

Nails

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Defendant

Beswick J.

By this application Ms. Dixon seeks an Order to strike out Mr. Jackson's case and to enter summary judgment. Further she seeks interim payment.

Ms. Dixon was nine years old at the time of the accident. It is her case that she was in the process of crossing the road, and had almost finished when the left side of Mr. Jackson's vehicle collided with her.

The parties do not agree as to what was actually happening at the moment of the collision.

Application to strike out case

Mr. Reitzin, Counsel for Ms. Dixon, submits that the defence ought to be struck out because Mr. Jackson has no real prospect of success in defending the claim as the witness statements do not support his denial of negligence. The defence filed should be regarded as an abuse of process.

Counsel for Ms. Dixon also urges the Court to strike out the defence on the further basis that the Defence does not contain a Certificate of Truth which is required by the Civil Procedure Rules.

Application for Summary Judgment

Mr. Reitzin invites the Court to make an Order for summary judgment based on an analysis of the pleadings and witness statements of the parties which, he submits, reveals that Mr. Jackson is responsible for the accident.

Mr. Manning for Mr. Jackson argued that Ms. Dixon was to be blamed either fully, or at least in part, for the accident as she had not exercised reasonable care in using the road.

Every statement of case must be verified by a certificate of truth. Rule 3.13(1) Civil Procedure Rules 2002 (CPR) provides that the Court may strike out any statement

of case which has not been verified by a certificate of truth. The defence was not verified by a certificate of truth.

By Rule 26.9 CPR, an error of procedure does not invalidate any step taken in the proceedings, unless the Court so orders.

In my opinion, the failure to verify the defence was not fatal to the defence. Indeed the matter had been progressing up to the point where a trial date has been set.

It is clearly in the interest of justice that where a claimant has a case which is bound to fail or bound to succeed, the claimant should know that as soon as possible.

Swain v Hillman (2001) 1 ALL ER 91 at 94.

However, where there are issues to be resolved, a trial becomes necessary.

“[O]rders dismissing or striking out a claim at the interlocutory stage ought only to be resorted to ‘where on an examination of the claim or defence it is plain and obvious that the claim or answer is on the face of it obviously unsustainable’.” **Fong & Fong v Bent** (1997) 34 JLR 453

In my view it is not obvious that the defence is obviously unsustainable.

Rule 15.2 CPR provides:

“The Court may give summary judgment on the claim ... if it considers that – (b) the defendant has no real prospect of successfully defending the claim”

It is a very serious step to deprive a litigant of the opportunity to have his matter heard at a trial, to fully ventilate the issues. This should only occur where the case is not fit for trial at all.

Mr. Reitzin argues that it is obvious that the claimant must succeed. He carefully dissected the defence case and focussed on the presence or absence of particular words in

the pleadings and witness statements. From that analysis he concluded that Mr. Jackson had no defence and that summary judgment should be entered against him.

“...[T]his summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers ... without oral evidence tested by cross-examination in the ordinary way.” **Wenlock v Moloney** (1965) 2 ALL ER 871 at 874.

I agree with this expression of the law. The parties must be given the opportunity to cross-examine each other, to explore pertinent issues so that the truth will be exposed. This will not be achieved by only an examination of the documents.

There are factual issues that must be resolved at a trial after consideration of all the evidence in the case.

Interim Payments

Rule 17.6(1) CPR provides:

“The court may make an Order for interim payment only if
(d).... it is satisfied that, if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs.”

Mr. Reitzin’s submission that because of the strength of the claimant’s case and the weakness of the defendant’s case, an Order for interim payment should properly be made, does not find favour with me. I am not satisfied that the claimant would obtain judgment. It follows therefore that an interim payment would not be appropriate in this case.

Applications for striking out the defence, summary judgment and interim payment are refused.