facts

[2] The first defendant, Mark Hardy, is the father of the second defendant, Mathew Hardy. Mark Hardy was the owner of a house on a parcel of land situate at Morne Jaloux, Grenada. On October 6, 2015, the claimant filed a statement of claim

together with an ex parte injunction against the defendants seeking specific performance of an oral agreement. The claimant avers that the defendants agreed to pay him the standard five percent (5%) commission of the selling price of the first defendant's house at Morne Jaloux equivalent to US \$67,664.10 or EC\$180,663.14. The claim was not served on the first defendant, Mark Hardy, within the six months period prescribed by CPR 2000.

[3] The court on the even date of the filing of the statement of claim granted an ex parte injunction consisting of the following terms:

- (1) The defendants pay into court the sum of US \$67,664.10 or EC \$180,663.14 being equivalent of 5% commission of the selling price of the first defendant's house at Morne Jaloux;
- (2) An injunction restraining the defendants from disposing the said sum.
- (3) A Mareva injunction freezing the first defendant's account/s in any bank, credit union or financial institutions). The order named a total of eight (8) financial institutions.
- (4) An injunction restraining the first and second defendants from travelling outside the jurisdiction of the state of Grenada until final disposition of the case therein.

[4] On 13th October 2015, the injunction was varied to allow the second defendant to access his joint account at the Bank of Nova Scotia for the purposes of withdrawing \$5000.00 to meet his living expenses.

[5] On 20th October 2015, the second defendant filed an application to discharge the injunction in its entirety and to strike out the claim against him on the ground that it

disclosed no reasonable cause of action. The judge in an order made on 16th October 2018 refused the application to strike out the claim and adjourned the application to discharge the injunction to a date to be fixed by the court. A mediation order made on 21st October 2019 was unsuccessful.

- [6] The matter came on for case management on 18th February 2021 and the court noting that the statement of claim was never served on the first defendant accordingly struck out the claim against Mark Hardy, the registered owner of the property. Upon reviewing the claimant's statement of claim, the court was of the view that the statement of claim as pleaded did not have any realistic prospect of success against Matthew Hardy. Being minded to enter summary judgment, the parties were directed to file and exchange submissions pursuant to CPR 15.2 (1) and 26.2.

Submissions Counsel for the first defendant

- [7] Ms. Sandina Date, Counsel for the defendant, Matthew Hardy, in her filed submissions contends that the claimant's pleaded case does not establish agency between the defendant and his father, Mark Hardy. Counsel contends that the defendant has emphatically stated that he was never an agent for his father and the nexus to the sale of the subject property was only that of a son providing moral and emotional support to an elderly father.
- [8] Counsel refers to **Halsbury's Laws of England** in its definition of agency "the terms "agency" and "agent" in law describes a relation which exists between two persons one being the principal the other being a representative of the principal. One person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.
- [9] Counsel also relies on the decision in **Uriel Caleb v National Mortgage Trust**¹ where Wilkinson J held that the claimant although having specifically pleaded

¹ ANUHCv2013/0719.

agent and agency within its cause of action found that the claimant failed to prove that the very intrinsic relationship of agent and agency had been created according to the law and the claimant's claim was struck out on that integral ground.

[10] Counsel contends that summary judgment should be entered against the claimant and relies on the Court of Appeal decision in **The Bank Of Bermuda Limited v Pentium (BVI) Limited et al.**²

[11] Counsel further states that the Mareva injunction granted on 6th October 2015 freezing the bank accounts of the defendants continues to date and seeks for an order to discharge the said injunction.

Submissions of the claimant

[12] Mr. Ruggles Fergusson, counsel for the claimant, both in his filed submissions and authorities deals exclusively with the issue of striking out pursuant to CPR 26.3 and not summary judgment pursuant to CPR 15.2 as was directed by the court. It is trite that the principles governing striking out and summary Judgment are distinct remedies under CPR 2000.

[13] The Court of Appeal decision in **Dr. Martin G.C. Didier Et al v Royal Caribbean Cruises Ltd**³ Chief Justice Dame Pereira said:

“The legal tests for entering summary judgment pursuant to CPR 15.2 and striking out a party's statement of case pursuant to CPR26.3(1)(b) are not the same and should not be confused with each other. The summary judgment and strike out procedures are distinct—they have different procedural requirements, are used in different circumstances and have different legal consequences. In particular, the two cannot operate simultaneously. In disposing of a claim using the Part 15 summary judgment procedure, the legal issues in the case are considered by the court and then it is determined, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim.

² BVI Civil Appeal No.14 of 2003:

³ SLUHC VAP2014/0024

A judgment entered on a summary judgment application is a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court. On the other hand, an application for a party's statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties 'pleaded cases before it. All facts pleaded in the statement of case are assumed to be true for this purpose and no additional evidence is adduced. If the court finds that the pleadings are untenable as a matter of law and disclose no reasonable ground for bringing or defending the claim, then the statement of case may be struck out. Striking out, however, does not produce a judgment on the merits and a party whose claim is struck out is not precluded from remedying its faults and bringing further legal proceedings in relation to the same dispute."

Law and analysis

- [14] **CPR 15. 2 (1)** provides the grounds for granting summary judgment against a claimant. The court may grant summary judgment where a claimant has no real prospect of succeeding on the claim or issue. Summary judgment is granted when issues which are dependent upon factual assertions in a statement of case may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable:⁴
- [15] In the case at bar, the claimant seeks specific performance from Matthew Hardy on an oral contract. The court's discretionary jurisdiction to order specific performance is based on the existence of a valid, enforceable contract.
- [16] The claimant's pleadings in his statement of claim reads "The claimant approached the second defendant (Matthew Hardy) about whether the first defendant's dwelling house and entire lot of land situate at Morne Jaloux was still available for sale". The claimant avers that he offered his service to the second defendant (Matthew Hardy) to act as agent to get a buyer for the sale of the First defendant's property and to locate a buyer. The claimant avers that the defendants expressed an interest in the service of the claimant would be providing them. Upon accepting the offer the first and second defendants agreed that the

⁴ Three Rivers DC v Bank of England.

claimant would be paid for his service in securing a sale of the property and a standard commission rate as though he was a licensed real estate agent.

[17] The claimant in his pleadings acknowledged that Mark Hardy was the owner of the property. However, he never particularized the nexus between Mark Hardy and Mathew Hardy in the oral contract, other than as father and son.

[18] It is noted that the issue of agency was only pleaded in the claimant's reply to the Matthew Hardy's defence. In the reply, the claimant pleaded "that the second defendant presented himself as acting as agent of the vendor".

[19] A statement of claim must plead and particularize all the relevant facts upon which the claimant rely to give the defendant an opportunity to set out its case and to dispute the claim in the filed defence in compliance with CPR 10.5.

[20] In Blackstone **Civil Procedure** it is stated:

"Where the defence takes issue with a fact set out in the particulars of claim and the claimant accepts that the fact is incorrect, the proper course of action should be for the claimant to seek to amend his statement of case accordingly and not to deal with the matter in a reply".

[21] In **Williamson v London and North Western Railway Company**⁵ it was held that "A reply to a defence must not plead mere evidence nor must it raise new issues or claims or any issues ought properly have been pleaded in a statement of claim".

[22] Rule 8.7 requires a claimant to plead all the factual matrix in a claim form and statement of claim and not in a reply. A defendant does not have a right of reply to new issues raised by the claimant in a reply to a defence. The pleading of agency in the reply and not in the statement of claim in my view is fatal to the claimant's claim. To rely on agency, it was incumbent on the claimant to have

⁵ 1879 12 CH D 787.

amended the statement of claim to reflect a proper cause of action against the Matthew Hardy especially in light of the fact that the claim was not served on Mark Hardy.

[23] The failure to particularize Matthew Hardy's capacity to enter into a binding enforceable contract to grant specific performance, to my mind is a grave omission. The property sold belonged to Mark Hardy, father of Matthew Hardy. It is Mark Hardy who would be the recipient of the proceeds of the sale. It is only upon proof of an existing contract and capacity to enter into a legal binding contract would an order for specific performance be made for the payment of the 5% commission. The pleading in the statement of claim is devoid of a nexus of any legal or arguable case of actual or ostensible authority or agency with respect to Matthew Hardy and his father. The court is of the view that the claimant's claim is devoid of any legal cause of action or issue against the defendant, Matthew Hardy.

[24] In **The Bank Of Bermuda Limited v Pentium (Bvi) Limited etal**⁶ Saunders Chief Justice (Ag) as he then was, said:

"A judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[25] Counsel for the defendant states by parity of reasoning the court should not allow the matter to proceed to trial where the claimant has not produced nothing to persuade the court that his claim has a realistic prospect of success. Counsel avers that the claimant has failed to plead a cogent case against the defendant or breach of contract and/ or a breach of contract as an agent of his father Mark Hardy.

⁶ BVI Civil Appeal No.14 of 2003:

[26] The court agrees with counsel for the defendant. Summary judgment should only be granted by a court in cases where it is clear that a claim on its face obviously cannot be sustained or is in some other way an of the process of the court.⁷ The court is of the view that the claimant's claim and issue raise does not have any realistic prospect of success and according grants summary judgment in favour of the defendant, Matthew Hardy with costs.

[27] The defendant also seeks to discharge of the *ex parte* injunction entered by the court on 6th October 2015. Counsel states that the injunction has caused the second defendant severe hardship, both financially and emotionally as he has suffered considerably as a result. The court accepts that the imposition of these atrocious prohibitions from travel and freezing the defendants bank accounts in excess of five years is indeed a real travesty. Mainly because of the claimant's negligence in failing to serve the claim on the first defendant and there not being any lawful cause of action against the second defendant. Counsel for the claimant graciously concedes to the discharge of the injunction. Accordingly, the *ex parte* injunction issued against the defendants is discharged, with liberty to apply for damages on the undertaking for damages in granting the injunction.

ORDER

[28] It is hereby ordered and directed as follows:

- (i) Summary judgment is entered in favour of Matthew Hardy pursuant to CPR 15.2(1).
- (ii) Prescribed Costs in the sum of \$17,558.02 pursuant to CPR 65.5(1).

⁷ *Swain v Hillman* [\[2001\] 1 All ER 91](#) at 95.

(iii) The ex parte injunction entered on the 6th October 2015 against the defendants, Mark Hardy and Matthew Hardy is discharged in its entirety with immediate effect.

(iv) Liberty to apply.

Agnes Actie
High Court Judge

BY THE COURT

REGISTRAR