[2015] JMSC Civ. 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2014CD00005

BETWEEN	**MAVIS BANK COFFEE FACTORY LIMITED**	**CLAIMANT**
AND	**DONOVAN ROOKWOOD**	**DEFENDANT**

Application for summary Judgment - Whether Defence and Counterclaim have real prospect of success- Agency agreement-Whether acknowledgment of a liability an unconditional admission.

Kimberly Morris instructed by Symone Mayhew for Claimant

Shauna Kay Dacres instructed by Patrick Peterkin for the Defendant

Heard: 18th May 2015 and 22nd May 2015

In Chambers

Coram: Batts J.

[1] This Judgement was delivered orally on the 22nd May 2015 and I now reduce it to writing. By Notice of Application filed on the 24th February 2015 the Claimant asks that:

a) Mediation be dispensed with
b) There be summary judgment against the Defendant for $1,341,738.60 with interest at commercial rates
c) There be summary judgment on the Ancillary Claim (Counterclaim)
d) Alternatively that the defence and counterclaim be struck out
e) Costs

[2] In support of the application is an affidavit dated 24th February 2015 by Norman Grant. The Defendant relies on the affidavit and further affidavit of Donovan Rookwood dated 25th March 2015 and 14th May 2015. Mr. Norman Grant filed an affidavit in reply

dated April 24th 2015. Both parties also filed skeleton submissions and lists of authorities.

[3] It is common ground between the parties that on an application for summary judgment the test is whether the Defendant has a real prospect of successfully defending the claim on the one hand and /or a real prospect of success with his counterclaim on the other see CPR rule 15.2. In this regard it is now well established that this procedure is designed for clear cases. It is not intended to substitute for a trial and as such where there are factual issues or complex issues of law to be determined, summary judgment ought to be refused.

[4] By its amended Particulars of Claim the Claimant relies on an agency agreement dated April 1st 2010 by which the Defendant agreed to act as the Claimant's agent for the sale of the Claimant's product. That agreement expired on the 30th July 2012 and was not renewed. It is alleged that the Defendant breached the agreement in the following respects:

a) He breached the restraint of trade clause in the agreement
b) He failed to take reasonable and proper steps or to exercise due diligence to collect from customers the amount due and /or to render a true account to the Claimant
c) He failed to remit all sums collected

[5] By way of a further Defence and Amended Counterclaim the Defendant does the following:

a) Puts the Claimant to proof of the implied terms alleged with respect to the Defendant's duty to take reasonable care and due diligence to collect from customers sums due

b) Asserts that the total sum due to the Claimant is $431,000.00 and not $3,245,230.00

c) By way of set off and counterclaim seeks damages of $19,854,032.00 for wrongful restraint of trade.

d) Claims $2,481,754.00 for commission due to the Defendant from the Claimant

e) Claims the return of two(2) titles wrongfully held by the Claimant

f) The Defendant also asserts that the agency agreement was unlawfully terminated without written notice

It is fair to say that the document entitled Further Defence and Amended Counterclaim is not particularly well drafted. However as far as I can discern it does raise the issues itemised above. By way of Reply filed on 2nd October 2014 the Claimant traverses those allegations.

[6] Whether or not the Defendant has a real prospect of succeeding on any of those issues can only be determined by reviewing the evidence relied upon.

[7] The Agency Agreement commenced on 1st April 2010 for a period of two (2) years and it clearly states the duties of the agent. These include not to:

> 2(g) "... sell the products on terms other than for cash against delivery unless the consent of the principal in writing.....", has been obtained .
>
> 2(j) "unless expressly authorised by the principal, will not collect payment for the products directly from purchasers and will ensure that all payments for the products are made to or made payable to the principal"

[8] The agreement sets out the payment terms and rate of commission in clause 5. The agreement was terminable "at anytime by giving written notice to the agent to terminate this agreement forthwith" if (among other things) ,the agent committed a breach of any term or condition of the agreement. Either party was also given the right to termite by one month's notice (see clause 6)

[9] Clause 8(b) prevented the Defendant for a period of two (2) years after the agreement had been determined from being associated with the manufacture sale or distribution in "the Territory "or outside of Jamaica" of any product "of like or similar kind" to the Claimant's product without the Claimant's prior consent. The Territory is defined as "the geographical area of St. Ann, Trelawny and Negril Proper" (see clause 1).

[10] The Claimant relies on an exhibit which is said to be an email in which the Defendant admits collecting sums which he failed to remit. The document attached to the affidavit is virtually illegible. The Claimant by affidavit of the 20th April 2015 relies on a statement of account with cover letter (NM4). This document demonstrates that after the application of commission due to the Defendant up to July 2012 the amount due to the Claimant was $1,541,738.61

[11] The Defendant in his affidavit of 25th March 2015 asserts:

> "8. That I never failed to remit any funds collected to the Claimant. However, the sums that were due were uncollected sums and I accepted the responsibility to pay up the funds but made it clear that it was uncollected funds".
>
> He relies on a document under his signature dated the 6th June 2012. That document appears to be a statement of account and concludes as follows:
>
> "I Donovan Rookwood accept liability for the total amount of $3,254,230.00 reflected on the above customers' account as at June 1st 2012 and consent to these amounts being transferred to an account receivable from me. I commit to settling this total of $3,254,230.50 by June 30th 2012. I also declare that the amounts stated as due from customers represent uncollected amounts on coffee I sold to them on behalf of Mavis Bank Coffee Factory Ltd"

[12] The Defendant further asserts in his affidavit that certain items were erroneously inserted in the account with the result that the amount due to the Claimant is really $431,000.00. Interestingly one document on which the Defendant relies is a letter dated 1st October 2013 from his attorney at law which asserts that $631,000 is the amount due. Importantly also the Defendant by that communication offered to forego some commission allegedly due to him if the Claimant would waive the restraint of trade clause.

[13] The Defendant also asserts that the restraint of trade clause precluded him earning an income. Further that the Claimant has included in the sums owed amounts owed by the customers and not by him. He asserts that,

> "as a way of enforcing the non-compete clause [The Claimant] went to my customers who are outside of the territory ....and told them that they should not

> purchase coffee from me as if they did they could be in trouble... that those customers are my own customers and not of the company as per agency agreement. That I lost customers as a result of this"

He asserts that this occurred long before the injunction was obtained. That injunction granted on the 2nd May 2014 applied to the entire island of Jamaica and not just "the territory" as defined.

[14] It does appear to me that there are mixed issues of law and facts to be determined. In the first place the amount alleged to be due from the Defendant to the Claimant is uncertain. The claim and the affidavit of the Claimant do not equate. Furthermore the Defendant is asserting that he was not in law liable for amounts uncollected from customers, although he acknowledged responsibility it was not his contractual duty to collect those amounts. The Claimant appears to concede this and contends that when approached the customers maintained they had already paid. This aspect therefore concerns issues of fact. It cannot be said that either the Defence or the Counterclaim have no real prospect of success.

[15] Then there is the question whether the agreement was terminated wrongfully or expired by effluxion of time. The agreement it seems (and I make no final determination on this) contemplates a notice even where termination is for cause. It does not appear notice was ever given. The Defendant says it was terminated. The Claimant suggests the agreement expired. Resolution of this issue will determine whether there are damages due to the Defendant and whether there is uncredited commission due. Related to this question also is the matter of the restraint of trade clause. As drafted it is limited in scope to a geographical area, and does not seem to offend public policy. The Defendant contends that the Claimant sought to apply it to the entire Jamaica and even "blacklisted" him with customers outside of the allowed area. This the Claimant denies. The fact however that the Claimant obtained an Order ex parte from this court which applied to the entire island, adds some credibility to the Defendant's contention. I express no view on these matters save to say that they are factual issues on which the Defendant does have a real prospect or possibility of succeeding. Those issues are best reserved for a trial. Their determination will affect whether there is merit in the counter claim and the amount for set off if any.

[16] The Claimant understandably places great reliance on letters admitting responsibility. These were written prior to litigation being commenced. They were also, as mentioned above, qualified by reference to whether the amounts had been paid by the customer. The Defendant contends that the admission was in the hope of a peaceful

resolution and that he had expressed an awareness of the sums not a binding agreement to pay. He merely intended to accept responsibility to collect the uncollected funds. These are largely issues of fact. The letter / admissions are not sued upon as contracts/settlement agreements. They are used by the Claimant in this litigation as evidence of an admission of liability for the sums claimed in the suit. Whether they amount to an admission is an arguable matter (particularly as the document relied upon does contain a qualification by the Defendant as to the fact that the amounts are uncollected). The contract being sued upon does not contemplate the Defendant doing collections. It does appear that a practice had developed whereby the Defendant would do collections. Whether this leads to a variation / waiver is another triable issue of fact with respect to which it cannot be said the Defendant has no realistic prospect of succeeding.

[17] I have said enough to indicate that in my judgment this application for summary judgment must be refused. As regards the application to dispense with mediation it is also denied. It does seem to me that the case is one appropriate for negotiation. In the first place a proper accounting exercise can help determine exactly whether commissions were taken into account, exactly which customers allege they have paid and any evidence of that and exactly what amount the Claimant contends is due from the Defendant. Hopefully there can be give and take on the question of the Defendant's counterclaim as well.

[18] I therefore order as follows:

1) The application to dispense with mediation and for summary judgment is dismissed with costs to the Defendant
2) Matter to proceed to mediation
3) Case Management Conference fixed for the 12th December 2015 at 11:00am

David Batts
Puisne Judge