

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2014/2088

BETWEEN:

VINCENZO ROMEO MEGNA

Claimant

AND

FLAT POINT DEVELOPMENT LTD

Defendant

BEFORE:

Raulston Glasgow

Master

Appearances:

Hugh Marshall along with Kema Benjamin and Tamara Khan for The Claimant
Anthony Ross Q.C along with Jacqueline Walwyn for The Defendant

2015: April 27
May 29; August 31

RULING ON APPLICATION FOR SUMMARY JUDGMENT

- [1] **GLASGOW, M:** A fairly uncomplicated assertion of the breach of an employment contract has turned into a contest of multiple applications.¹ At present the number of challenges has been reduced to (2) applications, the first of which was filed by the defendant (hereinafter referred to as "Flat Point") on July 18, 2014 wherein Flat Point requested an order that the claimant (hereinafter referred to as "Megna") provide security for Flat Point's costs. The second application was filed on March 5, 2015 whereby Megna seeks a summary judgment against Flat Point on the grounds, inter alia, that Flat Point has no real prospect of successfully defending the claim. The second application forms the subject of this ruling.

¹ Flat Point's affidavit in opposition to the summary judgment application filed on April 24, 2015 lists the several applications including the summary judgment application.

RELEVANT BACKGROUND

- [2] Megna filed a claim form and statement of claim on May 19, 2014 in which he alleges the existence of a contract of employment with Flat Point. The statement of claim alleges that the contractual relationship between the parties commenced 'in or about January 2006'. Paragraph 4 of the statement of claim recites what are termed '*the material parts of the agreement*'... including salary, allowances, bonuses and reimbursements. Attached to the claim form is a letter dated August 10, 2011 (hereinafter the employment agreement) addressed to Megna which states, among other things, that it is written to '*confirm ... the agreement ...between Flat Point Development Ltd and your person*'. The letter bears the signature of one Elisa Gamondi. There is no nothing beyond the signature to state whether Ms. Gamondi signed as a director or other personnel on behalf of Flat Point. Megna states that Flat Point acted in breach of the terms of the employment agreement and that he has lost several million dollars as a consequence of the said breaches.
- [3] Flat Point filed its defence on July 25, 2015. Attached to the defence is a counterclaim. The essence of the defence is a denial of the existence of the employment agreement as pleaded by Megna. There is a positive assertion on the defence that the employment agreement was not signed by anyone on behalf of Flat Point. Flat Point in fact avers that Ms. Gamondi who is said to be the signatory on its behalf did not sign the document at all or on behalf of Flat Point. The defence also states that Megna pleaded insufficient particulars on the claim to permit a proper response and that Flat Point would be serving a formal demand for further particulars regarding the allegations made against it. The demand was served along with the defence. The counterclaim asks for, among other things, the return of property owned by Flat Point and held by Megna. Flat Point also seeks an order that Megna removes his personal belongings from its premises.
- [4] On March 15, 2015 Megna filed this application requesting a summary judgment. In the affidavit in support of the application, Megna relates that it has produced irrefutable evidence that there existed a contract of employment with Flat Point. Attached to the affidavit in support of the application are –
- (1) A letter dated January 14, 2011 from one Guillermo Guerra. There is no addressee referenced in the correspondence but it states that Megna was employed as Chief Technical Installations Manager with Flat Point from January 2006. The letter details salary and other benefits to be received by Megna;
 - (2) A document titled '*Allowance Receipt*' in which Megna acknowledges receipt of the sum of \$3000 (XCD) as housing allowance for the period 1st June to 30th June 2011. The document is purportedly signed by Mr. Guerra and Megna;
 - (3) Letters dated October 7, 2013 and April 4, 2014 written by Mr. Guerra and addressed to Ms. Jacinta Daley, Labour Commissioner. The letters refer to work permit applications on behalf of Megna;
 - (4) A work permit dated December 13, 2013 granted to Megna. The work permit was issued for a period of (3) months from the date of issue;

(5) A letter dated December 30, 2011 from the Medical Benefits Board of Control and addressed to the Chief Immigration Officer. The Board discloses in the letter to the Chief Immigration Officer that contributions were remitted on behalf of Megna for the periods January to December 2007, January to December 2008, January 2009 to December 2009 and January to June and August to November 2011. It is not stated who or which entity made the remittances on behalf of Megna;

[5] Based on those facts, Megna claims that Flat Point's case is unsustainable. Megna states that he was in the employ of Flat Point since January 2006 and under a new contract since January 2011. He further contends that the counterclaim to return items belonging to Flat Point bears out the claim that he was in fact employed by Flat Point.

[6] Flat Point's response to the application is contained in (2) affidavits filed by one Claudio Marieschi.² In the affidavits, Mr. Marieschi states that there is evidence from Ms. Gamondi by way of a witness statement made on August 17, 2014 and served on Megna on September 8, 2014. The witness statement is exhibited to Mr. Marieschi's affidavit of April 24, 2015 as "CM 1". It contains rebuttals to the effect that Ms. Gamondi did not or could not have executed the employment agreement. Flat Point informs the court that it obtained the witness statement from Ms. Gamondi who was gravely ill at the time. Further evidence reveals that Ms. Gamondi has since passed away. Mr. Marieschi's affidavits also reveal that in further searches of its records, Flat Point found that –

(1) from 2006 to 2009 there was a working relationship between Megna and Flat Point through Megna's company, EUROM. Flat Point says that its records show that EUROM invoiced Flat Point for all the work it performed during that period and that EUORM was paid;

(2) from 2010 to 2011 and in 2012 any involvement with Mena was conducted through his Company Vincenzo Romeo Megna Tecnical Consalting (sic). Again Flat Point submits that the company performed as requested and was fully paid;

(3) In 2013 and for (3) months in 2014, Megna continued to invoice Flat Point and was duly paid

Submissions

Megna's Submissions

[7] In aid of his application, Megna argues that the pith and substance of Flat Point's defence rests in the evidence of Ms. Gamondi which is proffered to show that there are no contractual relations between the parties. Megna says that while other contractual relations may have existed between the parties, there is simply no answer to his present claim in respect of the employment agreement as pleaded on his statement of claim. The defence is a mere denial. A mere denial, he maintains, flouts the requirements of the Part 10. 5 of the Civil Procedure Rules 2000 (hereinafter the "CPR"). According to that rule, Flat Point ought to state any alternate version of the events that it intends to rely on. This would evidently include their version of events that led to the employment agreement. Flat Point has failed to put any alternate version or evidence before the court to refute Megna's allegations. The cases of **Sandra Ann Marie George (Administratrix of the Estate of Karlos**

² The affidavits were filed on April 24 and June 15, 2015

George) v Nigel Don-Juan Glasgow³ and Elwardo Lynch v Ralph Gonsalves⁴ were supplied as authority for the proposition that a bare denial will not suffice.

- [8] Megna also submits that Flat Point has acknowledged the contract in its counterclaim when it averred that Megna holds property and a vehicle belonging to Flat Point and demanded the return of the same.
- [9] The request for summary judgment is made pursuant to CPR 15.2(b) whereby the court may grant a summary judgment on a claim or a particular issue if it is shown that the defendant has no real prospect of successfully defending the claim or an issue on the claim. Megna repeats the submissions made in respect of CPR 10.5 and takes the further position that even if Flat Point is able to prove the employment agreement is a forgery, there is no answer to his allegation that a contract of employment exists which allegation is confirmed by the letters and work permit attached to the affidavit in support of the summary judgment application. Additionally, there is no answer to the averment that he performed under the employment agreement. Megna asks the court to disregard Flat Point's complaints about his non response to the request for further information. In his opinion, the court should disregard the oral submissions made by counsel for Flat Point at the hearing as this submission was evidence which should have been reduced to an affidavit as is stipulated in CPR 29.2(1).

Flat Point's Submissions

- [10] For Flat Point it is said that summary judgment applications *'are not meant to dispense with the need for a trial where there are issues which should be tried and evidence to be weighed. The court must not conduct a fact finding exercise and the weighing of evidence is not an option'*.⁵ It is said that the CPR 15.2(b) is inapplicable to this case where the defence and available material demonstrate a realistic as opposed to a fanciful prospect of success. The cases of **Swain v Hillman⁶** and **Stoelker and Street v Bank of Antigua⁷** have been presented as authorities for these views.
- [11] Flat Point continues in its argument that, if it is to accede to Megna's request, the court will have to determine whether –
- (1) the employment agreement in question was signed by the alleged author. Flat Point claims that this averment is totally denied;
 - (2) an employment contract existed between Megna and Flat Point in any event;
 - (3) the purported employment agreement is a legally binding agreement.

³ SVGHC VAP 2013/0003

⁴ SVGHC VAP 2005/0018

⁵ Paragraph 12 of Flat Point's Submissions filed on June 10, 2015

⁶ [1999] CPLR 779

⁷ ANUHC V 2010/0197

- [12] Flat Point submits that there are factual disputes as demonstrated on the pleadings and in this context, reliance is placed on paragraphs 5 and 6 of the defence where Flat Point denies (a) the existence of the pleaded employment agreement; (b) that Ms. Gamondi ever signed it; and (c) that any of its officers, representatives or directors ever signed the said document. The court was reminded of Ms. Gamondi's witness statement in which she denies signing the said document. It is Flat Point's view that whether the parties have a contractual relationship as pleaded or at all is a serious matter which would require the court to weigh the evidence. A weighing of the evidence is not permissible on a summary judgment application.
- [13] In further written submissions filed on July 3, 2015, Flat Point says that its defence is not a bare denial. The defence identifies the allegations that are admitted, denied or neither denied or admitted. Flat Point argues that a defendant does not have to put forward a different version of the facts (CPR 10.5(4)(b)). However, the defendant must either state the reasons for resisting any allegations made by the claimant (CPR10.5(5)). Flat Point says that it has pleaded the reasons for denying the existence of the employment agreement. It is not required that Flat Point put forward any material to show the existence of an alternative employment relationship with Megna. Rather, it is for Megna to prove that such relations existed between the parties. Regarding the documents attached to the affidavit in support of the summary judgment application, it is said that the material does not demonstrate or prove the employment agreement as pleaded. On the contrary, Flat Point will rely on evidence to indicate a relationship with Megna's corporations and not with Megna. A summary judgment should not be granted on such contradictory evidence. In respect of the assertion that Flat Point acknowledged the employment agreement on its counterclaim, Flat Point again argues that no employment arrangement can be implied. Megna has property belonging to Flat Point and there is a demand for the return thereof.

Analysis and conclusion

- [14] In furtherance of the overriding objective to deal with cases in an expeditious and cost efficient manner, the court is clothed with the discretion to weed out cases that are hopeless and incapable of succeeding. It is often repeated that the jurisdiction is applicable to the instances where '*... it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.*'⁸ The approach to be adopted indicates that a trial of factual disputes is not in order.

*"The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is 'no real prospect', he may decide the case accordingly... the judge is making an assessment not conducting a trial or fact-finding exercise... it is the assessment of the whole that is called for. The criterion which the judge has to apply ... is not one of probability; it is absence of reality."*⁹

⁸ Spencer v AG of Antigua et al ANUHCVP199/0020A

⁹ Three Rivers District Council v Bank of England [2001] 2 All ER 513 at 158 (Per Lord Hobhouse of Woodborough)

- [15] It is further said that the exercise of the jurisdiction does not require

*"that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment."*¹⁰

- [16] Megna argues that summary judgment should be granted since (1) the defence is a mere denial; and (2) that in all the circumstances, Flat Point has no real prospect of successfully defending the claim.

Whether the defence is a bare denial

- [17] In addition to the obligation to state all the facts on which the defendant relies to dispute the claim, CPR 10 contains proscriptions against bland denials of a claim. CPR 10.5(3) to 10.5(5) are the applicable rules –

" (3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

- (a) are admitted;*
- (b) are denied;*
- (c) are neither admitted nor denied, because the defendant does not know whether they are true;*
- (d) the defendant wishes the claimant to prove.*

(4) If the defendant denies any of the allegations in the claim form or statement of claim –

- (a) the defendant must state the reasons for doing so; and*
- (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.*

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –

- (a) admit it; or*
 - (b) deny it and put forward a different version of events;*
- the defendant must state the reasons for resisting the allegation."*

- [18] I cannot agree with Megna that the defence contains bare denials. The allegations set out in the statement of claim are that Megna was engaged to perform the services of Chief Technical Installations Manager from January 2006. The terms of that arrangement have been pleaded. A written document is exhibited to the statement of claim as supporting the allegation that the

¹⁰ Pereira J.A in Saint Lucia Motor & General Insurances Co. Ltd v Modeste HCVAP 2009/008 at paragraph 21

agreement subsisted. The statement of claim alleges breach of the said agreement. The defendant, Flat Point denies the existence of the alleged employment contract. On its defence, it has not alleged a different version of what is claimed by Megna. If a different version of matters was contended on the pleaded, then Flat Point would be obliged to plead the matters on which it charges that the alleged different version of events exists (CPR 10.5(4) (b)). Flat Point simply resists the claim as pleaded by stating that the contract set out on the statement of claim does not exist. Consistent with CPR 10.5(4)(a) and 10.5(5), Flat Point is enjoined to state its reasons for resisting the allegations. I find that the reasons for resisting the claim are plainly recited at paragraphs 5 and 6 of the defence wherein Flat Point denies (a) the existence of the pleaded employment agreement; (b) that Ms. Gamondi ever signed it; and (c) that any of its officers, representatives or directors ever signed the said document. These are substantial matters which, if substantiated at trial, will completely answer the charge made by Megna. This ground of the challenge therefore fails.

[19] Before departing from this aspect of the application, I will comment on the disagreements on the request for further information. The request was made at the time of the service of the defence and sought further details of the alleged relationship between the parties. It would have been quite useful for Megna to have responded to Flat Point's demand for further information. Flat Point may have been afforded a much earlier opportunity to respond to the assertions surrounding the many letters and the work permit produced by Megna later in the proceedings.

[20] The grant of a summary judgment is discretionary. It may be relevant, in a proper case, to consider it disingenuous for a claimant to attack pleadings which clearly allude to the fact that the claimant holds information which, if produced, may further elucidate matters on the defence. However, I do not agree that in this case such an approach would assist Flat Point. Flat Point signalled its intention to ask for further information from Megna and later sought the same from him. Megna never responded to Flat Point's demand. If Flat Point regarded the information as critical to its defence, it could have applied pursuant to CPR 34.2(1) for an order compelling Megna to produce the requested information consequent on his failure to respond to the written request.

[21] CPR 34.1 and 34.2 (1) state –

"34.1 (1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.

(2) To obtain the information referred to in paragraph (1), the party must serve on the other party a request identifying the information sought.

Orders compelling reply to request for information

34.2 (1) If a party does not, within a reasonable time, give information which another party has requested under rule 34.1, the party who served the request may apply for an order compelling the other party to do so."

[22] A request could have been made for conditions to be attached to an order compelling Megna to produce the requested information. No action was taken by Flat Point to follow through with its request even when it received the application for summary judgment. In the circumstances, I find that it does not aid Flat Point to argue that the court should not entertain an application for summary judgment due to Megna's lack of response to its request for further information.

Whether, in any event, the defendant has a real prospect of successfully defending the claim

- [23] On this issue it must be recalled that I am not tasked with performing a fact finding effort. This is not the trial of the claim. Rather I am to assess the pleadings and the evidence available thus far or which may be presented to ascertain whether Flat Point has a more than fanciful prospect of successfully answering the claim. As was admonished by Danckwerts LJ in **Wenley v Moloney**¹¹

*"...this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*¹²

- [24] When looked at in this fashion, I do not find that Flat Point's case is hopeless or unsustainable. As I have stated from the outset, the allegations in these proceedings are fairly straight forward. Megna alleges that there exists a contract of employment with Flat Point. He has attached a written document to the claim in support of this contention. Flat Point has not only denied the relationship but has averred on its pleadings that the document in question was not signed by itself or any of its representatives. In support of this assertion, Flat Point intends to rely on evidence that it has produced refuting not only the signature on the document but the contents thereof. There is more. Megna has produced letters and a work permit in his name which he claims signals the existence of the pleaded relationship. Flat Point has rebuffed this assertion and signalled its intention to rely on evidence showing that the documentary proof relates to other arrangements existing between the parties. While it would have been helpful to have sight of the documents referenced in Flat Point's affidavit sworn by Mr. Marieschi, there is no argument from Megna that such relations do not exist. His response is that the documents produced by Flat Point may indicate other arrangements between the parties and in no manner suffice to an answer to his pleaded claim. Therein lays the crux of the case. The two sides take different positions on the state of relations between them. There are assertions on the pleadings and evidence presented or which is to be presented that I am satisfied, when tested at trial, may substantiate either claim.

- [25] I view this case as one involving highly contentious facts and evidence which cannot be resolved by reference to the court's power to grant a summary judgment. If I am to accede to the request to grant summary judgment, I will have to make findings, for instance, on the authenticity of the document attached to the statement of claim. Other contentious matters to be resolved would include whether the letters and work permit referenced by Megna relate to the claimed employment relationship or whether, as asserted by Flat Point, the said documents along with documents to be processed by Flat Point establish other contractual relations between the parties. Disputes of this nature cannot be resolved on an application for summary judgment. Summary judgment will only be granted in cases where, after considering the pleadings and available evidence, the court is

¹¹ [1967] 2 All E R 871

¹² [1967] 2 All E R 871 at 874

satisfied that the claim or defence is patently incapable of succeeding. I am not convinced that Flat Point is not in a position to prove its case at trial. It may be the case that Megna's contentions may be more probative on a balance of probabilities than the case put forward by Flat Point. However, adventures in determining such issues are not to be countenanced at this juncture as Flat Point is merely required to show that its defence has more than a fanciful prospect of success. I find that the assertions made by Flat Point are not fanciful and if substantiated at trial, will afford it a real chance of success.

- [26] The application for summary judgment is therefore refused. Megna is to pay Flat Point's costs on this application in the sum of \$800.00. The further case management will be conducted on a date to be notified to the parties by the court office. I thank counsel for the thorough arguments presented to assist the court


Raulston Glasgow
Master