IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

REGISTRAR GENERAL'S OFFICE
Am 8:30
27 JAN 2015
FILED
COMMONWEALTH OF DOMINICA

CIVIL

SUIT NO: DOMHCV2011/0325

BETWEEN:

WILLEM NICO BROUWER AKA WILCO BROUWER

Claimant/Applicant

AND

REMY LAWRENCE TRADING REJENS SERVICES

Defendant/Respondent

Appearances:

Mrs. Heather Felix-Evans of Heather Felix-Evans Chambers for the Claimant/Applicant

Mr. Lennox Lawrence of Lennox Lawrence Chambers for the Defendant/Respondent

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2014: September 19th

October 10th

2015: January 27th

DECISION

[1] **THOMAS, J (Ag.):** Given the number of stages in this matter, it is appropriate to set out a brief history thereof. On 29th May 2013 the claimant obtained judgment against the defendant arising

from a fixed date claim form filed on 5th October 2011. In it the claimant sought certain remedies, including an order that the defendant account to the claimant for the sum of EC $138,719.43 being the remaining balance of monies received by the defendant from the claimant for specific purposes, which purposes have been achieved. Also sought was an order for payment by the defendant to the claimant of any sum found to be due from the defendant on the taking of the account under (1) above.

[2] At paragraph 16 of this judgment Justice Brian Cottle ruled as follows:

> "Judgment is entered for the claimant. The defendant will account for the sum of $138,719.43. Upon the taking of the account the defendant will pay to the claimant all sums found due. The defendant will pay to the claimant prescribed costs on the sum found due. The defendant will pay to the claimant interest at the rate of 5% per annum on the sum found due from 5th October 2011, the date of the filing of the claim, until payment."

[3] The order made by Justice Brian Cottle on 29th May, 2013 was entered on the same day. On 5th December 2013 the claimant filed a Notice of Application supported by affidavit sworn to by the claimant/applicant, seeking an order that:

> "(i) The Defendant complies with paragraph 2 of the order of the Court made on May 29, 3013 within 7 days
>
> (II) The Defendant complies with the rest of the order of Court made on May 29, 2013 within 7 days of filing the account , if there is no challenge to the account from the Claimant.
>
> (III) Costs of this application."

[4] The application was heard on 28th February 2014 and an order was granted wherein the defendant was ordered to, *inter alia*, account to the claimant for the sum of $138,719.43 within 7 days of today, that is, on or before the 7th March 2014. The order was entered on 6th March 2014.

[5] On 12th March 2014 the defendant filed an affidavit, in which he deposed as to his understanding of "seven clear days" as contained in the order of 28th February, 2014. The deponent also sought to explain the constituents of the sum of $138,719.43 based on statement of account provided by Winston & Co, Chartered Certified Accountants. By Notice of Challenge filed on 17th March 2014, the statement of account was challenged by the claimant.

[6] A further Notice of Application was filed by the claimant on 19th March 2014 seeking an order that: "(i) the Respondent is due to pay to the Applicant the sum of $138,719.43. (ii) The Respondent shall pay to the applicant interest in the sum of $17,141.98, being interest at the rate of 5% per annum from 5th October 2011 to 19th March 2014. (iii) The Respondent shall pay interest on the sum of $138,719.43 at the daily rate of $19.00 as from March 20th 2014 until payment in full. (iv) The Respondent shall pay to the Applicant prescribed costs of $19,839.93. (v) The Respondent shall pay to the Applicant all sums due hereunder ordered within 7 days of the making order. (vi) Costs of this application in the sum of $750.00." The application contains grounds which are essentially the history of the matter from the judgment in favour of the claimant on 29th May 2013 and ending with the statement of account. The application is supported by an affidavit sworn to by Willem Nico Brouwer, the applicant.

[7] On 2nd May 2014, the orders sought by the applicant were granted with the final paragraph stating that: "The Respondent shall pay to the applicant all sums due hereunder within 30 days of the making of this order, namely 2nd June 2014."

[8] A Notice of Application for Extension of Time supported by affidavit sworn to by the defendant was filed on 3rd June 2014. In his affidavit in support of even date, the defendant details the order of the court dated 2nd May 2014. He goes on to say that he does not have the resources to settle the award and did approach the Bank of Nova Scotia and is in the process of gathering documentation to meet the bank's conditionalities. The extension was granted by the court on 20th June 2014 with an extension to 25th July 2014.

Judgment Summons

[9] On 8th September 2014, the matter reached the stage of Judgment Summons. It recited the Order of 2nd May 2014 and summoned the Defendant/Respondent to appear personally in court on 19th September 2014 to be examined on oath as to the means he has since the date of the order to comply with the terms of order. The Summons goes on to state that amount of which it is to issue is $138,719.43 plus various amounts of interest, less an amount of $5,000.00 paid to date, is $174,608.18.

Supplementary affidavit

[10] Pursuant to an order of the court the defendant of 23rd September 2014 filed a supplementary affidavit which he exhibits a number of documents relating to outstanding loans. The first[1] of these is AID Bank with a primary loan of $2,517,795.16 with an outstanding arrears of $121,416.56 two other loans totaling $738,400.68 with cumulative arrears of $16,041.65.

[11] The second relates to a hotel operated by the defendant which has an outstanding electricity bill of $10,772.28. Also in arrears, with respect to the said hotel is the cost of television services which is $1,704.30[2]. Also exhibited is an outstanding debt in relation to the said hotel. The outstanding debt to date is $73,199.00[3]. The deponent next deposes as to the action of the Inland Revenue Department in garnishing income derived from his security services[4]. Finally there is correspondence from the Bank of Nova Scotia indicating that the application for a loan of $150 million cannot be proceeded with due to absence of certain requested documentation[5].

Affidavit in reply

[12] On 1st October 2014, the claimant filed an affidavit in reply. In it the claimant deposes that he knows the defendant for several years prior to 2010 but he has very little, if any, knowledge of the defendant's means. He however deposes that he knows the defendant to be involved in the security services business and the importation of vehicles, including his own vehicle in 2006. He deposes further that he verily believes that the defendant, through a company, is engaged in financial services, namely off-shore banking and exempt trust.

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1 Exhibit RL3
2 Exhibit RL4
3 Exhibit RL5
4 Exhibit RL6
5 Exhibit RL7

Evidence as to means

[13] The defendant was cross-examined as to his means and he gave evidence as to his current, past or uncertain connections to commercial entities in different fields. Evidence was also given regarding real estate holdings. In the process he gave evidence as to some of his income.

[14] The commercial entities are as follows:

(a) Rejens Hotel Limited as sole director and shareholder, from which he is not paid remunerations. Annual returns are filed for this entity.
(b) Vibes Group of Companies- a holding company constituted by Vibes Radio, DA Vibes and Vibes Telecom, he is a director of the holding company and asked to be removed as a director
(c) 1Bank, a foreign-owned bank of which he is a director and receives a US $2,000.00 monthly salary.
(d) In respect of FGC Bank and Trust, ASA Bank and Trust, Barnett and Brilla Bank and Trust was not denied but the receipt of a monthly salary of US$10,000.00 was denied.
(e) FGC Bank and Trust- a director up to May 2014
(f) ASA Bank and Trust a director up to September 2014
(g) Barnett Capital Bank, a director up to late 2012 or early 2013
(h) Pheonix Capital of which he is now the sole director but receives no salary. Former directors of this company with him were his brother Edward in May 2009 and also Nanya Thomas is November 2012.

[15] The real estate holdings are as follows:

(a) the land on which Rejen's Hotel stands containing approximately half acre.
(b) 4,000 square feet of land on which his dwelling house is built.
(c) 2 acres of land situate in Portsmouth used for farming.
(d) 4 acres of land situate in Portsmouth
(e) 3,000 square feet at Cotton Hill sold in 2012 to his brother.

Submissions

[16] In summary the submissions on behalf of the claimant/applicant are: the applicant is asking the court to treat the respondent's evidence as being unreliable because of time at which it was disclosed (which shows lack of good faith and an unwillingness to be upfront and honest.) The evidence volunteered by the respondent was evidence of his liabilities only in relation to the AID Bank, electricity and cable bills, taxation of the income of Rejens Security Services.

[17] At paragraph 12 of the written submissions the following extract appears:

> "In response to the suggestion that this evidence of his inability to pay but his failure to pay, the Respondent asserted that this was evidence of his inability to pay. The Applicant submits that this could not be as the Respondent never gave evidence of his income from the hotel or his income from his security business which he admitted were ongoing businesses. The Respondent failed to inform the court by way of oral evidence and documentary evidence in support of what is his monthly gross income and monthly net income from these businesses are."

[18] A further submission is made that the failure on the part of the Respondent to pay the AID Bank debt, plus electricity and cable debts seem to have commenced during the period of these enforcement proceedings.

[19] Grave doubt is cast on Exhibit RL7 which the defendant said related to a loan of $150,000.00 but in fact it bears the figure of "$150 million". According to the claimant the document is "fraught with difficulties for the Respondent as it only has to be looked at once for its authenticity and truthfulness to be brought into serious question." The submission on the point ends by saying even if the respondent is to be given the benefit of doubt, the contention is that "RL7" does not provide irrefutable or even strong proof that it was directed to or intended for the respondent.

[20] The submissions conclude with the following contentions: the defendant has not provided the court with the relevant information which could assist the court. The respondent has not given any evidence to indicate his inability to comply with the claimant's proposal that he pays $10,000.00 monthly towards the liquidation.

Submissions on behalf of the defendant

[21] In submissions on behalf of the defendant/respondent reviews the evidence on assets, sources of income, real estate [business], fixed income and hotel business

> "20. From the evidence before the Court both upon affidavit and upon cross examination the Defendant does not have the means to settle the Judgment debt. The Defendant as at September 11, 2014 has received official notification that his account at the AID Bank is the legal action/non-performing category.
>
> 21. It is undisputed that a loan to settle outstanding loan payments had not bettered the Defendant's financial position but has itself fallen into arrears. The further evidence of an Agency Notice by the Inland Revenue is additional evidence that

he Defendant's financial position is adverse and that he is unable even meet his tax obligation in a timely manner.

22. The evidence of a monthly loan installment of $23,614.24 is undisputed. It is this amount that the defendant is himself not able to pay which has rendered his loan account into non-performing/legal action category.
23. Notwithstanding his adverse financial position the Defendant repeat his commitment to pay according to his proposal of $10,000.00 by way of first payment and $3,000.00 a month until settlement.
24. It is submitted that the claimant has presented no evidence whatsoever to show that the Defendant is in a better financial position or has income that will render him able to settle the debts. In fact the Defendant's evidence is that the Scotia Bank rejected his application as he had no unencumbered asset to guarantee the loan and no fixed income to guarantee the payment.
25. In the circumstances, it is submitted that the appropriate order in this case would be $10,000.00 as a first payment and $3,000.00 a month until settlement."

Reasoning and conclusion

[22] *Ab initio* the court must state that, having regard to the evidence and the submissions on both sides, the court agrees with the contention of the claimant that the defendant had not adduced the relevant evidence to show his inability to comply with the order of the court for the following reasons:

1. Of the various sources on income there is no evidence to show what income is derived therefrom by way of documentary evidence. For example Rejens Hotel is a going concern, in fact an up-scale hotel and yet there is not even a hint of occupancy, rather it is a debt approximately $3,000,000.00.
2. Indirect evidence of income comes from the evidence that the Inland Revenue taxed the revenue owed to Rejen's Security firm.
3. The court agrees with the claimant that the defendant has not been truthful to the court. The most potent piece of evidence is the Exhibit RL7 which expressly mentions of $150 million, but the defendant says it was an application for $150,000.00 that was intended.
4. The defendant, on his own evidence, owns 6 acres of land in Portsmouth and being in business he must have some notion as to what can be done in this regard.
5. The matter of the commencement and termination of directorships of various off-shore entities and the timing is simply beyond the court, based on the evidence.

6. The defendant seems unable or unwilling to make a distinction between debt owed by him in his personal capacity and those owed by a separate legal entity.
7. What of the used car business? The claimant deposed that the defendant made a profit of $16,000.00 from the importation of a single vehicle. This piece of evidence stands un-contradicted.
8. The court agrees with the claimant's contention that while the purpose of the summons was to get the defendant to indicate his means, his indications are in respect of liabilities.
9. In all the circumstances of this case the defendant has not shown good faith, except for the $5,000.00 paid to the claimant.

Conclusion

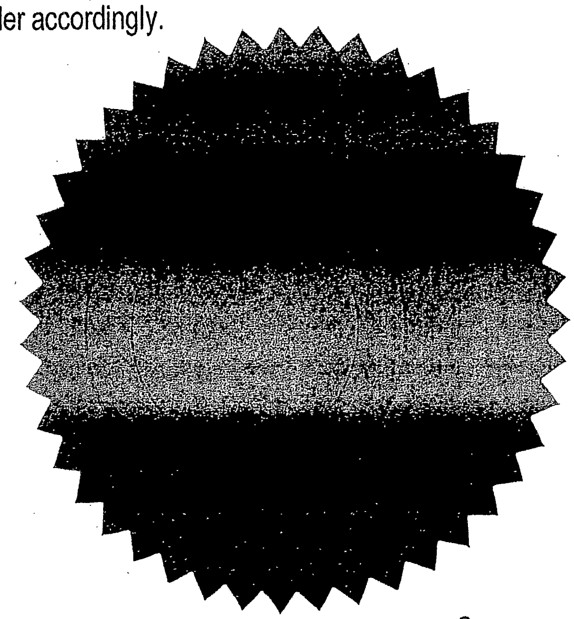
[23] Based on the evidence given by the defendant and the reasonable inferences drawn by the court, the court is satisfied that the defendant has the means to pay the debt or secure the payment of same. Accordingly, based on Part 52.4 © (v) of CPR 2000, it is the order of the court that the defendant must pay the claimant $10,000.00 at the end of January 2015 and further monthly payments of $10,000.00 on the last working day of each succeeding month until the debt is satisfied.

The defendant must pay costs of $1,500.00 to the claimant by 30th June 2015.

The parties have liberty to apply

A penal notice shall be attached to this order.

Order accordingly.



Justice Errol. L. Thomas

High Court Judge (Ag)