[2022] JMSC Civ 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV00905

BETWEEN	**MONICA CHAMBERS**	**CLAIMANT**
AND	**MESSRS HAMILTON & HAMILTON**	**1ST DEFENDANT**
AND	**COURTNEY HAMILTON**	**2ND DEFENDANT**

IN CHAMBERS

Yualande Christopher instructed by Yualande Christopher & Associates for Claimant.

Andrew Graham instructed by Bishop & Partners for Defendants.

Heard: 3rd and 22ndJune, 2022

Summary Judgement; Breach of Contract; Professional Negligence

S. Barnes, J (Ag)

This is an application for Summary Judgement filed by the Claimant on June 22, 2021 on the grounds that the Defendants have no real prospect of defending the claim or issue.

The Claim and Application for Summary Judgement

[1] The Claim Form filed on March 9, 2021 is for:

1. Damages for Breach of Contract and/or Negligence

2. Specific Damages for US$99,708.33

3. Interest at 2% above commercial bank rate on Damages

4. Cost and Attorney's Cost

[2] The Particulars of Claim accompanying the Claim Form, outlines, *inter alia,* that the Defendants who acted as Attorneys-at- Law in a sale of land for the Claimant and her parents, failed to pay over to the Claimant her one third (1/3rd) share of the proceeds of sale being US$99,708.33.

[3] The Claimant says she instructed the Attorneys to send her portion of the sale proceeds (as above) to her address in the State of Georgia in the United States of America. Those instructions were by email and later acknowledged in a letter from the Defendants to the Claimant.

[4] The Breach of Contract averred, is with respect to:

a. Failing to give effect to the Claimant's instructions pursuant to the terms of engagement

b. Failing to deliver the Claimant's one third share of the proceeds of sale to her

[5] The particulars of (Gross) Professional Negligence are:

a. Misleading the Claimant

b. Failing to act in the Claimant's best interest

c. Failing to disclose Conflict of Interest

d. Intentionally breaching confidentiality

e. Failing to adhere to professional standards

f. Causing loss, damage or injury through serious negligence

[6] The above Breach of Contract and Professional Negligence are as stated in the Particulars of Claim filed by the Claimant on March 9, 2021. To that she exhibited:

1. A copy of the Registered Title bearing Volume 1402 and Folio 116, subject of the sale, showing transfer to the purchasers on November 2, 2020.

2. A trail of email between the Claimant and Defendants in which the Claimant clarified

    (i) That she is entitled to 1/3rd portion of the sale proceeds

    (ii) That said portion would be sent to her home address at 3233 Hope St, Hopeville, GA 30354

3. Letter from the Defendants to the Claimant at the above address, confirming that her portion would be sent there

4. An email from the Defendants with letter to Evan/Denise Chambers stating, *inter alia,* that the 1/3rd payment to each owner would be US$99,708.33 and that "Monica has instructed us to send her portion directly to her in Georgia, hence we will do so."

These are substantially referred to in the Claimant's submissions for Summary Judgement filed March 23, 2022.

The Defence

[7] In his Defence to the Claim filed on April 16, 2021, Mr Courtney Hamilton, the 2nd Defendant (at paragraph 4) said the Claimant's cheque was sent to her parents' address, the one used by all Vendors on the Agreement for sale. Thereafter they made efforts "to have the cheque that was made payable to the Claimant replaced and rerouted to an address provided that predated the duly executed agreement for sale".

[8] Those efforts came to naught as the cheque was already negotiated and the Defendant stated that “the cheque would have had to be endorsed by the claimant for it to be encashed.” Anything else would be fraud “to which the defendants played no role”.

[9] They further denied there was any breach of contract as there was no failure to give effect to her instructions – the cheque having been sent to the address she used on the Agreement for Sale. They also put the Claimant to strict proof that she did not receive the cheque.

[10] With respect to Professional Negligence, the Defendants vehemently denied those claims.

[11] The Affidavit in response to the Application for Summary Judgement filed on January 19, 2022, repeated the Defence filed on April 16, 2021 to the Claim. The Exhibits attached to the affidavit in response to this application are:

1. The cheques to the Vendors

    a. one made out to Monica Chambers in the sum US$99,686.66,

    b. the other to Evan and Denise Chambers in the sum US$199,373.34.

2. A letter to Evan Chambers noting that cheques (as above) were enclosed.

3. The Agreement For Sale showing the address for all three Vendors as Lakeland, Florida.

4. An Ancillary Claim Form filed October 28, 2021 adding themselves as Ancillary Claimants and Evan and Denise Chambers as 1st and 2nd Ancillary Defendants.

[12] It is important to note that the procedure for adding Ancillary Claimants is set out in Rule 18 of the CPR:

18.5 (1) A defendant may make an ancillary claim without the court's permission if

a. in the case of a counterclaim, it is filed with the defence; or

b. in any other case, the ancillary claim form is filed before or at same time as the defence is filed.

(This rule does not apply to an ancillary claim under rule 18.4.)

(2) Where either –

a. rule 18.3; or

b. paragraph (1),does not apply, an ancillary claim may be made only if the court gives permission.

(3) An application for permission under paragraph (2) may be made without notice unless the court directs otherwise.

[13] These documents naming Ancillary Claimants and Defendants are therefore not properly before the court and will not be referred to or recognised in this Application.

Summary Judgement

[14] The Grounds for Summary Judgement are stated at Rule 15.2 of the Civil Procedure Rules

The court may give summary judgment on the claim or on a particular issue if it considers that –

a. the claimant has no real prospect of succeeding on the claim or the issue; or

b. the defendant has no real prospect of successfully defending the claim or the issue.

Rule 15.6(1) outlines the court's powers in granting summary judgment: -

15.6 (1) On hearing an application for summary judgment the court may-

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.

[15] **Swain v Hillman and another [2001] All ER 91** has become the well-known and oft quoted authority on Summary Judgement. At paragraph j, Woolf MR states *inter alia*:

> *It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.*

[16] The case of **Gordon Stewart et al v Merrick Samuels SCCA no. 2/2005** is also quite instructive. At page 94 therein, Harrison J.A stated: -

> *The prime test being "no real prospect of success" requires that the learned trial judge to do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning.*

[17] I remind myself here that I am not conducting a trial and I am restrained from applying the balance of probabilities standard of proof as is usually done in cases tried. As noted by Jackson Haisley J in **Easton Lozane v Junior Beckford [2020] JMSC Civ.106** (paragraph 18)

> *"…….It is noteworthy to state here, that, the burden of proof upon an application for summary judgment rests with the applicant, to adduce sufficient evidence, that the Respondent's Defence has no realistic prospect of success, if it were to proceed to trial. To have a real prospect of success, a case has to carry some degree of conviction and has to be stronger than merely arguable as seen in the case of* ***Bee v Jensen [2007] RTR 9."***

[18] Sinclair-Haynes J (as she was then) in Allan Lyle v Vernon Lyle [2005] Supreme Court, Jamaica HCV 02246/2004 enunciated the following:

An application for summary judgement is, however, inappropriate where there are important disputes of facts. On an application for summary judgement, the applicant must satisfy the court of the following:

1. All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.

2. Those facts must be undisputed or there must be no reasonable prospects of successfully disputing them.

3. Those facts must be undisputed or there must be no reasonable prospects of successfully disputing them.

[See S v Gloucestershire County Council and L v Tower Hamlets London Borough Council (2000) The Independent 24th March (C.A.)]

[19] In Sagicor Bank Jamaica Limited v Taylor-Wright [2018] UKPC 12 PC Appeal No 0011 of 2017 Lord Briggs stated at paragraph 21

> *The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b).*

Breach of Contract & Professional Negligence

[20] In Sun Rose Limited v Grant, Stewart, Phillips and Kitson (Carrying on Practice as Grant, Stewart, Phillips and Co., Attorneys-at-law), HCV 1541 of 2003, Straw J (as she was then) stated that an Attorney-at-law can be liable both in contract and in tort to his client. She quoted from *Midland Bank v Hett Stubbs aid Kemp*, 1979 Ch. 384 Oliver 3, in which the solicitor's contractual duties were stated as follows: (per page 434 – 435).

> *"The classical formulation of the claim in this sort of case as 'damages for negligence and breach of professional duty' tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one."*

[21] Straw J also stated (page 6 of the Judgement) that:

> *In discussing the duty of care and skill of lawyers, the authors of '**Jackson and Powell on Professional Negligence**' 4th edition (London, Sweet and Maxwell 1997), quotes Riley J, in **Tiffin Hldg Ltd. v Millican** 4a D.L.R. (2d) 216 as follows (per heading 'Content of the Duty' at paragraphs 4 – 55, pg. 448):*
>
> > *"The obligations of a lawyer are, I think, the following: (1) To be skilful and careful; (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary; (3) To protect the interest of his client; (4) To carry out his instructions by all proper means; (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left o him; (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."*

Analysis

[22] In the instant case, the Attorneys were contracted to execute a sale of land and got specific instructions as to the portions distributable and where they should be sent. Those instructions formed part of their contract, and as stated from the

authority above, Attorneys have an obligation “to carry out his instructions by all proper means”.

[23] The Defence of the Respondents/Defendants is that a cheque was issued in the name of the Claimant and duly sent to the address she used on the Agreement for Sale of the subject property. As such, there was no negligence on their part. But they also agree that the Claimant had given another address prior to executing the Agreement, to which her share of the proceeds should be sent and that they had acknowledged those instructions. Additionally, they took steps, through their bank, to place a stop order on the issued cheque and have a replacement issued. If there was no negligence and breach of duty on their part, they would not have gone to those lengths.

[24] Facts not in issue are:

1. On September 2, 2020 that there was an email trail between the Claimant and defendants that her portion would be sent to her address in Georgia. That was later formalised in a letter from the Defendant law firm.

2. A cheque was issued in the name of the Claimant and sent to the address on the Agreement for Sale, which is not the address the Claimant gave instructions for her cheque to be directed.

[25] The Claimant’s instructions were twofold:

- One address was to be used for completing the sale

- Another address was where her portion of the sale proceeds were to be sent.

[26] Had the Defendants not acknowledged those arrangements before the parties signed the Agreement for Sale, the Claimant would be at liberty to instruct other Counsel to act on her behalf in order to have her specific instructions fulfilled.

[27] As Attorneys, the Defendant firm not only breached the contract they had with the Claimant, but acted negligently by their own admitted "error" in not having her proceeds of sale sent directly to her. To say that they are putting the Claimant to "strict proof that she did not receive the cheque" is disingenuous in circumstances where they conceded that they did not send the cheque to her as per the acknowledged instructions.

[28] This case falls squarely within the statement of Lord Briggs in **Sagicor Bank Jamaica Limited v Taylor-Wright** (supra). There is no defence that could be raised which would nullify the fact that there are funds owed to the Claimant.

[29] That being so, the defendants have no real prospect of successfully defending the claim and the Application for a Summary Judgement is granted.

ORDERS:

1. Notice of Application for Summary Judgement filed June 22, 2021 are granted, per:

    i. That Summary Judgement be entered in favour of the Claimant against the Defendants

    ii. The automatic referral to mediation be dispensed with in accordance with rule 74.4(1) of the CPR

    iii. Cost to the Applicant/Claimant on this application to be taxed if not agreed.

2. The matter is set for Case Management Conference for Assessment on November 15, 2022 at 10:30 a.m. for half an hour.

3. The Claimant is granted Leave to appeal Order 2.

4. Leave to Appeal granted to the Defendants.

5. The Claimant's Attorney-at-Law is to prepare, file and serve these orders.