

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2013

CLAIM NO.: SKBHCV 2013/0290

BETWEEN:

TERRANCE THOMPSON
Applicants/Claimant

And

LARKLAND RICHARDS
Respondent/Defendant

Appearances

Ms. Natasha Grey for the Applicant

Mr. Sylvester Anthony, with Ms. Angelina Gracy Sookoo for the Respondent

2013: October 31, November 14
December 11

Injunction - Application for Interim Injunction – Threatened Eviction of Leaseholder – Expiry of Lease – Creation of Statutory Tenancy of a Commercial Property – Rent Restriction Act of St. Kitts and Nevis – Possible Destruction of 12 year-old Business – Question of Adequacy of Damages – Whether Respondent can pay damages – Balance of Convenience.

JUDGMENT

[1] RAMDHANI J. (Ag.) On the 11 December 2013, I delivered an oral judgment in this matter, granting, on certain terms, an interim injunction. At that time I promised to reduce the judgment into writing. This is that judgment.

[2] This matter arose out of an application dated the 31st October 2013, which was originally commenced under CPR 17.2 *ex parte*, by the applicant/claimants (the 'applicant') for

certain interim orders including injunctions to restrain the defendant/respondent (the 'respondent') effectively from interfering with the applicant's peaceful occupation of certain business premises which the applicant holds as a tenant. The ex parte application was immediately made *inter partes* and by 2:30 p.m. that same day, the respondent, an attorney at law, had appeared before the court having filed an affidavit in answer.

The Affidavits

- [3] In the affidavit in support dated the 31st October 2013, the applicant stated that he had occupied the premises for over 12 years, and since 2011 he had occupied as a tenant under the lease noted above, paying a monthly rent of \$4050.00.
- [4] He states that prior to entering into the lease, he had expended in excess of EC\$486,000.00 in improvements to the premises to facilitate his business, which includes a bar, snackette, and a two stages dance floor. He states that he also secured the premises by erecting a wall, as this was not being done by the previous landlords and or their agents.
- [5] He admits that he is in arrears of rent in excess of \$52,000.00 and that he had been served with a Notice to Quit before the 31st October 2013. He however states, that the landlord had acknowledged that the value of improvements are at least \$75,000.00 and was willing to set off the arrears of rent owed and pay him the difference.
- [6] The applicant states that he believes that having regards to the amount of money he has expended on the premises, he is entitled to an equitable interest in the premises. He states that the respondent has clearly expressed his intention to evict him without seeking a court order and that if the respondent were to be allowed to do so; it may force his business to close and have a negative impact on his business. In an affidavit in reply dated 12th November 2013, the applicant also states that if the respondent is allowed to carry out his intentions, the goodwill of his business will be affected.

- [7] When the court first saw this application, it was noted that the allegations were being made against an attorney at law, the respondent, to the effect that he had allegedly threatened the day before to unlawfully evict the applicant from the premises that very day the application was made. Having regard to the seriousness of these allegations, as noted earlier, the court directed that the proceedings be served immediately and that the matter be adjourned to 2:30 p.m. on the same day.
- [8] At 2:30 p.m., the respondent, having filed an "Affidavit in Opposition of Ex Parte Injunction", and represented by counsel on record in this matter, appeared in court, and through his affidavit contended that in his personal capacity he was not the landlord of the applicant. Further he stated that he was simply one of three joint administrators of the Estate of the original owner of the premises who was deceased. The administrators of the Estate are the landlords of the applicant.
- [9] The respondent's affidavit further stated that the lease by which the applicant held the property had expired, and that rent was due. He stated that as such, the applicant had no further legal right to remain on the property and that the landlords intended to exercise their right of re-entry. He did not deny that he had spoken to the attorney at law of the applicant the day before and had indicated that he intended to evict the applicant on that very day.
- [10] The respondent's affidavit essentially set out above which states his belief that he is entitled to evict the applicant under his right of re-entry. It is also important to note that several exhibits were attached to this affidavit, namely the lease in question, and two letters, one dated the 24 September 2013 and the 25 October 2013, from the respondent to the applicant, and one dated the 29 October 2013 from the attorneys at law for the applicant to the respondent.
- [11] The letter of the 24 September 2013 is a one month's notice to quit the premises. It is significant to note that apart from giving notice to quit, it states *inter alia*:
- "... You agreed to pay \$4,050.00 per month. Our records reveal that you are currently in arrears of \$48,914.50 having paid only \$48,285.50 from \$92,200.00.

Under paragraph 4(d) you were offered to take the structures that you built at the determination of the lease. In light of the outstanding debt please be advised you cannot remove anything. Instead you will be paid \$26,714.50 being the difference for your expenditure. The said amount of \$26,714.50 will be paid upon examination of the property..."

[12] The letter of the 25 October 2013 from the respondent attached as L.R. 2 to his affidavit is a brief letter and points the applicant to Clauses 4d, e, f and g of the lease. Significantly, clause 4e of the lease attempts to provide for a right of re-entry.

[13] The letter dated the 29 October 2013 which is attached as an exhibit to the affidavit of the respondent is from the applicant's attorneys, and it essentially reminds the respondent that as an officer of the court he is well aware that he requires the assistance of the court to evict the applicant, and any illegal eviction would be resisted by the applicant moving to the court.

[14] Curiously in his affidavit in reply, the applicant attaches another letter dated the 25 October 2013 which he states was sent by the respondent. In that letter the respondent states *inter alia*:

"On the afternoon of Thursday 31st October, the father of the children of the late Isis Bradshaw together with the necessary security officers and myself will repossess the property pursuant to the lease. If your client has any issues let him address them in Court."

[15] As noted earlier, the applicant had deposed in his affidavit in support of the application that on the 30 October 2013, the respondent met with his attorney at law, and advised that he, the respondent, was still going to evict him on the 31 October 2013.

[16] The court was unable to fully hear the matter on the 31 October 2013, and sought and accordingly obtained an undertaking from the respondent through his attorneys at law that he would not take any steps to evict or otherwise interfere with the applicant's right to peacefully occupy the property until the hearing of the matter. The matter was adjourned to the 14 November 2013 for hearing.

The Issues at the Hearing

[17] At the hearing, in both oral submission and written submissions, made by Mr. Sylvester Anthony on his behalf, the respondent raised a number of issues which he contended should properly prevent this court from granting any of the interim orders sought. The issues raised by the respondent's submissions are as follows:

(a) That the applicant had sued the wrong defendant, that there was no privity of contract between the applicant and the defendant.

(b) That this was not a suitable case to grant any interim injunctive order as there were no serious issues to be tried and that in any event damages would be an adequate remedy. Bound up in this issue that respondent argued that the applicant is a trespasser and the landlords are entitled to exercise the right of re-entry and that they are entitled to evict the applicant without the need for any order of the court.

Whether the Respondent is a Proper Defendant in this Matter

[18] The respondent contends that from a reading of the lease it is clear that he is not the landlord in his personal capacity. He is one of three joint administrators of an Estate that owns the premises. If any action is to be brought against the landlord that action should name the landlords properly.

[19] The argument that the application had been brought against the wrong party is without merit. On one view of this case, the respondent stands in the shoes of a stranger – a trespasser threatening to enter. There is no doubt in the law that where there is a deliberate and unlawful invasion by one man of another man's property, for the purpose of a continuing trespass, an injunction will lie.¹ It would be a rather surprising conclusion if a

¹ Goodson v Richardson [1873 G. 62.] Court of Appeal Chancery

tenant, faced with an unlawful eviction by a third party who has no interest in the property, cannot seek injunctive relief against that third party.

- [20] On another view he is acting as an agent of the landlord – and as the discussion below will show, the landlord is not entitled to act in this manner. If he is acting as an agent and about to perform an unlawful act he would be personally liable for any of his actions.

Principles Governing the Grant of an Interim Injunction

- [21] There is no doubt that the court has the power to grant an interim injunction in cases where it is just and proper to do so.
- [22] In approaching the exercise of its powers in this case, the Court is reminded of the well-established principles governing the grant of an interim injunction that requires that the court consider first, whether there is a serious issue to be tried. It is only where this first question is answered in the affirmative, that the Court will proceed to determine whether the applicant for an injunction would be adequately compensated for any damages he may suffer as a result of the conduct which he seeking to restrain; where he can be adequately compensated, no injunction will be granted, but if the court is in doubt as to the adequacy of damages, the court will proceed to consider the balance of convenience, balancing as it were, the risk of doing an injustice to either party by the grant or refusal of the order.

Whether a serious issue to be tried

- [23] The respondent at the hearing contended that there is no serious issue to be tried as the lease in question has ended and the applicant is clearly a trespasser.
- [24] The applicant had always contended in this matter that a court order was required before he could be required to leave the premises. Thus at the hearing the question of the protection of the Rent Restriction Act was raised; was the applicant entitled to the protection of the Rent Restriction Act?

[25] The respondent *at the hearing*, having filed written submission on the 13 November 2013, vigorously opposed to the proposition that the Rent Restriction Act applied to these premises. He was of the view that the termination of the written lease did not bring the applicant under the protection of the legislation, as the Rent Act did not relate to commercial premises. He further argued through his attorneys that as a matter of the practice landlords in similar situations landlord were accustomed to exercising their right of re-entry.

[26] The court at the hearing expressed a provisional view that it did not agree with the respondent that the Rent Restriction Act does not apply to these premises. Section 3(1) of the Rent Restriction Act states:

(1) This Act shall apply to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter."

[27] The effect of section 3 is that regardless of whether or not there is a contractual tenancy in effect, commercial properties such as the present premises fall to under the general protection of the Act. The question then is what is the scope of this protection? And whether having regard to the nature of this application whether there are any serious issues to be tried in relation to this? And does the Act affect the right of re-entry which the respondent contends that the landlords are entitled to exercise?

[28] First, with regards to the contractual clause for re-entry, there has been no contention that there has been a new contractual tenancy created in terms with the original lease. Accordingly, when the lease came to an end on the 31st August 2013, there was no contractual arrangement between the parties, the effect of which was that the tenant would be holding under the protection of the Rent Restriction Act, and the landlord could not call in aid the contractual right of re-entry.

[29] Even if the court were wrong about the survival of this contractual right of re-entry, and even if the landlords have a common law right to re-enter for the non-payment of rent, a

question arises as to whether or not they are entitled to exercise this right for the non-payment of rent in the circumstances of this case?

- [30] One of the features of this case is the position that the landlords seemed to have taken on the issue of the outstanding rent. By the letter of the 24 September 2013 the respondent, writing to the applicant on behalf of the landlords, states *inter alia* :

"You agreed to pay \$4,050.50 per month. Our records reveal you are currently in arrears of \$48,914.50 having paid only \$48,285.50 from \$97,200.00. Under paragraph 4(d) you were offered to take the structures that that you built at the determination of the lease. In light of the outstanding debt please be advised that you cannot remove anything. Instead you will be paid \$26,714.50 being the difference of your expenditure. The said amount of \$26,714.50 will be paid upon examination of the property. If any damage is done to the property you will be sued and the said amount withheld until the matter is determined.

- [31] The landlords, by the terms of this letter, on one view of this matter, appeared to have taken a position relating to the outstanding rent; they seem to be saying that they have offset this rent against the money outstanding owed to the applicant for his expenditure on the premises. On one view of this matter, they may not be entitled to now claim that rent is owed. If this is what they have effectively done, then even if a contractual right or common law right of re-entry could have been exercised in the face of the Rent Restriction Act, the landlords may have lost this right by taking this position.

- [32] This court has not determined this factual issue; but this is a serious issue to be tried in relation to the applicant's right to remain in the premises under the protection of the Rent Restriction Act. If rent is no longer owed, then there can be no common law right of re-entry, and the landlords' right to seek possession then falls to be governed by section 16 of the Rent Restriction Act.

- [33] Section 16 deals with restrictions on the right of possession of property under the protection of the Act. It provides for a number of situations in which the court may make an order for possession of any property protected by the Act including the non-payment of rent, and where the property is required for the personal use of the landlord provided that

the court will not make the order unless it considers it reasonable to make such order or give such judgment.

[34] Thus the landlords' right to possession in the magistrate's court would depend on whether the landlords can satisfy the magistrate, that one or more of the relevant subsections of section 16 applies and it 'is reasonable to make the order' of possession.

[35] At the end of the hearing, the court granted the applicant leave to file submissions in writing on the issues raised, and also granted leave to the respondent to file submissions in reply within seven days of necessary.

[36] Following the hearing, on the 21 November 2013, the applicant filed its submissions addressing generally all the issues raised above.

[37] Then surprisingly, without leave of the court being given, the respondent filed a supplemental affidavit on the 4 December 2013 that on its face indicates that he swore to on the 4 November 2013.² It contains one paragraph which reads:

"On December 3, 2013 upon the instructions of the Administrators of the Estate of Robert Llewellyn Bradshaw, deceased a Summons for Possession was filed in the Magistrate's Court against the Applicant herein for an order for possession of the subject property."

[38] A copy of the summons was attached to the supplemental affidavit. Submissions in Reply were also filed on the 4 December 2013. By these submissions, the respondent, now conceded that the Rent Restriction Act applied to the premises the subject matter of this application, and relying on the new factual matters raised on the supplemental affidavit, argued that having filed a summons for possession, the premise which grounded the applicant's application no longer existed.

² This affidavit must have been sworn on the 4 December 2013 as it speaks to an act done by him on the 3 December 2013.

[39] I wish to state that parties before the court on an application should not take it on themselves to file affidavits after a hearing of such an application without first obtaining the leave of the court. I was minded to ignore this affidavit. I did, however, consider it.

[40] With regard to this affidavit, the respondent also contended that there was no longer any issue to be tried. I do not agree. Whilst there was an issue as to the applicability of the Rent Restriction Act, there is also the issue of whether rent is actually owed or not, which is a matter that this court is entitled to examine, having regards to the threats of eviction, and breach of the applicant's right of quiet enjoyment. There are also those averments contained in the affidavit of the applicant in support of his application that sets out the respondent's stated intention to evict the applicant. I am being asked by submissions on behalf of the respondent to treat his (the respondent's) last affidavit as a statement that he does not intend to exercise any right of re-entry again. That is an inference that may be drawn, but it does not satisfactorily answer the applicant's fears, or more importantly the court's questions. Having regard to the fact that there has been no clear statement by the respondent, by way of admissible evidence, that he does not intend to exercise the right of re-entry to evict the applicant, the inference that he may still seek to do so is equally alive. In the circumstances, this court is not of the view that that risk has been removed.

Damages – Whether Adequate

[41] The respondents have contended that even if the court were to find that there are serious issues to be tried, an injunction should not be granted as all the applicant is complaining about is loss to his business and therefore damages will be an adequate remedy.

[42] The applicant on the other hand has stated that this precipitous attempt by the respondent to evict him will *inter alia*, 'force his business to close', and that the 'goodwill of his business is at stake'.

[43] Now what are the likely losses that the applicant will suffer if the respondent or the landlords cause his business to close by immediately evicting him? This is a business that

has been in existence for over twelve years and in the context of St. Kitts and Nevis would have built up considerable goodwill. Further, this case is to be distinguished from the Port Zante's case where the applicants simply said that their businesses were likely to be disrupted. Here, as the court understands it, this applicant is saying that the threatened evicting by the respondent is likely to destroy his business.

[44] The respondent's submissions on this point require that this court assume that he has the ability to pay any damages which might be incurred by the applicant if his business is destroyed. First, there is no evidence that there is this ability to pay, but second, even if there was such an ability to pay the question for this court is whether damages would be *adequate* to compensate the applicant in the event his business is destroyed. In the circumstances of this case, I have doubts that the applicant can be adequately compensated.

[45] That being said, on the converse, whilst the applicant himself has not included an undertaking to pay damages should the injunctive relief be wrongfully granted, I note that the draft order submitted did in fact set out such an undertaking to pay the respondent such damages as he may suffer in that event.

Balance of Convenience

[46] Having regard to the doubts that the Court has on the issue of damages, it is now appropriate that the Court turn to the balance of convenience to determine where the balance of justice lies, which really is a question of balancing 'the risk of doing an injustice'³.

[47] The Court found relevant, the guidance found in the case of *Evans Marshall & Co Ltd. v Bertola S.A.* 1 W.L.R. 349 where Sachs L.J. stated at page 379:

"The standard question in relation to the grant of an injunction – 'Are damages an adequate remedy?' – might perhaps, in light of the recent authorities of recent

³ *Cayne v Global Natural Resources plc* [1984] 1 All E.R. 225 at page 237 per Sir Robert Megarry V.C.

years, be rewritten – ‘Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?’”

[48] Having regard to the case presented by the applicant, and the real risk that an immediate eviction might destroy his business, and the questions which have been raised as to the adequacy of damages, this court considers that it would be just in the circumstance of this case to allow the status quo to continue until the hearing and determination of this matter.

[49] I am comforted that this is the right conclusion additionally, because this respondent has always argued that he has been sued in his personal capacity. He states that he is not the landlord, and that he has not been properly named in the matter. If I accept this, he is then a third party who has threatened to evict a statutory tenant who is asserting lawful rights to remain on the property. He should therefore have no quarrel if an order is granted against him for the promises of eviction that he has gratuitously made.

[50] I see no need to stay the possession proceedings before the magistrate's court, as this injunction was premised on the threatened eviction that the applicant has properly claimed could only lawfully be grounded in a court order. My order will accordingly reflect this.

The Order of the Court

[51] In the circumstances, the court made the following order on the 11 December 2013, namely:

1. *An injunction restraining the respondent by himself, his servants, and or his agents or persons subject to his control, authority or direction or howsoever from trespassing on the premises known as “Potential Bar and Snackette” which is presently occupied by the applicant as a tenant at Cayon Street, Basseterre, St. Kitts in the Parish of St. George in the Island of St. Christopher.*

2. *The respondent is to desist from interfering with or obstructing the applicant's occupation, use and quiet enjoyment of the said premises, the subject matter of this action.*
3. *This order remains in force until the hearing and determination of the substantive matter or until further order of the court.*
4. *The application before the Magistrate's Court for possession in relation to the said premises shall be allowed to take its normal course.*
5. *If an order for possession is granted by the Magistrate's Court the respondent shall be at liberty to apply to set aside this injunction."*

[52] That order is subject to an undertaking as to damages by the applicant. Costs to the applicant to be assessed if not agreed.

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Darshan Ramdhani
Resident Judge (Ag.)