



[2015] JMSC Civ 102

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02692

BETWEEN	CAPITAL ONE N A	CLAIMANT
AND	BUSINESS VENTURES AND SOLUTIONS INCORPORATED	1 <sup>ST</sup> DEFENDANT
	ANTHONY D. THARPE (discontinued on 26 Nov. 2012)	2 <sup>ND</sup> DEFENDANT
	JACQUELINE BUCHANAN (discontinued on 26 Nov. 2012)	3 <sup>RD</sup> DEFENDANT

J. Graham and J. Beharie instructed by John Graham and Co. for the Claimant  
Business Ventures and Solutions Inc. purportedly represented by A. Tharpe  
Mr. A. Tharpe in person

Heard: November 24, 2014 and May 29, 2015

Striking out counterclaim – Striking out claim

### **Lawrence-Beswick J**

[1] These parties have been engulfed in litigation for several years. The applications have been numerous and varied and inexplicably and inextricably intertwined, involving several courts. The issues have engaged the minds of almost one dozen Judges of the Supreme Court and of the Court of Appeal.

[2] Still, applications/issues remain unresolved, and, sadly, sometimes undefinable, because of the unusual intertwining of the applications and because of the heavy reliance which Mr. Tharpe places on the law and procedure applicable in New York and in Florida which do not apply in this jurisdiction. Currently no counsel represents the 1<sup>st</sup> defendant and Mr. Tharpe, 2<sup>nd</sup> defendant, purports to represent it.

### **Applications**

[3] The chronology which follows makes it clear that the applications are overlapping and are not clear. The parties themselves were not agreed as to the applications to be considered in this hearing. In at least one instance one party regarded particular issues as having been already determined by the Court whilst the other party regarded the hearing of those issues as being part heard. The documentation did not assist in that regard.

[4] At the Case Management Conference of July 30, 2014, “an application for court orders” was adjourned to September 18, 2014 and on that day it was further adjourned to November 24, 2014. However, it was not clear as to which application was in fact adjourned.

[5] I have therefore identified the issues which I discern to be outstanding and which in my view are to be considered now by me. Those are found in the applications:

- (i) by the claimant for judgment,
- (ii) by the claimant to strike out counterclaim
- (ii) by the 1<sup>st</sup> defendant to strike out the claim.

### **Background**

[6] Mr. Alexander Burnham owned property in Montego Bay, St. James. He died, leaving Mr. David Rubin as the executor of his estate. Mr. Rubin, as executor, contracted to sell Mr. Burnham’s land to Business Ventures and Solutions Inc. (“Business Ventures”).

[7] Business Ventures paid part of the purchase price and the title was transferred into Business Ventures' name. It did not, however, pay the balance of the purchase price.

[8] Capital One N.A. ("Capital One") filed suit against Business Ventures naming Mr. Anthony Tharpe and Ms. Jacqueline Buchanan as co-defendants, and alleging that these latter were the director and director/secretary, respectively, of Business Ventures. It sought orders to rescind the contract for sale of the land, to re-convey the property to Capital One and for damages.

[9] Capital One claims to have an interest in the property. It claimed to be trustee of the estate of Alexander Burnham which had owned the land. It alleged that it held that capacity because on 1<sup>st</sup> August 2007 it had merged with North Fork Bank which had been earlier appointed, in 2006, by a New York court as co-trustee with Mr. Rubin for the estate of Mr. Alexander Burnham.

[10] Mr. Rubin died intestate in 2007. The argument was that from the New York perspective, North Fork Bank would then have become the sole trustee of Mr. Burnham's estate. Capital One is alleging that when it merged with North Fork Bank, it then became trustee. However, there is no evidence that North Fork Bank was appointed as personal representative for Mr. Burnham's estate under Jamaican law. Neither was there evidence of the operation of the New York and Florida laws which governed various aspects of the business transactions under which the parties claimed an interest in the property and which would determine the rights of the parties under those laws.

[11] On April 7, 2014, two experts were appointed to provide reports to the court. One report was to be on the law of trust and probate in New York. The other was on corporate law in Florida.

### **Claim Form**

[12] Mr. Tharpe, purportedly on behalf of the three defendants, filed an acknowledgement of service of the claim form and also a document entitled "Defence

and Counterclaim.” However, that latter document was not in accordance with the Civil Procedure Rules 2002 (CPR).

[13] At a Case Management Conference on 29<sup>th</sup> February 2012, that defence was struck out, and judgment was entered for the claimant. Business Ventures and Mr. Tharpe appealed those orders.

### **Appeal**

[14] On 26<sup>th</sup> June 2012, the Court of Appeal allowed the appeal and set aside the judgment, stating that no step had been taken to entitle Capital One to be recognized by the Supreme Court of Jamaica as the personal representative of the estate of Alexander Burnham. That was one of the reasons cited for Capital One not being entitled to judgment on the claim.<sup>1</sup>

[15] The Court of Appeal further stated that there were no averments by Capital One which placed any personal liability on either Mr. Tharpe or Ms. Buchanan. This would be another obstacle to Capital One succeeding on the claim [at par. 12].

[16] The Court of Appeal then considered the document which had been filed by the defendants, [Defence and Counterclaim] and remarked on what it described as the “offensive character” of the document, stating that nonetheless the 1<sup>st</sup> instance judge ought to have given Business Ventures an opportunity to cure the defects [par. 19].

[17] The Court then ordered that the defence shall stand struck out unless the **defendant** [emphasis supplied] files and serves an amended defence within 14 days of the order [par.6]. Although the appeal was by two defendants, the judgment of the Court referred to “defendant.” The parties in this court have argued as to the meaning of “defendant.”

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<sup>1</sup> [Business Ventures and Solutions Inc. and Anthony Dennis Tharpe v Capital One NA (Trustees of the estate of Alexander Burnham) SCCA 39/2012 delivered 5<sup>th</sup> November 2012] [at par. 10].

### **Amended Defence**

[18] Although the original defence had been purportedly filed on behalf of all three defendants by the second defendant, the amended defence was filed by the 2<sup>nd</sup> defendant on behalf of himself, on July 3, 2012. To date, almost three years after the order of the Court of Appeal, there is no record of an amended defence filed by the 1<sup>st</sup> defendant, Business Ventures. Mr. Tharpe asserts that the order of the Court of Appeal referred only to the defence to be amended by Mr. Tharpe and not by Business Ventures. I disagree with that view. Immediately before making the order, the Court of Appeal had stated that Business Ventures ought to have been given time to file an amended defence. It seems clear therefore, that if the Order is taken to refer to a single defendant, it must be to Business Ventures.

### **Further proceedings**

[19] Meanwhile, proceedings continued. On July 27, 2012, the claimant was granted an injunction restraining the 1<sup>st</sup> defendant from, *inter alia*, dealing with the property which was the subject of the claim, for a period of 28 days. On August 22, 2012 that order was extended until the hearing of the claim and the Case Management Conference was scheduled for November 26, 2012.

[20] November 26, 2012 saw the claimant filing a notice of discontinuance of proceedings against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The claimant was ordered, *inter alia*, to comply by the next day, with s. 37.3(2) Civil Procedure Rules (CPR) which provides for certifying that the notice of discontinuance has been served on every other party to the claim. The Case Management Conference was then adjourned to April 4, 2013 when it was again further adjourned to April 11, 2013.

[21] Issues remained unresolved before the court and on July 10, 2013, the Case Management Conference was adjourned to January 16, 2014 after the 2<sup>nd</sup> defendant had been ordered to file and serve an affidavit on or before July 31, 2013 to prove that he is authorised to conduct proceedings on behalf of the 1<sup>st</sup> defendant. Authorisation was filed concerning the 3<sup>rd</sup> defendant on July 18, 2013, not the 1<sup>st</sup> defendant.

[22] Again on September 30, 2013, the court ordered the 2<sup>nd</sup> defendant to file an affidavit in proof of his assertion that he is authorised to represent the 1<sup>st</sup> defendant and again that order was disobeyed.

[23] Meanwhile, on August 17, 2012, the 2<sup>nd</sup> defendant had filed a notice of application for court orders seeking ten reliefs including dismissal of the claim, summary judgment, default judgment, security for costs, security bond, an injunction, and an order barring the use of privileged information. He refiled it on October 2, 2013.

[24] On November 6, 2013, that application was dismissed with the ruling being that the 2<sup>nd</sup> defendant had no claim pending against him at the time.

[25] Two days later, on November 8, 2013, the 2<sup>nd</sup> defendant filed a notice of application on behalf of “defendants” seeking 12 orders. On January 16, 2014, the court refused five of those orders including orders for a security bond and default judgment requested by the **2<sup>nd</sup> defendant** (emphasis supplied) on the ancillary claim. Seven applications for orders were adjourned to be determined “on another date” including orders to produce the contract for sale of the land, for security for costs and damages..

### **Issues remaining for determination**

[26] The chronology detailed above indicates the numerous applications which have been made by both parties. It shows the applications which, according to the records, await adjudication:

- a) The remaining 7 orders found in paragraphs 1, 2, 8, 9, 10, 11 and 12 of the application which had been filed on November 8, 2013 and which was adjourned on January 16, 2014 to be determined “on another date.”
- b) Case Management Conference adjourned from April 7, 2014 to July 30, 2014 but which was not held, having been overtaken by various other applications.
- c) Notice of application filed September 25, 2014 by the claimant asking for judgment to be entered against the 1<sup>st</sup> defendant, rescinding the contract of sale between Capital One and Business Ventures.

- d) Amended notice of application filed September 30, 2014 by the claimant for an order striking out the defendant's counterclaim on several listed bases.

According to the parties there are two applications by Mr. Graham on behalf of Capital One and five by Business Ventures.

### **Representation**

[27] The purported representation of the 1<sup>st</sup> defendant by Mr. Tharpe was already the subject of comment by the Court of Appeal. There the court held that it was unnecessary at that stage to embark on an analysis as to whether Mr. Tharpe, not being an attorney-at-law, was entitled to file a defence on behalf of any person other than himself [Par.14 judgment]. In my view, such an analysis continues to be unnecessary at this time.

### **Discussion and Analysis**

[28] In view of the lack of precision which surrounds which applications are in fact before the court, I have placed the outstanding issues in categories and I will now discuss them in those categories. In so doing I mean no disrespect to Counsel or the litigants but aim rather to bring clarity to the issues remaining.

### **Judgment for the Claimant - Rescission of Contract**

[29] Counsel for Capital One argued that since North Fork Bank has merged with it, Capital One now has the interest which North Fork had. It would therefore now benefit from the contract which it submits North Fork had with the defendants.

[30] Mr. Tharpe countered that there should be judgment against the claimant in this matter for a number of reasons. In written submissions, he stated that the primary question to be decided is whether the Supreme Court can grant an order favourable to a claim where the claimant has no legal standing to file a claim.

[31] He argued that the Court of Appeal has already found the claim of Capital One to be insufficient. According to him, he did not enter into an agreement with Capital One.

The agreement was with David Rubin, as executor of Mr. Burnham. Mr. Rubin had been the executor of Mr. Burnham and Capital One has not provided proof that it has been legally appointed as a trustee for the Alexander Burnham Trust although a defendant has formally requested such proof. It is his view that Capital One appointed itself as trustees of the estate of Alexander Burnham without taking the legal steps necessary.

[32] It is his argument that in any event, even if they were trustees, only the executor could continue the claim. Capital One had not proved that the trustee has rights in the contract and property, subject of the claim.

[33] Mr. Tharpe submitted further that the estate of Mr. Burnham was settled in probate before North Fork Bank became involved so that not even North Fork could pursue a claim concerning it. Even moreso would that apply to Capital Bank.

[34] Mr. Tharpe's arguments in this regard are sound. In my view there has been no evidence presented so far to prove that Capital One has been lawfully appointed as trustee of the estate of Mr. Alexander Burnham. The co-trustee was North Fork Bank and there is no evidence establishing that that co-trusteeship translated into trusteeship of Capital Bank. Capital One has not provided evidence that it is the trustee or executor for the estate of Mr. Burnham, nor that it is authorised to act on behalf of the estate of Mr. Alexander Burnham.

[35] In this application no evidence has been presented of a contract of sale between Capital One and Business Ventures. Neither is there evidence that Capital One is entitled to any benefit under the contract which is the subject of this claim. It follows therefore that there can be no order for the rescission of such a contract at the instance of Capital One when there is no evidence of Capital One having any interest in the contract.

[36] Indeed in its judgment delivered in an appeal arising in this matter, the Court of Appeal commented that Capital One did not have "standing which allowed it to bring



any claim on behalf of the estate.” [par.12]. There has been no evidence filed to fill that lacuna. Capital One has not shown itself to be entitled to judgment.

### **Additional arguments**

[37] Mr. Tharpe filed additional arguments as to the reason that Capital One should not have judgment entered in its favour. He submitted that any debt there may have been is now statute barred but that in any event, the contract on which Capital One relies was forged and fraudulent.

In view of my finding above, it is not necessary to comment on these additional arguments.

### **Judgement in default of defence to counterclaim**

[38] Mr. Tharpe submitted that Capital One is in default of filing defence to the counterclaim and therefore judgment should be entered against it.

[39] Mr. Tharpe submitted that the counterclaim is against Capital One for making what he considered to be illegal collection efforts in Jamaica when all the parties are domiciled in the USA. However, before judgment can be properly entered on the counter claim, it must be shown to be a proper counter claim. The claimant says it is not proper and sought to strike it out.

### **Striking out of the counterclaim**

[40] The grounds of Capital Ventures’ application to strike out the counterclaim are several in number but for ease of discussion I will place them into categories:

- i No cause of action known to Jamaican law disclosed
- ii No details provided of the alleged conspiracy and the alleged damage
- iii Prolixity
- iv Medical Report not exhibited
- v Defamatory words not displayed

### **Cause of Action in Counterclaim**

[41] Counsel Mr. Graham focussed his argument for the counterclaim to be struck out on the absence of a cause of action. He submitted that the counterclaim signed by the 2<sup>nd</sup> defendant Anthony D. Tharpe specified the causes of action as tortious interference and civil conspiracy which are not actions recognised in Jamaican law.

[42] Mr. Tharpe has not provided any authority in support of the assertion that tortious interference and civil conspiracy are causes of action in our jurisdiction. Mr. Tharpe may have done himself a disservice in not allowing himself to be represented by counsel. Detailed and mature submissions on the law would be required to show any merit there may be in a claim introducing a cause of action now unknown to our jurisprudence.

### **Additional Omissions in the Counterclaim**

[43] In addition, Mr. Graham asserts, although the counterclaim alleges a conspiracy, there are no details in the counterclaim as to the identity of the conspirators, the nature and object of the conspiracy and the damage alleged to have been suffered as a result of the conspiracy. This, he says, must be provided as prescribed by the Civil Procedure Rules 2002 [CPR]. This assertion is well-founded in law.

[44] In the circumstances, the counterclaim as filed does not accord with the requirements of the CPR and should be struck out.

### **Judgment against Business Ventures Service**

[45] In opposing the application for judgment against Business Ventures, Mr. Tharpe challenged the validity of service on it of the process in the claim.

[46] Mr. Graham for the claimant, argued that at least four lawyers had provided addresses for service of documents for Business Ventures and documents had been served on them. He submitted that in addition, the suggestion by Mr. Tharpe that leave was needed to serve any document out of the jurisdiction holds no validity.

[47] Mr. Graham argued that this court has already ruled that having filed the acknowledgment of service plus having invoked the jurisdiction of this court and the Court of Appeal, and having gained benefit, it is impermissible for Business Ventures to now raise the issue of service.

[48] A perusal of the file shows that several Judges of the Supreme Court have already adjudicated on a multitude of applications in this matter, and the Court of Appeal also pronounced judgment on an appeal by Business Ventures that arose during the proceedings.

[49] Business Ventures cannot now be heard to complain about service, when there have been so many proceedings in which it has surrendered to the jurisdiction of the court without any challenge. In my view, the validity of service can no longer properly be an issue.

### **Summary**

[50] I have considered the matters below in an effort to bring the issues to the fore and to deal with them conclusively.

### **Defence of 1<sup>st</sup> Defendant**

[51] The Court of Appeal has ordered that the defence shall stand struck out unless the defendant files and serves an amended defence within 14 days of the order [par.6]. To date there is no record of any such amended defence of the 1<sup>st</sup> defendant having been filed. It follows that the defence of the 1<sup>st</sup> defendant stands struck out. The 1<sup>st</sup> defendant therefore has no defence to the claim.

### **Capital One's Entitlement to Judgment - Rescission of Contract**

[52] However, the claimant has not shown entitlement to a judgment against the 1<sup>st</sup> defendant. From almost three years ago the Court of Appeal ruled that Capital One was not entitled to judgment in this claim because it had no standing which allowed it to bring any claim on behalf of the estate of Alexander Burnham. Since then, Capital One has still not been shown to be authorised to file a suit against the 1<sup>st</sup> defendant.

[53] Further, one of the reliefs sought is the rescission of the contract for the sale of the land. In the absence of evidence of a contract of sale between Capital One and Business Ventures, there can be no order for the rescission of the contract. The exhibited contract shows David Rubin as the vendor and Business Ventures as the purchaser.

[54] The court cannot therefore properly enter a judgment for Capital One against the 1<sup>st</sup> defendant in the circumstances of this case.

### **Counterclaim**

[55] Despite the orders of the court, the 1<sup>st</sup> defendant has produced no evidence that proceedings and submissions which have been presented on behalf of the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant, have been made with the authority of the 1<sup>st</sup> defendant.

[56] The 2<sup>nd</sup> defendant disobeyed the Court's order of July 10, 2013 in which the Court had ordered him to file and serve an affidavit to prove that he is authorised to conduct proceedings on behalf of the 1<sup>st</sup> defendant on or before July 31, 2013. He again disobeyed a similar order made on September 10, 2013.

[57] There is therefore no authorisation presented for Mr. Tharpe to speak on the 1<sup>st</sup> defendant's behalf or to pursue any action on its behalf. The court cannot properly enter judgment against Capital One on the counterclaim purportedly filed by Business Ventures. The proof of consent/approval of Business Ventures to file and prosecute the counter claim which the court had ordered to be filed remains unfiled.

In any event vital particulars are omitted from the counter claim.

### **Conclusion**

[58] The purported defence of the 1<sup>st</sup> defendant stands struck out and the 1<sup>st</sup> defendant is therefore liable to have judgment entered against it. However, the claimant has provided no authority for it to file suit against the 1<sup>st</sup> defendant. Judgment cannot therefore be entered against the 1<sup>st</sup> defendant by the claimant. The counterclaim does not accord with the Rules of Civil Procedure. The judgment of the Court of Appeal concerning an aspect of this claim and counterclaim, has made that clear.

[59] The orders therefore are:

- i) Defence of the 1<sup>st</sup> defendant stands struck out.
- ii) Application for judgment on the claim is refused.
- iii) Application to rescind contract of sale is refused.
- iv) Counterclaim struck out.
- v) Each party to bear its own costs.