[2016]JMSC Civ. 86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 00852

BETWEEN	**PERCIVAL HUSSEY**	**DEFENDANT/APPLICANT**
AND	**PAUL WRIGHT**	**CLAIMANT/RESPONDENT**

IN CHAMBERS

Douglas Thompson for Applicant

Roderick Gordon instructed by Gordon McGrath for Claimant/Respondent

Heard: July 9 & 16, 2013 & May 27, 2016

Default Judgment - Application to set aside Default Judgment - 2nd Application - R. 13 (1) (2) (3) of CPR 2002, as amended - Definition - Promissory Note - Sec. 83 Bill of Exchange Act - Sec. 35-36, 50 Stamp Duty Act- Enforceability of Instrument - Creation of Hire Purchase Agreement.

Daye, J.

[1] A Final Judgment was entered on 5th January 2012 against the Defendant/Applicant at the request of the Claimant/Respondent on the 17th May, 2010. It was for the sum of US$124,428.16 inclusive of interest at the rate of 3 percent up to the date of judgment and costs in the amount of J$26,136.44.

[2] This was a default judgment pursuant to CPR. 10.3 (1) of the Civil Procedure Rules 2002, as amended in 2006. The Defendant, though he had acknowledged

service of the claim form by the Claimant, failed to file his defence within forty-two (42) days of the service of the claim form and particulars of claim dated February 24, 2010.

[3] The Defendant did file a defence on the 21st July 2010. However, this defence was filed out of time.

[4] The Defendant/Applicant acknowledged receipt of this final judgment on the 25th January, 2012. Consequently, he filed on the 16th February, 2012 an application to set aside the final judgment. He exhibited then a copy of his proposed defence to an affidavit sworn by his attorney on record.

[5] On 29th October, 2012 Pusey, J. sitting in Chambers heard and dismissed this Application to set aside the default judgment. It appears the reason for this decision was that the Applicant failed to provide details and particulars in his supporting affidavit of the dates of the claim form, the date of service and such other relevant pleadings as the date of entry of default judgment.

[6] As a result, the Applicant filed a re-issue notice of application to set aside the default judgment on the 2nd November, 2012. This application was a second application to set aside default judgment. It was supported by an affidavit which sought to correct the details which were absent in the first application. The same defence was exhibited to the affidavit and the grounds of the defence were the same.

Jurisdiction

[7] I accept the submission of the Defendant/Applicant which was not opposed by the Claimant/Respondent that a Judge of the Supreme Court, sitting in Chambers has an inherent jurisdiction to set aside or vary an order, where leave is given **exparte,** when new matters are brought to his attention either with respect to the facts or the law. I accept that the inherent jurisdiction does permit a Judge in Chambers to hear a second or subsequent application to set aside a default judgment. (per, Rowe P**. Gordon and Ors. v Vickers and Ors. (1990)** 27 JLR 60, per Carey JA, **Vehicles and Supplies Ltd. V the Minister of Foreign Affairs, Trade and Industry** SCCA 10/89

and per Sinclair-Haynes J. **Beckford v Quest Security Services Ltd.,** CL 2002 B 176).

[8] The only difference between the Applicant's first and second application to set aside the default judgment was the corrections of the pleadings or particulars that were omitted. Since the Applicant's defence was on file from July 2010, in the Court, and he was not able to present it at his first application, the Court permitted his second application.

The Law in Application to set aside Default Judgment

[9] Rule 13 (1) – (3) empowers the Court as follows:

(1) The Court may set aside or vary a judgment entered under Part 12, if the Defendant has a real prospect of successfully defending the claim

(2) In considering whether to set aside or vary a judgment under this rule, the Court must consider whether the defendant has

(a) applied to the Court as soon as is necessarily practicable after finding out that judgment has been entered,

(b) given a good explanation for the failure to file an acknowledgment of service or a defence as the case may be.

(3) Rule 13.4 provides for who can apply to set aside a default judgment:

"any person directly affected by the judgment (13.4 (1))

It also provides how the application should be made. It must be supported – "by evidence on an affidavit (R.13.4 (2). It must (ii) exhibit a draft of the proposed defence (R 13.4 (3).

[10] The Defendant/Applicant has satisfied the requirement that:

(i) he is a party affected by the default judgment as it is directly entered against him

(ii) he filed an Affidavit dated 2nd November, 2012 supporting his application,

(iii) he exhibited a draft defence to his Affidavit dated 21st July, 2010.

[11] In his Affidavit at paragraphs 1 to 6, he gave evidence that:

(1) he applied as soon as was reasonably practicable to set aside the default judgment after finding out if it had been entered.

(2) he has a good explanation for failure to file his defence on time, viz., he was trying to locate documents and records to instruct his Attorney but these documents were misplaced.

(3) his affidavit exhibited his defence that he has a real prospect of success.

[12] The order and sequence of the paragraphs at the Defendant/Applicant's affidavit reflect the grounds set out in R. 13.3 (1) to (2) of the CPR 2002 before it was amended in September 2006. In fact Counsel for the Claimant in his submissions and authorities of July 29, 2003 quoted the pre-amended Rule 13.3 (2).

[13] The difference between the order of sequence of the pre-2006 amended Rule 13.3 and the post 2002 CPR Rule 13.3 is material as the first ground that a judge must consider to exercise his discretion i.e. set aside a Defendant's judgment is whether the Applicant has a real prospect of succeeding in defending the claim. This warrants an explanation of the of the Applicant's affidavit in support of his exhibited defence.

[14] Both in his affidavit (paragraphs 8, 9 and 10) his defence exhibited (paragraphs 3, 4, 5) attack the validity of the three promissory notes on which the default judgment was made. He also contended that the transaction giving rise to the three promissory notes on which the default judgment was made. He also contended that the three promissory notes was a higher purchase agreement

[15] His reasons for contending that he had a good prospect of success are two: viz the validity of the promissory note and that the correct remedy of the Claimant is possession under the alleged hire purchase agreement. They are summarized in paragraph13 of his draft exhibited Defence as follows:

"13 ....

(a) The defectiveness and/or validity or unenforceability of the promissory notes: and

(b) The absence of an interest rate upon the face of the promissory notes,

(c) The Claimant's failure to fulfil the conditions upon which the said promissory notes were executed to wit, the execution of hire purchase agreements in respect of the motor trucks purchased.

[16] The test of real prospect of success was formulated by Lord Woolf M.R. in **Swain v Hillman [2001]** All ER 91 at 94 he expounded:

> "*the words 'no prospect of succeeding .... speak for speak for themselves. The word 'real' distinguishes fanciful prospect of success. They direct the Court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success".*

P .Harrison J.A. gives some guidance how to apply this test in **Gordon Stewart v Andrew Reid and Bay Roc Ltd. and (Merrick (Herman) Samuels** SCCA. No. 201 2005. Pages 6 – 7. He said:

> ***"****the prime test being" no real prospect of success" require that the learned judge do an assessment of the party's case to determine the probable ultimate success or failure. Hence, it must be a "real prospect" and not a 'fanciful' one".*

He said further:

> "*The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party".*

Discussion and analysis

[17] Now applying this direction, I consider the enforceability and/or validity of the three promissory notes. The essence of this contention is that the promissory notes are regulated and defined by the Bills of Exchange Act and the Stamp Duty Act. These three promissory notes were not stamped within seven (7) days of their execution as required by Sec. 35 of the Stamp Duty Act.

[18] The Court of Appeal in **Garth Dyche v Juliet Richardson and Michael Banbury** [2014] JMCA CIV. 23 pronounced on the effect of non-compliance of stamping a promissory note within Sec 35-36 and 50 of the Stamp Duty Act 1937. Phillips J.A. delivered the unanimous judgment of the Court of Appeal that had to decide the connectedness of the preliminary ruling of the judge at first instance that the promissory note in question which was not stamped had no evidentiary effect and could not be relied upon.

[19] The issues according to Phillips JA were whether the promissory note was stamped in breach of Section 35 of the Stamp Duty Act, 1937 and therefore not admissible by virtue of Section 36 of the Act and can the promissory note be relied on to correspond to the existence of a loan between the parties:

I pause to refer to the pleadings of the Claimant/Respondent about the three (3) promissory notes. He states in para. 2 of the Particulars of Claim:

> "The Claimant agree so to do [secure finance for the purchase of vehicle] and on three (3) occasions loaned the Defendant monies for the value of three trucks, the contracts for which were executed by way of three (3) promissory notes m three copies of which were attached as 'PW I."

The Stamp Duty Act

[20] Section 35 of the Stamp Duty Act of Jamaica, 1937, states as follows:

> "*The Commissioner shall not stamp any island or foreign bill of exchange or promissory note or foreign*

bill of lading after the lapse of seven (7) days from the execution thereof, or any coast-wise receipt, or inland bill of lading after the execution thereof".

Section 36 of the said Act further states:

"*no instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceedings for the enforcement thereof".*

[21] The requirement of a promissory note is laid down in Sec. 83 (c) of the Bill of Exchange Act, 1893. The instrument must be:

(i) in writing,

(ii) made by one person to another,

(iii) signed by the person who is making the promise to pay the(maker) although, it need not be signed by the person to whom payment is promised (payee)

(iv) must contain an unconditional promise to pay on demand or at a fixed or determinable time in the future a sum certain in money to or the order of a specified person or to person.

[22] Returning to the judgment of **Garth Dyche,** Phillips J.A. held at [53] and [54]:

> "[53] Section 50 of the Stamp Duty Act, however, appears to contemplate that even where a promissory note is not duly stamped within the time set out by Section 35, the necessary duties and fines can be paid thereon at which time the document becomes valid and available as evidence."
>
> "[54] The wording of Section 50 indicates that it does not amplify nor repeal Section 36. It therefore still remains that a document

> thus described in that section could not be admitted in evidence in order to recover on or enforce it. What in my opinion Section 50 does, however allow, is that on payment of the required Stamp Duty Act and the fine or penalty he document may be used for the purpose of evidence by virtue of this section. A person in the Appellant's position is able to say, "This document is corroborative of an agreement I had with the deceased. I now seek to tender it".

The learned judge then concluded at para. [66]:

> "[66] ......It is my view that the promissory note is admissible for evidentiary purposes once there has been compliance with Section 50 of the Stamp Duty Act...
>
> [67] .... the promissory note could be admitted in evidence as a promissory note not for the purposes for its enforcement. The provision of Sec. 35 and 36 of the Stamp Duty Act have not been complied with and so the promissory note cannot be utilized in that way...... However, once Section 50 of the Stamp Duty Act has been complied with the Appellant should be able to adduced in evidence, the promissory note in support of his contention that a loan existed".

Submissions

[23] Counsel for the Claimant/Respondent submitted in his written and oral submissions that Sec. 50 of the Stamp Duty Act was available to him to correct any defect in the promissory note if any. He did not however, concede that there was any defect or irregularity in the three (3) promissory notes. On the face of the three (3) promissory notes for US$75,000.00, US$57,000.00 and US$66,500.00 respectively there is an impressed stamp and the sums $10.00, pen $10.00 and $20.00 as the stamp fee and penalty.

[24] Counsel for the Defendant/Applicant submitted that the schedule of the Stamp Act required that the schedule of the Stamp Act required that each of these three (3) promissory notes be stamped for substantial sums of money and they were not and hence defective. No evidence was adduced that the amount he suggested is the correct stamp duty. Some witness from the Tax Administration and Assessment Department would have to give credible evidence that this is so. Accordingly on the face of it the three (3) promissory notes complied with Sec. 35 of the Stamp Duty Act and can be admitted in evidence to enforce the promissory notes.

[25] In view of the fact that the Defendant/Applicant pleaded the promissory notes and his submissions were premised on an underlying loan agreement to purchase the three trucks the consideration arises as to whether they could be used as evidence to corroborate the existence of the loan agreement. Based on the pronouncement of **Grace Dyche's** case (supra), it is my view that all three (3) promissory notes can be used in this way. It would therefore mean that the Defendant/Applicant defence would not have a real prospect of success that at the time of the trial of the action on the three (3) promissory notes are defective, invalid and/or unenforceable.

Interest

[26] It is true that there is no clause on the face of the three (3) promissory notes that state any interest to be paid or the sums promised. The Defendant/Applicant's affidavit acknowledged that there was to be a charge of ten (10%) interest per annum on each of these sums (para. 8 (d)). But of course he says that this was for a hire purchase agreement. It appears that interest was missing from these promissory notes. The omission does not affect the validity of the promissory note. It is for a fixed sum, the amount to be paid by instalment is for a fixed time for repayment and this is stated. Nonetheless, the default judgment entered was the sum of US$124,425 .16 inclusive of interest at the rate of three (3%) per annum. In my view and in exercise of the Court's discretion, the sum ought to vary the judgment to reflect the sum total of the balance of debts on the promissory notes exclusive of any interest. The sum would be the principal US$120,650.00

Hire Purchase Agreement

[27] I accept that the Applicant/Defendant relies on the ground that the three (3) promissory notes are evidence corroborative of a hire purchase agreement for three (3) trucks and not a loan agreement. This argument would be an issue of fact to determine at the trial. However, before that issue comes into play, it must be determined what is the formal requirements that constitute a purchase agreement. The defendant/Applicant submitted there was an issue whether the transaction between himself and the claimant/respondent was a loan agreement or a hire purchase agreement (paragraph 10 of written submission dated June 10, 2013). In paragraph 8 (b) and (d) of the defendant's affidavit dated 2nd November, 2012 he deponed that:

> (a) The claimant failed to execute hire purchase agreements for the motor trucks in respect of the indebtedness signified by the said promissory note, and
>
> (b) The transaction was for the purchase of there (3) motor trucks on hire purchase terms at an interest rate to ten percent (10%) per annum over a five (5) year period.

[28] In his draft defence attached to his affidavit he maintains that the transaction between himself and the claimant were hire purchase agreements, and further that it was not intended that any of the promissory notes would take effect as a contract until the execution of the hire purchase agreements for the respective motor trucks (paragraphs 2(b) and (c), 3 (a) and (b) 4 (a) and (b) 5 (a). The claimant's submission on the issue of the hire purchase agreement is encapsulated in his speaking notes hereunder:

> **"Response to Hire Purchase Argument**
>
> 12. The applicant has never prior to this hearing, demonstrated by virtue of any documentary evidence, that the agreement between the parties was that of a Hire Purchase Agreement.

13. Even so, the Respondent asserts that the arrangement between the parties subsisted solely on the Promissory Notes and there was never any Hire Purchase Agreement between them.

14. The Hire Purchase Act provides that certain prerequisite be fulfilled in order that an agreement can be classified as a Hire Purchase Agreement. These requirements are listed in Sec. 6 of the Act and include **inter alia** that the agreement contain a list of goods to which the Agreement relates sufficient to indemnity them and contain a notice that is at least as prominent as the rest of the contents of the Agreement. There is no written Agreement between the parties that fulfil either of these requirements."

15. Considering too the nature of Hire Purchase Agreements, where title to subject matter of such an Agreement remains legally vested in the vendor until payment is completed. However, this is not the situation in the instant case, since the Respondent was never the proprietor to the motor vehicle in question, conversely, the applicant at all relevant times had legal title for these motor vehicles."

Analysis

[29] Sections 5, 6 and 7 of the Hire Purchase Act, 1974 prescribe the requirements, that must be complied with before a vending Agreement can be enforced. In section 2, the interpretation clause, "vending agreements" means hire purchase agreement. Hence, the requirements for a vending agreement and a hire purchase agreement are the same. Therefore, based on the above sections, the requirements then for a hire purchase agreement are:

(a) It must be in writing which states:

(i) the cash price of the goods;

(ii) hire purchase price or total price of goods;

(iii) the amount of each installment, the number of installments to be paid and the date.

(b) the agreement must contain a list of the good(s);

(c) the address of each party;

(d) a notice of termination clause;

(e) copies of the Agreement are to be delivered or sent to the purchaser.

Remedy

[30] A vendor or an owner shall not be entitled to enforce any Agreement described as a hire purchase agreement unless each of these requirements are satisfied. In particular a owner shall not be entitled to enforce any right to recover the goods from the hirer unless these conditions are satisfied. The submission of the claimant/respondent is valid that none of these requirements are satisfied in relation to the defendant/applicant. None of the formal requirements to make a hire purchase agreement are established. Thus the defendant/applicant was not in law complain that he has lost the benefit of a remedy under the Hire Purchase Act, viz. the giving up possession of the motor trucks instead of the payment of the money under the promissory notes, as no hire purchase agreement existed.

[31] It is implied in the draft defence of the defendant/applicant that in fact there was no hire purchase agreement. He claims that the claimant failed to execute hire purchase agreements for each promissory note. On the state of the pleadings and affidavit evidence it is admitted there was no hire purchase agreement. As a matter of law there is no material to support any hire purchase agreement. The defendant/applicant cannot rely on any remedy flowing from any such non existing agreement to mount a defence which have any prospect of success.

[32] What remains standing in the absence of any hire purchase agreement as the arrangement or transactions between the parties must be the loan agreements to which the promissory notes relates. The defendant/applicant cannot now resile from the fact that he has accepted his indebtedness to the claimant/respondent and made payment on the promissory note. The defendant/applicant’s prospect of success disappears in all the circumstances.

Admissions

[33] There are other factors that stand in the way of the Applicant/Defendant's real prospect of success" of his defence. Counsel for the Claimant/Respondent, based on both his oral and written submissions that the Applicant/Defendant did not challenge or disputed that he made payments towards the sums that were owed. This is so in particular to paragraph 9 of his draft defence. He meticulously showed the balance on each of the three (3) promissory notes after his payments were deducted. His dispute would be about the quantum of the debt.

[34] Counsel for the Claimant/Respondent following up on his submissions say that the Applicant's conduct amounted to acceptance and acknowledgement that a debt is owed on an existing agreement. On the facts of **E D&F Man Liquid Products Ltd. v Patel** [2003] EWCA 472 held that in the "light of a series of unqualified admissions of the Claimant's debts over a prolonged period, prior to judgment, there was no real prospect of a successful defence".

[35] The Applicant/Defendant conduct of making payment on the debts and his explanation was of the difficulty of making further payment of the debt does appear to be an acknowledgement of the debt. He has introduced a qualification to this viz the hire purchase agreement was to be executed for the truck. However, at no time at all, as an experienced businessman prior to the claim, which should be acknowledged, did he make any request or demand for the execution of any hire purchase agreement for the three trucks. From this stage, his conduct placed alongside his assertion, put a manifest strain on his credibility that a reasonable tribunal hearing the matter could not find in his favour.

Conclusion

[36] The applicant/defendant does not, in my view, have a real prospect of defending this claim for each of the sums on the three (3) promissory notes. As matter of law each of these promissory notes has impression of stamping of a stamp duty and the penalty. They conform respectively to Sec. 5 of the **Stamp Duty Act**. They are admissible in evidence. The claimant/respondent can rely on each of them as corroborative of an

underlying financial transaction between himself and the applicant which could only be a loan agreement. The promissory notes are otherwise regular. The claimant can rely on each note to enforce each of them. As a matter of law there is no hire purchase agreement between the applicant/defendant and the claimant/respondent. No hire purchase agreement was executed. No benefit or remedy flow to the applicant/defendant from any purported hire purchase agreement for motor trucks. Such hire purchase agreements do not exist. In the absence of any hire purchase agreement the only financial transaction underlying the promissory notes would be the respective loan agreements. The applicant/defendant accepts indebtedness on these promissory notes. He must be taken to accept the loan agreement in all the circumstances.

Application to set aside default Judgment refused.

Default Judgment entered sum of US$ 124,428.16 inclusive of interest at the rate of 3% up to date of judgment at costs in the amount of J$ 26,236.44 varied as follows:

Default Judgment entered in the sum of US$ 120,650.00

Interest on the said sum of 3% per annum from the date of the Judgment to the date of payment.

Costs to the claimant/respondent to be agreed or taxed.