

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. SLUHCV2017/0470

BETWEEN:

Q. HOMES Ltd.

Claimant

and

AL's Investment Ltd.

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Mr. Michael Bruney with Beryl George for the claimant

Mrs. Wauneen Louis-Harris for the defendant

2018: December 11

2019: February 25

JUDGMENT

- [1] **ACTIE, M.:** The claimant applies for an order for summary judgment of the defence and counterclaim on the ground that the defendant does not have any realistic prospect of success. For the reasons given below, the application is refused with costs to the defendant.

Background Facts

- [2] On 2nd October 2012, the parties entered into a lease agreement for the rental of floor space on the ground floor of the defendant's building at Rodney Bay for the purpose of operating a restaurant and home furnishing retail store. The lease was for a term of four (4) years commencing on 1st November 2012 at a monthly rental of \$18,000.00. It was a term of the lease that a deposit of Fifty Four Thousand

Dollars (\$54,000.00) comprising of a security deposit plus one month's rent was to be paid prior to the commencement of the lease term. The claimant paid the agreed sum.

[3] On 30th October 2012, the claimant's representative visited the premises to ensure its readiness for occupation and discovered that the works had not been fully executed. The claimant avers that the defendant unlawfully demanded a further sum of \$18,000.00 as a precondition to the delivery of the keys to the premises. The claimant made the payment by cheque but contends that the payment was made under duress. The claimant being dissatisfied with the incomplete works stopped the cheque on 6th November, 2012. On 7th November 2012, the defendant demanded and the claimant returned the key to the premises.

[4] The claimant filed a claim seeking the return of the deposit of \$54,000.00 together with damages for breach of contract. The defendant filed a defence and counterclaim against the claimant seeking damages for breach of the lease.

Application for Summary Judgment

[5] By notice of application with supporting affidavit, the claimant seeks an order of court for summary judgment on the ground that the defendant has no real prospect of successfully defending the claim or succeeding on the counter claim.

[6] The claimant contends that the narrow issues arising are; (1) whether it was the defendant or the claimant who breached the lease agreement; (2) whether the claimant was entitled to repudiate the said agreement; (3) quantum of damages to be awarded to the claimant.

[7] The defendant in response contends that the matters in dispute both in the claim and counterclaim are not suitable for summary judgment under Rule 15.2.

Law and Analysis

- [8] The Court has discretion to enter summary judgment under CPR 15.2, if it appears that the parties do not have any realistic prospect of success. The rule granting the court jurisdiction to enter summary judgment is designed to deal with cases which are not fit for trial.
- [9] In **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**¹ Pereira CJ states that summary judgment should only be granted by a court in cases 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.
- [10] The determination of liability in the extant claim and counterclaim turns on whether or not the expressed terms of the lease agreement constitute the entire agreement between the parties and if so who was in breach of the terms.
- [11] Clause 2.02 of the lease agreement provides for a monthly rental of \$18,000.00 commencing on November 1, 2012. Clause 2.03 defines the security deposit as the rental of two (2) months totaling the sum of \$36,000.00. Clause 2.04 defines the deposit as the security deposit plus one month's rent totaling \$54,000.00 to be paid before the commencement of the term on the 1st November 2012.
- [12] The claimant made the payment of \$54,000.00 on 2nd October 2012 in keeping with clause 2.04 of the agreement. The defendant contends that the sum of \$54,000.00 paid did not constitute the first month's (November) rent. The claimant on the other hand contends that the deposit of \$54,000.00 represented the two (2) months security deposit (\$36,000.00) together with the first month's rent (\$18,000.00) payment for the month of November 2012.

¹ HCVAP2009/008 delivered on 11th January 2011.

- [13] As indicated previously, the claimant avers that the additional payment of \$18,000.00 on 6th November 2012 was made under duress as the premises were desperately needed for the commencement of its proposed business. The claimant avers that it stopped the cheque as the premises were not in a state of readiness for the purposes for which it was rented. The defendant on the other hand states that there was a misunderstanding of the expressed terms of the lease agreement as to the manner of payment of the rent.
- [14] The terms of the lease agreement are clear and unambiguous. Clauses 2.02 to 2.04 and the second schedule of the lease agreement clearly define the terms and manner of payment. Clause 8.00 of the agreement states that the agreed terms constitute the entire agreement between the parties and could only be modified by writing signed by both parties. The court notes a letter from Jennifer Remy's Chambers dated 20th November 2012 in response to a letter from the chambers of Mc Namarra & Co which suggests that the parties had been in further negotiations subsequent to the written contract. However, there is no written variation of the all-encompassing terms in keeping with clause 8.00 of the lease agreement.
- [15] An essential element in this case is the conduct of the parties in light of the expressed terms of the lease agreement. Although the claimant contends that the \$54,000.00 paid included the first month's rent yet a further payment of \$18,000.00 was paid on 6th November. The receipt described the payment as rent for the month of November. The evidence before the court suggests that the parties were not *ad idem* on the expressed terms of the agreement.
- [16] There had been conflicting authority, where it was held that a contract containing an anti-oral variation clause could only be amended by a written document. However the English Court of Appeal in **I-Way Ltd v World Online Telecom**

Ltd², dismissed an application by the defendant for summary judgment and held that the fact that the contract contained such a clause did not prevent the parties from later making a new contract varying the contract by an oral agreement or by conduct. The court held that absent statutory or common law restrictions, the general principle of the law of contract was that the parties have freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth, or by conduct.

- [17] The conduct of the parties in the case at bar suggests that there may have been unresolved issues especially with regards to the payment of rent and the deposit. The court in an application for summary judgment is not to conduct a mini trial in order to establish whether a summary disposal was appropriate³. In **Bolton Pharmaceutical Co 100 Ltd. v Doncaster Pharmaceuticals Group Ltd and Others**⁴ Mummery LJ stated:

“17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, 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.”

- [18] Although the facts of this case do not appear to very complicated, I am of the view that summary judgment is not appropriate without a fuller investigation after full disclosure. Further evidence and assessment of the whole facts is necessary to determine which of the two parties breached the lease agreement. In my

² [2002] EWCA Civ 413.

³ Swain v Hillman [2001] 1 All ER 91, CA.

⁴ [2006] EWCA Civ 661.

view the application for summary judgment should be refused with costs to the defendant.

ORDER

- [19] It is hereby ordered and directed that the application for summary judgment is refused with costs to the defendant in the sum of \$750.00.
- [20] The matter shall be listed by the court office for further case management conference.

**Agnes Actie
Master, High Court**

By the Court

Registrar