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NMLJ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. HCV 01702 OF 2007

IN CHAMBERS

BETWEEN NEW FALMOUTH RESORTS LIMITED	CLAIMANT	
A N D	FITZROY ALLEN	1 st DEFENDANT
A N D	SHARON ALLWOOD	2 nd DEFENDANT
A N D	JENNIFER ANDERSON	3 rd DEFENDANT
A N D	MARVA ANDERSON	4 th DEFENDANT
A N D	CHRISSANA BAKER	5 th DEFENDANT
A N D	MARK BLACK	6 th DEFENDANT
A N D	JESMINA BROWN-NOBLE	7 th DEFENDANT
A N D	SUZIE CAMPBELL	8 th DEFENDANT
A N D	MAURICE CAREY	9 th DEFENDANT
A N D	DELROY COOPER	10 th DEFENDANT
A N D	HEWIN DALE	11 th DEFENDANT
A N D	ENOCH EDWARD	12 th DEFENDANT
A N D	ANTHONY FISHER	13 th DEFENDANT
A N D	CECIL FISHER	14 th DEFENDANT
A N D	LURLINE FORREST	15 th DEFENDANT
A N D	COPELAND FULLER	16 th DEFENDANT
A N D	PATRICIA GILLINGS	17 th DEFENDANT
A N D	SHARON GRIFFITHS	18 th DEFENDANT
A N D	TRACY-ANN HAMILTON	19 th DEFENDANT
A N D	ANGELLA HARRIS	20 th DEFENDANT
A N D	DELROY HENLON	21 st DEFENDANT
A N D	MICHAEL HENLON	22 nd DEFENDANT
A N D	STANLEY HILL	23 rd DEFENDANT

AND	JACQUELINE HYATT	24 th DEFENDANT
AND	MARY HILTON	25 th DEFENDANT
AND	ALTHEA HOUSTON	26 th DEFENDANT
AND	ANNETTE HOUSTON	27 th DEFENDANT
AND	MARK HOUSTON	28 th DEFENDANT
AND	LAUREL HOWE	29 th DEFENDANT
AND	ANTHONY JOHNSON	30 th DEFENDANT
AND	PHILMORE JOHNSON	31 st DEFENDANT
AND	QUINCE JOHNSON	32 nd DEFENDANT
AND	YVETTE JOHNSON	33 rd DEFENDANT
AND	ANNETTE JOHNSON-SMITH	34 th DEFENDANT
AND	DELORES KIDD	35 th DEFENDANT
AND	VICTOR KNOWLES	36 th DEFENDANT
AND	INEZ LAWRENCE	37 th DEFENDANT
AND	MARGARET MCFARLANE	38 th DEFENDANT
AND	ILEEN MILLER-ALLEN	39 th DEFENDANT
AND	CECIL NOBLE	40 th DEFENDANT
AND	MICHAEL NORMAN	41 st DEFENDANT
AND	BRENTON PALMER	42 nd DEFENDANT
AND	DORETTA PALMER	43 rd DEFENDANT
AND	GLADSTONE PALMER	44 th DEFENDANT
AND	GARFIELD PEART	45 th DEFENDANT
AND	BOYDELL REID	46 th DEFENDANT
AND	MARCIA SCOTT	47 th DEFENDANT
AND	LOUISE SEATON	48 th DEFENDANT
AND	GARTH SMITH	49 th DEFENDANT
AND	JOAN SMITH	50 th DEFENDANT
AND	TUSSAIN SMITH	51 st DEFENDANT
AND	DEVON STEELE	52 nd DEFENDANT

A N D	IAN STEWART	53 rd DEFENDANT
A N D	NORMAN SMITH	54 th DEFENDANT
A N D	BRYAN STONEY	55 th DEFENDANT
A N D	JULLIAN THOMPSON	56 th DEFENDANT
A N D	NATILDA VERNON	57 th DEFENDANT
A N D	LEO BOUCHER	58 th DEFENDANT
A N D	MANA BRUCE	59 th DEFENDANT
A N D	CHRISTOPHER BURKETT	60 th DEFENDANT
A N D	LLOYD BRYANT	61 st DEFENDANT
A N D	ROBERT CAMPBELL	62 nd DEFENDANT
A N D	GABEL ELLISON	63 rd DEFENDANT
A N D	RAUL IBAR	64 th DEFENDANT
A N D	CLIFTON MILLER	65 th DEFENDANT
A N D	BRENTON MESSADO	66 th DEFENDANT
A N D	HORACE MCKENZIE	67 th DEFENDANT
A N D	ROBERT MORRISON	68 th DEFENDANT
A N D	MICHAEL PEARSON	69 th DEFENDANT
A N D	SHAUNA ROSE	70 th DEFENDANT
A N D	JOHN SPEARE	71 st DEFENDANT
A N D	MONICA SPEARE	72 nd DEFENDANT
A N D	CARL THORPE	73 rd DEFENDANT
A N D	PAUL TOMLINSON	74 th DEFENDANT
A N D	JOHN WAYNE	75 th DEFENDANT
A N D	ORVILLE WALLACE	76 th DEFENDANT
A N D	PAULETTE WILLIAMS	77 th DEFENDANT
A N D	ALFRED WRIGHT	78 th DEFENDANT
A N D	DONALD WRIGHT	79 th DEFENDANT
A N D	WAYNE WALKER	80 th DEFENDANT
A N D	SHARON WALLACE-SEATON	81 st DEFENDANT

A N D	CORAL WILKINSON	82 nd DEFENDANT
A N D	WINNIFRED WILLIAMS	83 rd DEFENDANT
A N D	LENNOX WRIGHT	84 th DEFENDANT
A N D	PERSONS UNKNOWN	85 th DEFENDANT
A N D	ASTON BYFIELD	86 th DEFENDANT
A N D	LYNVAL CAMPBELL	87 th DEFENDANT
A N D	YVONNE GRIFFITHS	88 th DEFENDANT
A N D	CAMILLE MILLER	89 th DEFENDANT
A N D	KEITH MILLER	90 th DEFENDANT
A N D	NORMA SMITH	91 st DEFENDANT
A N D	ISLEY SUTHERLAND	92 nd DEFENDANT
A N D	SYLVESTER APHONSON THOMPSON	93 rd DEFENDANT
A N D	ANGELLA WILSON	94 th DEFENDANT
A N D	NORMAN GREENWOOD	95 th DEFENDANT
A N D	VERA HAMILTON-HILL	96 th DEFENDANT
A N D	NEWTON JOHNSON	97 th DEFENDANT
A N D	OMAR BARRETT	98 th DEFENDANT
A N D	WYCLIFFE GORDON	99 th DEFENDANT

Miss Carol Davis for Claimant.

Mrs. Jade Hollis and Miss LaToya Green instructed by Hollis & Co. for 3rd, 8th, 15th, 16th, 17th, 18th, 21st, 27th, 30th, 32nd, 34th, 36th, 39th, 40th, 42nd, 43rd, 44th, 47th, 50th, 52nd, 53rd, 54th, 74th, 77th, 81st, 86th, 87th, 89th, 90th, 93rd, 95th, 96th, 97th and 99th Defendants.

Present in person: 2nd, 3rd, 4th, 7th, 8th, 9th, 14th, 15th, 16th, 18th, 21st, 22nd, 24th, 27th, 32nd, 33rd, 34th, 35th, 36th, 39th, 40th, 42nd, 43rd, 44th, 45th, 48th, 50th, 52nd, 54th, 55th, 66th, 68th, 69th, 70th, 73rd, 86th, 87th, 90th, 93rd, 94th, 95th, 96th, 98th, 99th Defendants and Joan Dobson, Marie Dobson, Yvonne Cooper, Jermaine Campbell and Earl Johnson.

Defendants not present or represented: 1st, 5th, 6th, 10th, 11th, 12th, 13th, 19th, 20th, 23rd, 25th, 26th, 28th, 29th, 31st, 37th, 38th, 41st, 46th, 49th, 51st, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 67th, 71st, 72nd, 75th, 76th, 78th, 79th, 80th, 82nd, 83rd, 84th, 85th, 88th, 91st and 92nd.

Practice and Procedure – Fixed Date Claim Form – Defendant failing to acknowledge service - Neither Default nor Summary Judgment available to Claimant – Statement of Case showing no reasonable ground for defending the Claim - Judgment for recovery of land – CPR rr. 5.2, 12.2, 15.3, 26.3, 27.2 and 27.8.

9th January and 9th April 2009

Brooks, J.

New Falmouth Resorts Limited is the registered proprietor of a number of acres of land in the parish of Trelawny. According to New Falmouth, scores of persons have occupied the land, without its permission. It has brought this action against almost one hundred of them. Some of the defendants have filed acknowledgments of service. Others, it is said, have not done so within the time allowed for so doing. New Falmouth, through its counsel, Miss Davis has, after giving notice, applied at a case management conference, for default judgment against the latter group. Learned counsel has also applied for summary judgment against a member of the former group, a Miss Paulette Williams, on the basis that she has no defence to New Falmouth's claim.

A formal notice of application for summary judgment was made in advance of the case management conference. The primary issue to be

determined is whether judgment in default of acknowledgment of service, may be given for a claimant, by a judge in chambers, in a claim for recovery of possession of land.

The relevant provisions of the CPR

The claim was commenced by a fixed date claim form. Rule 8.1 (4) (b) of the Civil Procedure Rules 2002 (the CPR) mandates the use of a fixed date claim form for claims for possession of land. Having served the fixed date claim form, with some defendants failing to file an acknowledgement of service, what then guides a claimant who is seeking possession of land?

A claimant is not entitled to either default judgment or summary judgment in fixed date claims. Rules 12.2 (a) and 15.3 (c) respectively, preclude such judgments. The claimant's must therefore look to rule 27.2. Rule 27.2 (6) deals with a defendant's failure to acknowledge service of a fixed date claim form. It states:

“Where the defendant does not file an acknowledgment of service the claimant must file evidence on affidavit of service of the claim form and the relevant documents specified in rule 5.2 (3) at least 7 days before the first hearing.”

The procedure, thereafter, is further dealt with at rule 27.2 (7) and (8). Rule 27.2 (7) allows the court, at a first hearing of the fixed date claim, to exercise all the powers of a case management conference. Rule 27.2 (8) provides that where the claim is not defended, the court may treat the first

hearing as the trial of the claim. In those circumstances therefore, if the claimant has complied with rule 5.2 (3) and rule 27.2 (6), the court may give such judgment on the claim that it deems appropriate. Rule 5.2 (3) is the rule which requires, for these purposes, the service of an affidavit in support of the fixed date claim form, or a copy of any order of the court, which dispenses with the service of that affidavit.

In addition to entering judgment against a defendant who does not file an acknowledgment of service, the court is also allowed, by rule 27.8 (5), to enter judgment against a defendant who does not attend the first hearing. It should be noted that there is no requirement to provide the defaulting defendant with any notice that an application for judgment will be made. He would have already been warned by the "Notice to Defendant" which would have been attached to the Fixed Date Claim Form, that "[if] you do not attend at that hearing, judgment may be entered against you in accordance with the claim". Mere presence at the first hearing does not by itself constitute a defence to the claim. A prior acknowledgment of service, or an affidavit contesting the claim, is required.

The last rule to be considered, in this context, is rule 27.2 (1). It specifies that the registry must fix the date and time of hearing of fixed date claim forms. All such claim forms are fixed for hearing in chambers.

In conclusion therefore, the CPR does not allow for either default or summary judgments in fixed date claims. It does, however, permit a judge in chambers, at a first hearing of such claims, to give judgment for a claimant who is thereby seeking possession of land.

Application of the principles to the instant case

With that background, I now consider the instant case. The application for judgment has been made in circumstances where the fixed date claim form was filed on April 24, 2007. By the claim form, New Falmouth seeks, among other things, possession of land known as Orange Grove and Florence Hall in the parish of Trelawny.

On April 26, Pusey J. granted permission for service, of the fixed date claim form, on the Defendants by way of registered post and an advertisement in the Daily Gleaner which is a nationally circulated newspaper. If therefore the fixed date claim form was properly served and service was proved, New Falmouth would be entitled to have judgment entered against the defaulting defendants.

Has rule 27.2 (6) been complied with?

Evidence of the service of the fixed date claim form was provided by two affidavits. Both were sworn to by a Violet Campbell and filed on May 10, 2007. The affidavits assert compliance with the order of Pusey, J.

The filing of the affidavits of service satisfies one of the requirements of rule 27.2 (6). Another requirement placed on New Falmouth by that rule is compliance with rule 5.2 (3). New Falmouth satisfied that requirement when it filed an affidavit in support of the fixed date claim form. The final requirement of rule 27.2 (6) is more implicit than specific; New Falmouth must prove that the Defendants have not filed acknowledgments of service.

The application for judgment, filed by New Falmouth, is supported by an affidavit sworn to by its managing director, Mr. James Chisholm. He deposed that a number of Defendants have not filed defences to the Claimant's claim. He however only asserted that fact, "to the best of [his] knowledge and belief". He does not seem to have, himself, conducted a search of the file or the suit book in the Registry. There is no affidavit of search, by any other person, to support his statement. Apart from that failure, rule 27.2 (6) has been complied with.

The absence of an affidavit of search to confirm the failure to file an acknowledgement of service is not necessarily fatal to an application for judgment under rule 27.2 (8). The circumstances must be considered. There have been several case management conferences held in respect of this claim. The notices for each have been advertised in the Daily Gleaner, in accordance with the order of Pusey, J. None of the attendees have indicated

that they have filed acknowledgments which have not been recognized. In order, therefore, to avoid placing a further burden on the judge hearing the contested applications, it is feasible to grant the order for judgment. The order would, however, be subject to an affidavit of search being filed in respect of the Defendants who are said to be in default. This, in my view, will prevent a waste of the court's limited resources.

May the claim be dealt with against some defendants only?

There is no rule which prevents judgment being given against one or more defendants, while the claim proceeds to trial against others. Rule 12.9 (2), which deals with claims against more than one defendant (albeit in the context of default judgments), may perhaps, assist. That rule gives the court the power, where the claim can be dealt with separately, to enter default judgment against one or more of several defendants and to allow the claimant to trial proceed against the others. The principle should be applicable in circumstances such as these.

In the instant case there is nothing on the evidence to prevent some of these defendants being dealt with separately from the others. This is not a case where joint occupancy is alleged and there is an attempt to deal with one of two or more joint occupants.

Has New Falmouth established its case against the defaulting defendants?

In his affidavit in support of the Fixed Date Claim Form, Mr. Chisholm deposed that New Falmouth was the registered proprietor of lands known as Orange Grove and Florence Hall, in the parish of Trelawny. He exhibited copies of the relevant certificates of title establishing New Falmouth's entitlement. One of the three titles showed that that ownership dated back to 1970. The others dated back to 1974 and 2006 respectively.

At paragraph 4 of his affidavit Mr. Chisholm deposed that:

“At various dates unknown and continuing without the knowledge and consent of the Claimant, the Defendants entered on to the Claimant's land and took possession of parts of same. In the circumstances I verily believe that all the Defendants are squatters, who have formed a squatter community on the said land”

Although he does not name the Defendants in the body of that affidavit, Mr. Chisholm does name the allegedly defaulting Defendants at paragraph 3 of his subsequent affidavit (sworn to on 17th December, 2008). In the circumstances I find that New Falmouth has established that it is entitled to possession of the subject lands as against the Defendants who have failed to file acknowledgments of service. It is therefore entitled to judgment as against those Defendants, including the 43rd Defendant Doretta Palmer, for whom, Counsel, Mesdames Hollis and Green, said that they appeared.

Application for judgment against Paulette Williams

There is one Defendant who has filed an acknowledgment of service but New Falmouth has, nonetheless, applied for judgment against her. She is Sonia Williams but is named on the claim form, as the 77th Defendant, Paulette Williams. New Falmouth asserts that based on the contents of her affidavit she has no defence to its claim.

Miss Williams deposed that she entered on the land in 1998. She does not assert that she had any authority to do so. She asserted that she built her house thereon, but subsequently expanded it on the basis that she believed that she would have been given an opportunity to purchase the land.

I accept Miss Davis' submission that Miss Williams has no defence to the claim. Miss Williams is unable to claim the benefit of section 3 of the Limitation of Actions Act (preventing claims after 12 years), and she cannot properly claim the benefit of any promissory or proprietary estoppel. She does not allege that she ever spoke to any representative of New Falmouth about being allowed to stay on the land or to purchase same.

Although rule 15.3 (c) prevents the grant of summary judgment in proceedings commenced by fixed date claim form, rule 26.3 (1) (c) does allow the court to strike out a defendant's statement of case where it discloses no reasonable ground for defending the claim.

For the reasons mentioned above, I find that Miss Williams' statement of case must be struck out on the basis that it discloses no reasonable ground for defending the claim. New Falmouth is therefore entitled to judgment as against her.

It is therefore ordered that:

1. The statement of case of the 77th Defendant Paulette Williams, is hereby struck out for failure to disclose a reasonable ground for defending the claim;
2. Judgment is granted for the Claimant as against the 5th, 6th, 10th, 11th, 12th, 13th, 23rd, 29th, 31st, 35th, 38th, 41st, 43rd, 46th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 73rd, 75th, 76th, 77th, 78th, 79th, 80th, 83rd, 84th, and 85th Defendants herein;
3. The 5th, 6th, 10th, 11th, 12th, 13th, 23rd, 29th, 31st, 35th, 38th, 41st, 43rd, 46th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 73rd, 75th, 76th, 77th, 78th, 79th, 80th, 83rd, 84th, and 85th Defendants herein, shall quit and deliver up possession of the portion of the Claimant's lands (being the lands comprised in Certificates of Title registered at Volume 1109 Folio 442 and Volume 1389 Folio 427 of the Register Book of Titles) which they respectively occupy, on or before 31st May, 2009;
4. Costs of the claim in respect of the aforementioned Defendants to the Claimant, which costs are to be taxed or agreed;
5. All the above orders, except for those in respect of the 77th Defendant, shall only be effective with regard to the respective Defendants if the Claimant shall prove, by filing an affidavit of search for acknowledgment of service, that those Defendants have failed to acknowledge service of the Fixed Date Claim Form herein.