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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C378 of 1991

IN CHAMBERS

BETWEEN	CENTURY NATIONAL BANK	PLAINTIFF
AND	JOHN SINCLAIR	DEFENDANT

Andre Earle for Plaintiff.

R.N.A. Henriques Q.C. Christopher Honeywell and Miss Joye Donaldson for Defendant.

HEARD: NOVEMBER 7, 8, 19, 1991 and FEBRUARY 5, 1992.

CORAM WOLFE J.

The Plaintiff by Writ of Summons with Statement of Claim endorsed, thereon dated the 1st day of August 1991, commenced proceedings against the defendant to recover the sum of Four Million Three Hundred and Eighty Three Thousand Seven Hundred and Thirty Three Dollars and Eighty One Cents ($4,383,733.81), being the balance due and owing on a loan made to the defendant by the plaintiff. Appearance was duly entered on the 27th day of August 1991. On the 22nd day of October 1991 the Plaintiff issued a summons, which was returnable on the 7th day of November seeking leave to enter Summary Judgment in the suit. The defendant on the 5th day of November 1991 issued a summons praying an extension of time in which to file defence. Both summonses now come before me for hearing.

Mr. Earle for the plaintiff raised a preliminary objection to the defendant's summons being heard as well as to the form of the affidavit opposing the application for Summary Judgment. Mr. Earle submitted thus:

(1) Paragraph 3 of the affidavit states that

> "in so far as is material that my knowledge of the facts and matters deponed to herein is derived from my conduct of this action as aforesaid and that such facts and matters in so far as they are within my own knowledge are true and in so far as they are not within my knowledge are true to the best of my information and belief."

The affidavit in this form, says Mr. Earle, is inadmissible

because it is sworn to by the attorney-at-law for the defendant and not by the defendant personally or by anyone on his behalf who can speak personally to the facts stated in the affidavit. Mr. Earle cited and relied upon section 80 of The Judicature (Civil Procedure Code) Act which states:

> "The Application by the plaintiff for leave to enter final judgment under the last preceding section shall be made by summons, returnable not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein; and the defendant may show cause against such application, by affidavit made by himself or by any person who can speak to the facts or (except in actions for the recovery of land) by offering to bring into Court the sum endorsed on the writ; or the judge may allow the defendant to be examined on oath. Such affidavit shall state whether the defence alleged goes to the whole, or to part only, and (if so) to what part of the plaintiff's claim ....."

(2) "The Affidavit sworn to by Mr. Christopher Honeywell refers to facts that are not within his own knowledge and states that the facts are true to the best of his information and belief without stating the sources and grounds of his information and belief."

In this regard section 408 of the Judicature (Civil Procedure Code) Act was relied on. Section 408 states:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this law, an affidavit may contain statements of information and belief, with the sources and grounds thereof."

Reliance was also placed on In Re J.L. Young Manufacturing Company Limited 1900 2 Ch. p753. The headnote reads,

> "An Affidavit of information and belief, not stating the source of the information or belief is irregular and therefore inadmissible as evidence whether on an interlocutory or a final application, and a party or solicitor attempting to use such an affidavit will do so at his own peril."

It was further urged that the affidavit of Mr. Honeywell did not state sufficiently the source or the grounds of his belief and to this extent the affidavit is irregular. The failure to so do it

is argued is fatal and for this proposition Ramkissoon v Olds Discount Company (T.C.C.) Limited (1961) 4 W.I.R. p73 at pp74 and 75 was relied on. McShine Ag. C.J. delivering the judgment of the Court said at page 74:

> "Nothing in the affidavit of the solicitor says or suggests that the solicitor had any personal knowledge of the facts of the case or that what appears in the statement of defence is true. This affidavit merely attempts in our view, to excuse the defendant for not filing his defence. The Appellant seeks to have the Court hold that the statement of defence exhibited is a sufficient substitute for an affidavit of merit by the defendant.
> In the first place such a statement is itself not on oath and it is open to the Court to suspect that the object of the defendant, in the absence of an affidavit, is to set up some mere technical case, or cause delay."

At p75 the Learned Chief Justice continued:

> "It is clear then from the learning of the cases that if the judgment is regular, the application must be supported by an affidavit of merits and when such an application is not thus supported it ought not be granted except for some very sufficient reason."

By way of response, Mr. Honywell submitted that section 408 of the Judicature (Civil Procedure Code) Act is not applicable to the present situation. He submitted that section 408 was only applicable where hearsay evidence was being deposed to in the affidavit. He contends that the affidavit by him, relates to his personal knowledge and therefore is not hearsay. In any event, says he, the affidavit sufficiently discloses the source and ground of his belief.

On examination of the affidavit I am satisfied that paragraph three (3) satisfies the provisions of sections 80 and 408 of the Judicature (Civil Procedure Code) Act. Further I am the view that the decision in Ramkissoon's Case (Supra) is limited to situations where a party is seeking to set aside a judgment which has been regularly entered. One can readily understand the strictures laid down in that case. A judgment regularly obtained ought not to be easily set aside. This would make a mockery of the process of the Court.

I rule that the prelimary point be dismissed as being void of merit.

The substantial point is whether or not the plaintiff ought to be allowed to enter summary judgment.

The loan agreement between the parties involves a principal sum of Five Million Four Hundred and Thirty Four Thousand One Hundred and Forty Five Dollars ($5,434,145.00). By an instrument in writing dated the 10th day of August 1987 the Defendant covenanted with the plaintiff as follows:

> "To pay to the Bank on demand all such sums of money as are now or shall from time to time hereafter become owing to the bank from the Mortgagor whether in respect of overdraft, moneys advanced or paid to or for the use of the mortgagor or charges incurred on his account or in respect of Promissary Notes and other negotiable instruments drawn accepted or paid or held by the bank either at the Mortgagor's request or in the course of business or otherwise and all moneys which the Mortgagor shall become liable to pay to the bank under any guarantee indemnity undertaking or agreement or in any manner or on any account (including all sums which have become immediately due and payable under the terms of any Scotia Plan Loan) whatsoever and whether any such moneys shall be paid to or incurred by or on behalf of the Mortgagor alone or jointly with any other person firm or company and whether as principal or surety together with interest at the rate per annum stated as the original rate of interest in Item 3 of the said schedule with such rests as are stated in Item 4 of the Schedule as rates at which interest payable or at such other times as the bank shall from time to time specify or at such other rate or rates of interest as the bank shall from time to time charge with interest may be computed as simple interest to compound interest as the bank shall require together also with all usual and accustomed bank charges."

In an affidavit sworn to by Mr. Valton Caple Williams, Director of Operations in the plaintiff's company, the plaintiff avers that the defendant has paid certain sums of money to the plaintiff, of which amount One Million and Fifty Thousand Four Hundred and Eleven Dollars and Twenty Cents ($1,050,411.20) has been applied in reduction of the principal sum and the balance

has been applied in the payment of accrued interest and that the amount of Four Million Three Hundred Eighty Three Thousand Seven Hundred and Thirty Three Dollars and Eighty One Cents ($4,383,733.81) is due and owing.

In an affidavit in opposition to the Application for Summary judgment, Mr. John Sinclair at paragraph 3 thereof states categorically that he does not owe the amount claimed or any part thereof. From this it may be seen that the issues are fiercely joined.

On the 18th day of June 1991 the defendant had by Writ of Summons commenced proceedings against the plaintiff in Suit C.L. S 172 of 1991. The Writ of Summons was specially endorsed in the following terms:

The plaintiff claim is against the defendant for:-

1. An Account of what is due and owing by the plaintiff to the defendant in respect of and arising out of the relationship between the plaintiff and the defendant as bank and customer as a consequence of accounts and loan transactions of the plaintiff with the defendant.

2. A declaration that the provisions in the agreement between the plaintiff and the defendant which provides for the payment of interest on the said loans is void for uncertainty and unenforceable. Consequently, the defendant is not entitled to any interest on the said loans.

OR IN THE ALTERNATIVE

3. If a declaration in terms of paragraph 2 is not made, a declaration that interest charged by the defendant on the said loans to the plaintiff which exceeds the minimum rate of interest charged by the defendant on the overdraft accounts constitutes a penalty and is void.

4. And further proper accounts, enquiries and directions.

It will no doubt be observed that the defendant's action against the plaitniff was commenced before the action herein. The defendant's action in suit C.L. S172/91 questions the interest rate

charged on the said loans. If the defendant's contention is sound then this would seriously affect the amount being claimed by the plaintiff. There is in my view a triable issue. C.L. S172/91 which precedes the suit in the instant case in terms of the date of filing and which was duly served upon the plaintiff herein would clearly have indicated to the plaintiff that defendant would be relying upon the contention set forth in its claim as an answer to the plaintiff's claim and that such a contention would have entitled the defendant to unconditional leave to defend. Paragraph 96E(2) of the Civil Procedure Code states as follows:

> "If the plaintiff makes an application under this title where the case is not within the title or where the plaintiff in opinion of the Court or Judge knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs."

Order 14/7/3 of The Supreme Court Practice 1976 is even more explicit. It states:

> "If before the issue of the summons the plaintiff knows that the defendant is relying upon a contention which would entitle him to unconditional leave to defend, he cannot properly invoke the jurisdiction of the Court under Order 14 to give him summary judgment, for neither he nor any one on his behalf can make the affidavit in support stating that "in his belief there is no defence to the claim or part to which the application relates. The belief that must be deposed to is, not that the ground of defence relied upon is not good, or substantial or has been raised very late or will in all probability fail at the trial, but that there is no defence to that claim or part. If therefore not withstanding such knowledge, the plaintiff proceeds under O.14 the application should be dismissed."

I am satisfied that issues involved herein require that this matter be fully ventilated as the defendant has a triable defence.

The Application for Summary Judgment is hereby dismissed.

The Application praying an extension of time in which to file defence is hereby granted.

Defendant is ordered to file and serve the defence herein within fourteen days of the date hereof.

Costs of both Applications to be paid by the Plaintiff to the Defendant.