[2020] JMSC Civ 211

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV01638

BETWEEN	**CHARLES E. PIPER & ASSOCIATES (A FIRM)**	**CLAIMANT**
AND	**CVM TELEVISION LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr M. Manning Q.C. and Mr. Arthur Compass instructed by Nunes Scholefield Deleon & Co. for the Claimant

Mr Nigel Jones and Ms Liane Chung instructed by Nigel Jones & Co., for the Defendant

Application for Extension of time to file Defence – Application for Summary Judgment

Heard: March 16, April 2 and October 28, 2020

LINDO, J.

Background

[1] The Claimant is a law firm engaged in the business of providing legal services and which operates from 13A North Avenue, Swallowfield, Kingston 5 in the parish of Saint Andrew. The Defendant is a limited liability company with registered office at Blaise Industrial Park, 69 Constant Spring Road, Kingston 10 in the parish of Saint Andrew.

[2] On April 16, 2019, the Claimant filed a Claim and Particulars of Claim in which it claims the sum of $7,955,850.23; interest at 6% per annum, or, alternatively, interest at such rate as this Honourable Court deems just, pursuant to the Law Reform (Miscellaneous Provisions) Act from January 3, 2019 to the date of judgment or sooner payment; costs and such further and/or other relief as this Honourable Court deems just.

[3] The Defendant filed an Acknowledgement of Service through its Attorneys-at- law on May 24, 2019. This was filed out of time and it indicated an intention to defend the claim. The parties were engaged in settlement discussions during which time the Defendant changed its attorneys-at-law.

The Applications

[4] On July 25, 2019, the Defendant filed a Notice of Application for Court Order for Extension of Time to file and serve a Defence and Counterclaim. It is supported by the Affidavit of Shamena Khan.

[5] On November 22, 2019, the Claimant filed a Notice of Application for Court Orders seeking the following orders:

1. That summary judgment be entered against the Defendant in favour of the Claimant for the sum of Four Million Nine Hundred and Sixty Eight Thousand Five Hundred and Sixty One Dollars ($4,968,561.00) with interest at a rate of 6% per annum on the sum of Seven Million Nine Hundred and Thirty-Three Thousand Eight Hundred and Fifty Dollars and Twenty-Three Cents ($7, 933,850.23) from January 3, 2019 to the date of each payment made by the Defendant since the claim was filed.

2. The costs of this application and the action to the Claimant to be taxed if not agreed

3. Such further and other relief as this Honourable Court deems just

[6] This application is supported by the Affidavit of Charles Piper sworn to on November 20, 2019.

[7] In identifying the issues to be dealt with at the hearing of the application for summary judgment, the Claimant sets out two issues which the court should address. They are:

a. Whether the Defendant received services rendered by the Claimant.

b. Whether the Defendant has acknowledged the debt owed to the Claimant for services rendered.

[8] The applications were heard simultaneously.

The Submissions

[9] The parties provided written submissions which were supplemented by oral submissions during which time a number of authorities were cited. Both parties have also provided documentary evidence in support of its respective position.

[10] The Claimant included in its submissions the added issue of whether the Affidavit of Ms Khan raises any issue which amounts to a real prospect for defending the claim.

[11] The court took some time after the hearing to examine the statements of case, assess and evaluate the submissions and consider the authorities cited by each party in support of its respective positions on the two applications. I will not restate the submissions for the sake of brevity but will make reference to particular aspects where I find it necessary in setting out the reasons for the decision arrived at.

The Application for Extension of Time

[12] **Rule 10.3(9) of the Civil Procedure Rules (CPR)** allows a party to apply for an extension of time to file a Defence, while **Rule 26.1(2)(c)** states that the court may extend the time for compliance with any rule, practice direction, order or direction of the court, even if the application for extension of time is made after the time for compliance has passed.

[13] The court has a discretion to grant an extension of time. The Rules however, do not set out the criteria to be used by the court in the exercise of its discretion. The court is guided by several authorities such as **Fiesta Jamaica Limited v The National Water Commission** [2010] JMCA Civ 4 in which an issue before the court related to the filing of a defence out of time, as in the instant case, **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered on July 31, 2007 as well as the case of **Strachan v The Gleaner Company**, Motion No. 12/1999 delivered December 6, 1999 where Panton JA (as he then was) outlined factors to be taken into account by a court in exercising its discretion in an application for extension of time. Panton JA stated the following factors:

> *"(i) the length of the delay;*
>
> *(ii) the reasons for the delay;*
>
> *(iii) whether there is an arguable case for an appeal and;*
>
> *(iv) the degree of prejudice to the other parties if time is extended."*

[14] The Claim Form and Particulars of Claim were filed on April 16, 2019, and served on the Defendant on April 24, 2019. An Acknowledgement of Service was filed on May 24, 2019, 16 days after it became due. The Defence became due on or about June 5, 2019 and the application was made on July 25, 2019. There was therefore a delay of about 50 days.

[15] The authorities such as **Peter Haddad,** supra, show that in relation to delay, in order to justify a court in extending time, there must be material on which the court can act. There should also be some explanation for the non-compliance and where necessary, it should be shown what efforts were made to comply and why those efforts failed. (see also **Re Jokai Holdings Ltd.** [1993] 1 All ER 630 at 637d per Brown Wilkinson VC).

[16] In the Affidavit in Support of the Application, the Defendant has advanced as reasons for the delay the fact that the parties were in settlement discussions "*and the Defendant believed that the parties had reached an agreement on May 22,*

2019...", as well as that the Defendant changed its attorneys-at-law on or about June 18, 2019 and had to provide its new attorneys-at-law with instructions, documents and information.

[17] Assessing the reasons for the delay, I bear in mind that during the course of the negotiations the Defendant was reminded of the need to comply with timelines, in particular, relating to the filing of the Acknowledgement of Service which was already out of time. I note that this was filed two days after the Defendant had expressed the belief that the parties had reached an agreement.

[18] The filing of a Defence to a claim is a procedural step and the failure to comply with the timeline is a 'highly material factor'.

[19] Although I do not find that the reasons proffered are good reasons, the court is not bound to refuse the application on that account, as the overriding objective is to ensure that justice is done.

[20] I will therefore examine the proposed defence to analyse its prospects of succeeding against the claim. I am guided by the case of **Fiesta Jamaica Limited v The National Water Commission**, *supra*, in which, Harris JA, at paragraph 35 of the judgment, indicated that *"the important question is whether there [is] material which demonstrated that there are issues to be investigated at trial".*

[21] In the proposed defence, the Defendant indicates, among other things, that subsequent to the filing of the claim "a further invoice providing that the total balance due after all payments received from the Defendant from November 2018 till May 17, 2019 was $2,434,111.73. This amount was paid by the Defendant on June 11, 2019". The Defendant also alleges that some items ought not to be included in the sum claimed and as such some aspects of the claim are statute barred.

[22] The Defendant also has a proposed counter claim. The contents of the proposed defence and counter claim give rise to issues joined between the parties which can

only be resolved by a trial as the Defendant has made several assertions which, if accepted by the court, would entitle it to the reliefs claimed. Additionally, the issue of limitation is a sustainable defence in law and cannot be decided in these proceedings.

[23] It is clear that there is uncertainty as to the sum, if any, which is now owed to the Claimant. Additionally, in the counter claim the Defendant is seeking an accounting and it is a determination of the facts of the case, and the issue of whether aspects of the claim are statute barred, which will tip the scale in favour of the successful party. This can only be done at trial.

[24] My examination of the proposed defence and counter claim leads me to a finding that there is sufficient material provided by the Defendant which shows that there are issues to be investigated at a trial.

[25] On the issue of prejudice, the court is loath to grant extension of time where there is delay, unless it is shown that in so doing the other party will not be prejudiced. In addressing the degree of prejudice, my focus is primarily with reference to the extent to which the delay in filing the defence would have resulted in hardship to the Claimant. As stated above, the delay of 50 days in the circumstances is not considered inordinate.

[26] On behalf of the Claimant it was submitted that to prolong the litigation will cause undue prejudice to the Claimant while it was submitted on behalf of the Defendant that there is no prejudice that will fall to the Claimant if the extension of time is granted as a date has not been set for a Case Management Conference and the Claimant had not taken any other steps in the proceedings at the point the application for extension of time to file the defence was made.

[27] The Claimant, in the instant case, has not claimed that it has been prejudiced by the delay and I find that granting an extension of time and permission for the Defence filed on July 25, 2019, (as well as the proposed counter claim), to stand, will cause no prejudice to the Claimant and has not prejudiced the commencement

of a trial. On the other hand, I find that a refusal would deprive the Defendant of the opportunity to present its defence by being able to traverse the averments made in the claim and therefore is more likely to be prejudiced if not allowed to put forward a defence.

[28] The fact of the failure to file the Defence within the period fixed by the CPR meant that the Defendant was exposed to the possibility of the Claimant applying for judgment in default, and I bear in mind that the Claimant filed for summary judgment after the application for the defence to be allowed to stand, was filed.

[29] I am persuaded by the authorities which declare that where there is a procedural default, even if unjustifiable and particularly where there is no real prejudice, the litigant ought not to be denied access to justice. Any prejudice to the Claimant as a result of the delay by the Defendant in filing its defence in this matter would be minimal when compared to the prejudice to the Defendant if not allowed to defend the claim.

[30] Notwithstanding the failure of the Defendant to proffer a satisfactory reason for the delay in filing the defence, I believe the overriding objective of doing justice in the instant case, favours the grant of an extension of time for the defence to be filed and for the defence filed, to stand, as I believe there is sufficient material on which the Defendant has shown that it has a realistic as opposed to a fanciful prospect of success and it would be unjust to prevent the Defendant, which appears to have a genuine desire to defend the claim, to be shut out at this point.

[31] The application for extension of time is therefore granted.

Application for Summary Judgment

[32] The principles which govern an application for summary judgment are set out in the CPR. Under **Rule 15.2(b)** of the CPR, the court may give summary judgment on the claim or a particular issue if it is considered that the defendant has no real prospect of successfully defending the claim or the issue.

[33] It is trite that the burden of proving that an order for summary judgment ought to be granted is on the applicant who must assert and show, on a balance of probabilities, that the respondent's case has no real prospect of success.

[34] In **Swain v Hillman** [2001] 1 All ER 91, the court defines what is meant by 'real prospect of success'. Lord Woolf MR, at page 92 of the judgment, in referring to Rule 24.2 of the English Rules which is similar to rule 15 of the Jamaica CPR, said, inter alia:

> *"... 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 ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

[35] Lord Woolf went on to indicate that applications for summary judgment have to be kept in their proper role and the summary process is not meant to dispense with the need for a trial where there are issues which are capable of being investigated at trial. Importantly, however, the court in considering whether or not to grant an application for summary judgment should not seek to conduct a 'mini trial' regarding the issues of the case.

[36] In considering whether a party has a real prospect of succeeding on the claim, the court is primarily guided by the contents of the parties' statements of case but can rely on other evidence provided in support of the respective claims. (See **Sagicor Bank Jamaica Limited v Taylor Wright** [2018] UKPC 12.

[37] The Claimant has indicated that it had a contract with the Defendant while the Defendant contends that legal services were provided by the Claimant by default of its prior engagement with a company which the Defendant bought in 2016.

[38] I find that several pieces of correspondence from March 23, 2007 to March 10, 2017 which were exhibited to the Affidavit of Charles Piper as "CEP 3 – CEP 11" show that the Defendant requested legal services of the Claimant and that the Claimant represented the Defendant in several legal matters even after 2016. There is no written retainer agreement put in evidence to show the terms on which

the parties were in contract but it is clear that the Defendant has, by making payments to the Claimant on tender of its invoices for legal services, shown that there existed a legal relationship between the parties, and by requesting that certain files be handed over, has shown that the Claimant performed legal services on its behalf.

[39] The statements of case of the Claimant show that it is claiming a sum of money as being a debt owed, and the application for summary judgment is made on the basis that "the Defendant has acknowledged the debt owed'.

[40] Queen's Counsel, Mr Manning, submitted that the acknowledgement was made by the Defendant through Ms Khan, who indicated, among other things, in letter dated December 4, 2018, that "we accept responsibility of our debt and propose the following payment plan towards the outstanding $12m...". It was also submitted that the Defendant indicated a willingness to pay $7,616,306.99 to satisfy outstanding amounts, has taken steps to liquidate the claimed amount, and the total due and owing is $4,968,561.00.

[41] Counsel Mr Jones, submitted that the statement made in the letter is not an admission and is a matter to be determined at trial. He expressed the view that an assessment of the letter shows, inter alia, that any indication of a willingness to pay the invoices was made "in the context of, and if not solely because the Claimant withheld, was withholding and is withholding files belonging to the Defendant" and there was no acceptance that the sum claimed is what was owed.

[42] I find that the 'without prejudice' correspondence was made in circumstances where liens were placed on files held by the Claimant, in particular, that concerning the matter which was before the Court of Appeal. When the letter is viewed and assessed in its entirety, along with the other correspondence between Counsel for the parties, I find that there is no clear admission. I bear in mind that after the claim was filed on May 2, 2019, there was further correspondence which queried the amount required to settle the claim for fees, as well as the time frame for the

delivery of files to Counsel for the Defendant in exchange for payment of the amount agreed as the settlement sum.

[43] I accept that an admission must be clearly made and in the instant case there is no clear admission and I find that the Claimant cannot rely on the contents of a few lines of the letter as proof of an admission of the debt. Additionally, I note that in the Acknowledgement of Service it was clearly stated that there was an intention to defend the claim and this document was filed during the course of the negotiations and after the Claimant had pointed out that it had not yet been filed.

[44] As I have found that there was no clear admission of liability, it follows that the issue of whether there was or should be a withdrawal of admission does not arise.

[45] Summary judgment is discretionary and although detailed submissions were made to point out the hopelessness of each party's case, the fact is that the issue of whether aspects of the claim is statute barred raises an arguable case. Additionally, the factual and legal bases of the proposed defence and counter claim have raised issues which are not only arguable, but on its own, the proposed counter claim is in my view, a case that would need to be properly ventilated.

[46] A defence may be fanciful where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by the documents or other material on which it is based.

[47] I agree with the expressed view that the jurisdiction of the court to grant summary judgment must be reserved for those cases which are 'clear cut' as the court should not embark on a mini trial of the issues to come to a determination. The Claimant cannot succeed in the application unless able to satisfy the court that the Defendant has no prospect of succeeding on its defence and there is no other compelling reason why the matter should not be disposed of at a trial.

[48] The evidence adduced by the Claimant in support of the application for summary judgment is not so compelling for this court to find that the Defendant has no real

prospect of success on its defence and I am of the view that it is only when it is clear to the court that a Defendant has no valid defence that he should be prevented from contesting the issue of liability in circumstances such as these.

[49] It is well established that in a case which turns on disputes of fact, and I would add, on issues of law, the summary judgment procedure is inappropriate if it would involve the court conducting a mini trial and undertaking protracted examination of documents. The instant case I believe is one such, as there are documents being relied on by the parties to prove their respective positions in relation to the exact sum, if any, owed by the Defendant. There is also the question of whether the amount claimed, or any part of it, is statute barred. Additionally, the fact that there has been a course of dealing and negotiations between the parties over the very subject matter shows that there are matters which ought to be tried.

[50] The jurisdiction to grant summary judgment is to be sparingly employed and will not be made except in a clear case where the court is satisfied that it has all the requisite material. From the material placed before the court it can be seen that there are issues of fact to be determined between the parties. The claim, as pleaded, is proposed to be met with a defence, seen in the affidavit in response to the application for summary judgment and in support of the application for extension of time to file the defence. This proposed defence, even if true, may still entitle the Claimant to relief sought in the claim, which is a sum of money for work done. However, the Defendant is seeking to raise the limitation defence in respect of aspects of the claim, which, if it succeeds, would entitle it to the relief sought in the proposed counter claim.

[51] I accept that to grant an order for summary judgment is a serious step and that the overriding objective of ensuring that justice is done may sometimes require that a matter be brought to an end at the earliest possible time rather than having time wasted and costs expended. I do not however find that the circumstances of this case lend itself for an order granting summary judgment in favour of the Claimant.

It would be consistent with the overriding objective of dealing with cases justly, for these issues of fact and of law to be resolved at trial.

[52] The Claimant's application for summary judgment is therefore refused.

Conclusion and Disposition

[53] In view of all the foregoing, I have come to the conclusion that the justice of this case requires that the Defendant be permitted to defend the claim. The Claimant's application for summary judgment is therefore refused and the Defendant's application for extension of time to file its Defence is granted.

[54] The Defence and Counterclaim filed by the Defendant on July 25, 2019, is to stand and to be served on the Claimant forthwith.

[55] In the exercise of my powers of case management, the following orders are hereby made:

1. Reply and Defence to counterclaim is to be filed on or before December 10, 2020;

2. The matter is referred to mediation on the filing of the Defence to the counterclaim;

3. If the matter is not resolved at mediation there shall be standard disclosure on or before April 29, 2022;

4. Inspection of documents disclosed on or before May 13, 2022;

5. Witness statements are to be filed and exchanged on or before September 15, 2022;

6. Trial by Judge alone in open court;

7. Trial set for one day, March 2, 2026;

8. Pre-trial memorandum to be filed on or before September 16, 2025;

9. Pre-trial review set for September 23, 2025 at 11:00a.m. for ½ hour;

10. Listing questionnaires are to be filed on or before September 9, 2025;

11. Costs of the applications to be costs in the claim;

12. Defendant's attorneys to prepare, file and serve order;

13. Leave to appeal is refused.