IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2007 HCV 02917

BETWEEN	DR. RICHARD KEANE	FIRST CLAIMANT
AND	KARENE KEANE	SECOND CLAIMANT
AND	DOROTHY VENDRYES	DEFENDANT

IN CHAMBERS

Nigel Jones for the claimant
Andre Earle and Anna Gracie instructed by Rattray Patterson Rattray for the defendant

June 5, July 3, 8, 17 and September 3, 2009

APPLICATION TO SET ASIDE JUDGMENT - JUDGMENT SET ASIDE - WHETHER COURT ON OWN MOTION CAN ENTER JUDGMENT

SYKES J.

1. At the end of the hearing of this matter I set aside the judgment on the ground that it was irregularly entered. I then heard further submissions on why I should not enter judgment for the claimants having set aside the judgment. I decided that in this case judgment should be entered because the defendant did not have any real prospect of successfully defending the claim.

2. This judgment is in two parts. I shall deal with the facts and law applicable to the setting aside of the judgment in part one, and in part two I shall give reason for entering summary judgment.

Part 1 - Setting aside the judgment

3. The claimants and the defendants entered into a lease agreement in respect of property found at Unity Hall in the parish of St. James and

registered at volume 1056 folio 390 of the Register Book of Titles. Eventually, a sale agreement was entered executed. The sale ran into difficulties. The upshot was the Dr. Keane and his wife, Mrs. Keane filed a claim against Mrs. Vendryes on July 17, 2007.

4. Dr. Keane served Mrs. Vendryes with the claim form and the particulars of claim but omitted to serve the prescribed notes, the form of acknowledgment of service and the form of defence.

5. Judgment in default of acknowledgment of service was entered in favour of Dr. Keane.

6. Mrs. Vendryes now takes the very technical point that the judgment was wrongly entered because there was non-compliance with rule 8.16 (1) of the Civil Procedure Rules ("CPR"). Rule 8.16 (1) states:

> *When a claim form is served on a defendant, it must be accompanied by*
>
> *(a) a form of acknowledgment of service (form 3 or 4);*
>
> *(b) a form of defence (form 5);*
>
> *(c) the prescribed notes for defendants (form 1A or 2A);*
>
> *(d) a copy of any order made under rules 8.2 or 8.13; and*
>
> *(e) if the claim is for money and the defendant is an individual, a form of application to pay by installments (form 6)*

7. I have examined the forms referred to in the rule. They all contain important and vital information that in my view makes service of them mandatory, unless of course there is evidence from which it can be

said that the defendant waived the right to be served these documents.

8. Forms 1A and 2A begin by telling the defendant that the form is important. It tells the defendant what his options are and how he can go about exercising the option he has chosen.

9. Forms 3 and 4 are the acknowledgment of service. These documents have a vital function in the CPR. The various questions asked on the forms which are required to be answered provide important information to the court so that the case can be managed properly by allocating to it an appropriate share of the court's resources. The document is linked to rules 19 and 20 which deal with adding a defendant as well as correcting the name of the defendants. The link is this: by asking whether or not the name is correctly spelt, the document is seeking to determine whether the defendant served is the correct defendant and whether he is properly identified.

10. Form 5 is clearly directed at the layman and allows him to put in his own non-legal way whether he is resisting the claim and on what basis he is doing so. He may even use the same document to set out a claim of his own against the claimant.

11. Form 6 allows the defendant to admit the claim and propose a settlement to the claimant.

12. These documents are important. It must not be forgotten that it is not a legal requirement that defendant retains counsel. He may choose to represent himself. One of the purposes of the new rules was to make justice more accessible by removing all the legal terminology that tended to hinder understanding. The CPR is written in plain ordinary English which a literate layman will be able to understand and apply. This underscores another important objective of the CPR which was to give greater access to justice. It does this by making civil procedure more user friendly which in turn is accomplished by giving instructions in plain English.

13. The litigant is actually encouraged to be a full participant in the process. He is required to attend case management conference and the pre-trial review or be represented by someone who can adequately represent his interest (see rule 27.8).

14. It is my view, that the objective of access to justice and telling the defendants of his rights are vital components of the new civil litigation process that ought to be reinforced and strengthened. Were I to decide that these documents need not be served I would be undermining an important concept that permeates the CPR. More important, I would be deciding that "must" in the rule does not mean what it says. I do not see any good reason for treating the word as meaning less than mandatory.

15. For these reasons, I concluded that the failure to serve the documents made the judgment entered an irregularly obtained judgment.

Part 2 – Entry of judgment

16. Mr. Earle endeavoured to persuade me that once judgment was set aside as an irregularity the defendant was now at liberty to file her defence and if on filing that defence, the claimants formed the view that it had not real prospect of success then may then apply for summary judgment.

17. I disagreed with this submission. In this particular case, the proposed defence is known. It was set out in the affidavit of Mrs. Vendryes when she applied to set aside the judgment. She had set it out because the application to set aside the judgment proceeded on either of two bases. The first was that the judgment should be set aside as of right because it was irregular and the second was that it should be set aside, under the discretionary power of the court in rule 13.3, because there is a real prospect of success.

18. The court has a duty to make sure that the court's resources are not expended on pursuing intellectually stimulating cases that have no realistic prospect of being established. This duty never ceases. Therefore, even if a judgment is set aside as of right because of some

defect in the procedure, that does not mean that the court should turn a blind eye to hopeless cases. I can see no justification for saddling a claimant with additional costs and anxiety because a defendant has established a purely technical point in an otherwise unmeritorious case.

19. In my view it really does not matter at which the issue of a reasonable prospect of success arises. Even in a setting aside application a judge is not deprived of case management powers. The judge still has a duty and an obligation to make enquiries about the proposed defence and if after enquiry the case cannot be established or has no reasonable prospect of being established then the judge ought to act and prevent the case from moving forward. For example, it may be that the defendant cannot secure the evidence to refute the claim. It may be that the proposed evidence is inadmissible as a matter of law. No one can seriously contend that the judge, in these two examples should twiddle his thumbs and permit the case to go forward. I can see no difference in principle if the ground on which the judge acts is that the case has no reasonable prospect of success.

20. Let me give the facts relevant to this aspect of the case. As stated earlier, there was a lease agreement under which Dr. Keane entered into possession and occupation of the property. It was later agreed that he would purchase the property. Both sides in the sale negotiations were represented by counsel.

21. After much negotiation, an under an agreement for sale dated December 31, 2004, Mrs. Vendryes agreed to sell the property to Dr. Keane and his wife for (US$300,000.00). There was also another agreement, dated December 31, 2004, governing the sale of chattels and other movables. By clause 10 the chattel agreement for sale it was expressly agreed that the chattel agreement would be read and construed as one with the agreement for sale of the real property.

22. At the time of the agreement, it was common ground that the property was encumbered and Mrs. Vendryes was seeking to realise the property so that she could pay off the mortgage.

23. It turned out that Mrs. Vendryes was not able to pass good title to Dr. and Mrs. Keane. Also the mortgagee eventually sold the property to a third party. The claimants have sued Mrs. Vendryes for breach of contract.

24. Mrs. Vendryes's defence, reduced to its core, is that it was a condition precedent to completion of the sale agreement that the Keanes were to honour their lease agreement by making payment as and when the rent became due and that failure by them meant that the sale agreement could not be completed.

25. She also adds that she could not complete the sale because of supervening activities by the Government. By this she was referring to the compulsory acquisition of the property by the Government of Jamaica for the North Coast Highway Project.

26. For good measure, Mrs. Vendryes counter claims for what she alleges is the outstanding rent. This counter claim is not part of my deliberation.

27. The claimants' response was direct. They say that there is no such term in the sale agreement and there was no such understanding between the parties.

28. It is common ground that none of the sale agreements reflect such an understanding.

29. The crucial paragraph on the completion point in the proposed defence reads:

> *Paragraph 11 of the Particulars of Claim is denied. The Defendant avers and states that there are two concurrent agreements which governed the parties. The Claimants have failed to perform the terms of the lease agreement which is a condition precedent to the completion of the Agreement for Sale.*

30. The proposed defence, at paragraph 13, refers to supervening events over which she had no control.

The law

31. Rule 15.2 permits the court to give summary judgment on the claim or on a particular issue if it considers that the claimant or defendant has no real prospect of succeeding or defending the claim or issue as the case may be.

32. This power is given to the courts in order that it may eliminate hopeless cases from the court lists at the earliest opportunity. This power can be exercised on the court's initiative without the necessity of an application by any of the litigants. The only requirement is that of natural justice, that is to say, the person who may be affected is given the opportunity to say why this should not be the case.

33. The case of ***Evans v James*** [2001] C.P. Rep. 36 supports the view the court can act on its own initiative. In the case, the trial judge, on the first day of trial, on his own motion indicated to counsel for the defendant that he had no real prospect of successfully defending the claim. This he did in the face of the fact that the matter was set down for a three day hearing and witnesses were present. From this case, with which I agree, there can be no doubt that a judge at any stage of the process after he has indication of what the defence and give summary judgment either on the application of one of the parties or on his own motion.

34. The summary judgment procedure requires that the judge looks down the road and determine, as best as possible, the likely outcome of matter should it have gone to trial. This power is in the context of shift in attitudes to civil litigation.

35. This new view of civil litigation is reflected in the Jamaican CPR. It is accepted that the summary judgment procedure is not to be used to circumvent the need for a trial but a court should not shy away from making the call if the court properly concludes that there is no real prospect of success.

36. Finally, it has been accepted by the Court of Appeal of Jamaica that ***Swain v Hillman*** [2001] 1 All E.R. 92 contains the correct approach to this issue of determining whether a matter has a real prospect of success.

37. According to ***Swain's*** case, there is no need for further exposition on the expression real prospect of success. The adjective "real" was meant to distinguish such a case from a fanciful one.

38. ***ED&F Man Liquid Products Ltd v Patel & ANR*** [2003] C.P. Rep. 51. went further to say that for a case to have a real prospect of success it must be more than arguable. It also held that in making the assessment the court does not have to accept every assertion, without analysis, made by party who may be the subject of a summary judgment. Also it was held that in some cases it may be so clear that the factual assertions have no real substance, particularly if contradicted by contemporaneous documents (see para. 10).

Analysis

39. With these principles in mind I turn to the proposed defence. Mr. Jones makes the telling point that it is nothing short of remarkable that in spite of the vendor being represented by counsel at all stages of the negotiation for the sale of the property up to and including the preparation of the sale agreement and execution of the agreement, not one line appears in the agreement reflecting this link between the payment of rent and completion of the sale agreement.

40. Mr. Jones also submitted that there were two agreements: one for the sale of land, and one for the sale of chattels, and despite this the defendant did not seek to make this link between completion of the sale agreement and the payment of rent. Indeed what is striking about the proposed defence is the absence of documentation supporting Mrs. Vendryes's contention. If this condition was so important why not put in the sale agreement as a special condition, he submitted? When the draft agreement was prepared why did the defendant not make the specific request that such a term be included?

41. I must say that I find Mr. Jones' submissions compelling. It is my view that the defendant does not have any real prospect of successfully defending the claim. It is simply incredible to believe that through all this negotiation, if the parties really intended to make payment of rent a condition of completion of the sale, they would have failed to make provision for it or even mention before now.

42. There is no substance to the defendant's case. The reference to supervening events which prevented the defendant from acting in accordance with the terms of the contract may be a reference to the doctrine of frustration. I am not saying that it is, but simply to say that supervening events prevented completion of the contract, in the context of this case, cannot avail the defendant. The Government acquiring the land is not an extraordinary or unusual event. The vendor could have managed this risk by including an appropriately drafted term of the contract. She decided not to do so and so must live with the consequences.

43. Judgment is entered for the claimant. Costs to the claimant to be agreed or taxed.