IN THE EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2014/0016

BETWEEN:

FARAH JACKIE THEODORE

Respondent/Claimant

And

JACQUELINE THEODORE

Applicant/Defendant

Appearances:

Mr. Lennox Lawrence for the Applicant/Defendant

Mr. Henry Shillingford for the Respondent /Claimant

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2014: December 17th

2015: February 12th

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DECISION

[1] **THOMAS, (Ag):** Before the court is a Notice of Application for Extension of Time, filed by the applicant/defendant on 26th June, 2014. The applicant seeks an order:

1. That time be extended by forty-five (45) days to comply with the order of the Honourable Justice Errol Thomas granted on 9th May, 2014.
2. That the Claimant be ordered to deliver to the Applicant within seven (7) days all records, documents and bank statements relating to the Estate of

Ferdinand Theodore, deceased, which are and/or were unlawfully taken possession of by the said Claimant from on or about 17th October, 2010 and continuing to date.

3. That the costs in these proceedings be costs in the cause.
4. Further or other relief.

[2] The grounds of the application are:

1. That the Applicant was ordered by the Honourable Court to provide accounts of the Estate of Ferdinand R. Theodore, deceased on or before 23rd June, 2014.
2. That the Applicant's best effort to prepare the accounts have been frustrated by the fact that on or about 17th October, 2010 and thereafter the Claimant had broken into the Applicant's residence and had unlawfully taken possession of, stolen and or detained several records, bank statements, cheque books, receipts and other documents relating to estate of Ferdinand Theodore, deceased.
3. That in order to comply with the order of the Honourable Court it is required that the Claimant surrenders, delivers and or transfers to the Applicant the original of all the documents that have been stolen and/or unlawfully detained by her.

Affidavit in Support

[3] The applicant in her affidavit in support outlines the use of the income from the estate for the purposes of the education of the 5 children of the marriage and one child of the family. The affiant also details the manner in which she kept the estate documents at her residence at Rock-a-Way of which "the claimant was well aware at all times of the location since she lived with her for several years".

[4] The date on or about 17th October, 2010 is given by the affiant as to when the claimant unlawfully trespassed upon the residential property and forcefully entered through a window, and stole the documents and records relating to the estate.

[5] The affiant deposes further that the unauthorized taking was a matter of grave contention between herself, and the claimant and the documents were demanded through several phone calls and personal meetings. The applicant says that despite these efforts the claimant vehemently refused to return them.

[6] At paragraph 11 of her said affidavit the applicant deposes in part as follows:

> "The fact of the theft and unlawful detention is referred to in several documents before the court. I refer to a Supplementary Affidavit of Farah

Theodore, filed 14th May, 2014 particularly at paragraph 9 and 11 where the Claimants refers to the papers that she had found..."

[7] It is the applicant's contention that without the cheque books, receipts, bank statements and other documents she is precluded by the very act of the claimant from complying with an order obtained against her. It is the applicant's further contention that without these documents she can only provide partial or incomplete accounts.

Cross-examination

[8] The applicant was cross examined on various aspects of the case which centered on the disappearance of the records relating to the Estate of Franklyn Theodore. The applicant gave the following reasons and circumstances as the basis for believing that the claimant was involved: the claimant had belongings at the family home; on 17th October, 2010 she was not at home; there was evidence to suggest that the claimant took a bath; the window through which entry is sometimes made was broken down; the place was ransacked; there was evidence of the use of a towel; the records were kept in the room the claimant occupied which was the safest place to keep them; the receipts were in a bag and this manner did not change between 2010 and 2013; the bag was last seen on the Sunday prior to 17th October, 2010.

[9] In further cross examination concerning the missing records the applicant testified that the bank concerned was approached but it was indicated the account numbers were required.

Amanda Theodore

[10] This witness gave evidence of the records relating to her father's estate and what they relate to, including money being transferred. She went on to say that there was "complete transparency" in the family.

[11] Further evidence was given concerning the bag with the records and the nature of its contents.

[12] Concerning the loss of the bag the witness explained the condition of the house on 17th October, 2010 when she returned home with her mother. The witness went on to give evidence of the condition of the house which gave rise to the belief that the respondent had been in the house. Mention was also made of quarrels between the applicant and the respondent concerning the missing documents.

[13] It is the evidence of Amanda Theodore that the respondent returned to the home in 2013 and stayed for about one year but the bag was an issue between the applicant and the respondent.

Affidavit in Reply

[14] Farah Jackie Theodore, the claimant/respondent, in her affidavit in reply says that she is not guilty of the accusations against her in the defendant's affidavit. The affiant goes on to say that she is unaware of any reports made to the police or otherwise regarding the allegations. She goes on to say that she was not questioned.

[15] In the remainder of the affidavit, the respondent identifies documents, cheques, vouchers and orders she found at the family home in Rock-a-Way in April 2013 and which she has retained and made reference to in several affidavits.

[16] At paragraphs 4 to 6 of her affidavit the claimant identifies correspondence from the defendant's attorney to her attorney dated January 6, 2014 promising "first report" and allegations of trespass into and burglary of the defendant's residence.

[17] Finally, the claimant denies that she trespassed into or burglarized the defendant's property and have not stolen any documents relating to the defendant's transactions concerning her late father's estate.

ISSUE

The issue for determination is whether the application to extend time should be granted.

Submissions

[18] Learned counsel for the applicant/defendant, Mr. Lennox Lawrence has raised several issues which for all appearances relate to criminal law in the midst of civil law proceedings. However, in relation to the issue identified the court considers the following to be relevant:

> "27. It is submitted that the Defendant/Applicant has satisfied the evidential burden on the balance of probabilities that the Claimant/Respondent did in fact broke into her residence and unlawfully took possession of the checkbooks, records and statements relating to the estate and has continued in her unlawful detention thereof. Further that several of the documents which have been exhibited by the said Claimant are among the documents which were unlawfully taken possession of by the Claimant. Additionally that the Claimant has given no reasonable explanation of how she came into possession of these documents or where the other documents are now located.
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> 28. It is further submitted that the continued detention of the estate records and documents by the Claimant renders it impossible to provide verifiable accounts without the said records being returned. The Claimant should

not be permitted to demand a remedy while at the same time frustrating the very possibility of that remedy being made available.

29. It is submitted therefore that the Claimant should be ordered in the terms prayed by the Defendant, that is to say that the Claimant be ordered to deliver to the Applicant within seven (7) days all records, documents and bank statements relating to the estate of Ferdinand Theodore, deceased which are and were unlawfully taken possession of by the said Claimant from on or about 17th October 2010 and continuing to date.

30. In the premises it is submitted that time be extended to the Defendant/Applicant to comply with the order of the Honourable Justice Errol Thomas by providing accounts forty-five (45) days after compliance by Claimant/Respondent.

31. Finally that cost in the cause should be cost in this matter."

[19] Learned counsel for the respondent, Mr. Henry Shillingford, has made extensive submissions on the matter including: the power of the court to grant extension[1] of time, the duty to render accounts by trustees in the context of delay to perform their duties.

[20] The submissions continue thus[2]:

"3. We say this failure to give accounts does not need any extension of time as de facto they have already been given the extension by the very date of the application i.e. they had 90 days between filing and hearing. We submit that the whole defence of this case has been shown to be not only deplorable but a willful default and breach of trust as to this we quote Ramdin v Maharaj (1980) TnT (unreported) cited Bartlett v Barclays No 2 (1980) AER 92 @ 97 where Brightman J defined;

> "*Willful Default by a trustee in this context means a passive breach of trust an omission by a trustee to do something any prudent trustee ought to have done as distinct from an active willful default that is to say doing something which the trustee ought not to have done…*"

We submit that the failure to keep accounts is passive willful default. Active willful default would be sale of property and gift of property to persons not named in the will, receipt of money and use of it for personal benefit, these go to depletion of the estate that would be active willful default matters cited in the Statement of Claim that is to say the depletion of the estate by the Executor in blatant disregard of the Will and the trust.

4. Keeping Accounts is the minimum a prudent trustee should do. Here she says she is unable to produce any accounts due to loss of receipts 19 years old that were kept in a bag and its absence prevents her from doing any accounts! The Applicant/def by that admits she has never kept

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[1] The authorities cited include: Rule 26 of CPR 2000 and Schafer v. Blyth [1920] KB 143, 145; Atwood v. Chichester [1873] 3 QBD 722, 723

[2] Authorities cited include: Caribbean General Fire v Frizell Ins. [1997] 2 Lloyds 32, Gilbert Kodilinye, The Law of Trusts in the West Indies 2nd ed. at page 178

accounts, hence giving her the widest berth for ignorance of her duty and her attorney's assumed equal ignorance of not advising her to do so, it further would mean that her only reason to do so was because she was taken to Court. Now in the face of the Court in further absolute breach of the minutiae of her duties as executor/trustee she has not even used this year to do some accounts. This admission on its own should cause the Court to throw out this application and Direct a draconian Unless Order be issued against the Applicant who has the audacity to request further time 11 months after the beneficiary required her to do so!!and 19 years after required."

Reasoning

[21] The application before the court compels the highlighting of certain dates in relation to the Estate of Ferdinand Roosevelt Theodore (deceased). These are as follows:

(a) Probate was granted to Jacqueline Theodore, the Sole Executrix on 28th November, 1995.

(b) In October 1997 the Estate of Ferdinand Roosevelt Theodore (deceased) commenced an action against the Government of Dominica with respect to a portion of the said Estate.

(c) The litigation aforesaid ended with a decision of the Court of Appeal delivered on 30th April, 2012 in favour of the said Estate awarding compensation in the amount of $1,569,050.00.

(d) By Consent Order dated 29th November, 2013 a method of payment of the $1,569,050.00 was agreed.

(e) As at 25th November, 2013 the Government of Dominica had paid $1,210,737.00 to the applicant/defendant as part of the said $1,569,050.00 awarded. The residue of the compensation was to be paid to the Applicant.

(f) On 20th December, 2013 the respondent/claimant filed an application against the Applicant/Defendant seeking an account.

(g) On 17th January, 2014 the respondent/claimant filed a Fixed Date Claim Form seeking, *inter alia,* an account inventory of the assets of the estate.

[22] It is the applicant's/defendant's contention that on or about 17th October, 2010 her residence was broken into and a variety of records relating to the Estate was stolen and in the affidavit in support the person identified as the perpetrator is the respondent/claimant. Accordingly, the submissions on behalf of the applicant has asked the court to hold the respondent liable for what is in reality a criminal offence in a civil matter to be determined on a balance of

probabilities. To state the obvious: all criminal matters begin as reasonable suspicions and they fall within the province of the Police, and thence to the relevant criminal court. There is no evidence that this was done, and by implication it was not done.

[23] The court therefore rejects the applicant's submissions relating to what is claimed to be a loss of the records relating to the Estate of Ferdinand Theodore. Indeed, even if there is a loss of documents or even an entire Court Registry is destroyed life can be made to go on. This is where the sequence of the events from the time of the grant of Probate becomes relevant, against the legal obligations of the applicant/defendant as executrix. In that capacity the applicant's Oath of Executrix taken on 21st November, 1995 said in part:

> "4. That I will
>
> **i.** collect, get in and administer according to law the real and personal estate of the said deceased;
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> **ii.** when required to do so by the court exhibit in the court a full inventory of the said estate and render an account thereof to the court; and
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> **iii.** when required to do so by the High Court, deliver up to that court the grant of probate."

[24] Against the extract from the oath taken by the applicant on the 21st November, 1995 must be juxtaposed the following extract from an affidavit in support sworn to by the respondent/claimant on 14th January, 2014 in support of an application for an injunction. This is what the affiant deposed:

> "I, Farah Jackie Theodore of Snug Corner, in the parish of St. George in the Commonwealth of Dominica and I am the claimant herein and a beneficiary do make oath and say as follows;
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> 1. I am a beneficiary under the Will of Ferdinand R Theodore deceased and I seek an immediate and urgent injunction to prevent further dissipation of my share of the Ferdinand Theodore Estate.
> 2. There was a final judgment by the Court of Appeal in 2012 which ordered the Government of Dominica to pay to the Estate of Ferdinand R. Theodore $1.6 m of which the executrix has not informed me of nor has any money been distributed to me.
> 3. I have personally witnessed major building activity on the property at Rock-A way devised to the executrix via the estate of Ferdinand R Theodore inclusive of excavators and extensions to the house which has been ongoing from December 2013 and continues.
> 4. I also know that another beneficiary, my younger sister has left to attend school since this judgment in Canada. Again I know that it was due to lack of funds why she has not been able to further her studies previously.

5. I know the executrix has no current source of income and I fear the sending my sister to Canada and the building and development on her property is being financed by the assets of the estate derived from such judgment prior to distribution.
6. Due to the foregoing and my personal circumstance I pray that this injunction be heard urgently and that a preliminary payment be made prior to such injunction."

[25] It will be recalled that the Fixed Date Claim seeking an account was filed on 17th January, 2014. This was long after the grant of Probate and after the Judgment of the Court of Appeal granting compensation in an amount exceeding $1,500,000.00 to the Estate of Ferdinand Theodore. Much later, on 9th May 2014, the applicant was ordered to account for the assets of the Estate by 23rd June, 2014. Then on 26th June, 2014 comes an application from the applicant for an extension of time to file the account based on the breaking into of her home and the loss of the relevant documents. It is now February 2015 and there is not even a hint of an account. And at this point it is instructive to note that the Estate of Ferdinand R. Theodore included land at Rockaway, Canefield, upper Morne Daniel, Bay Street, Portsmouth, Hamstead, Calibishie and Calibishie Ridge.[3]

[26] The applicant is of full age and mother of 5 children and the court takes the view she fully understood her Oath of Executrix which mirrors the legal obligations of an executor. In this connection the following is stated in **Williams and Mortimer –Executors, Administrators and Probate**[4] at page 920:

> "[A]n executor must account for all the profits of the estate of the deceased which accrue in his own time; and that if he carries on trade or business of the testator the profits must be accounted for as assets."

[27] The position is stated in this way:

> "Trustees must keep accounts and produce them for inspection by any beneficiary when requested to do so. They must also, when required, give beneficiaries information as to the manner in which the trust is being administered and produce for inspection title deeds and other documents relating to the trust estate. A trustee who fails to render accounts may be ordered to pay costs of any application to the court made necessary by his breach of duty."[5]

Conclusion

[28] The evidence shows that the applicant has ignored her oath and the relevant law and as such has no standing to seek an extension to comply with the Order of the court.

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[3] Probate (Declaration and Account) dated 21st November, 1995
[4] 15th ed. by J.H.G. Sunnucks, M.A. (Cantab.)
[5] Gilbert Kodilinye, Caribbean Law of Trusts (3rd ed.)

[29] The extension sought by the applicant has long elapsed and yet there is not even a semblance of a report which suggests further that the applicant's purpose is to abuse the process of the court. What the applicant is saying implicitly is that without the documents that were stolen, there can be no account. The court cannot accept that a bank or banks and other companies with which the applicant did business, in relation to the Estate, cannot assist in any manner, after more than seven months.

[30] The application is denied and the applicant must personally (as distinct from the Estate) pay the respondent $1,500.00 in costs.

[31] Order accordingly.

EASTERN CARIBBEAN SUPREME COURT
FIAT JUSTITIA
HIGH COURT OF JUSTICE D...

Justice Errol L. Thomas
High Court Judge (Ag.)