



[2016]JMSC Civ. 175

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2014 HCV 05915**

BETWEEN	MICHAEL SMITH	RESPONDENT/ 1ST CLAIMANT
A N D	SOUTHERN FINANCE INDUSTRIAL AND PROVIDENT SOCIETY	RESPONDENT/ 2ND CLAIMANT
A N D	JN SMALL BUSINESS	APPLICANT/ DEFENDANT

IN CHAMBERS

Philip Bernard, instructed by Philip Bernard and Company, for the Applicant/Defendant

Heard: June 3 and September 30, 2016

APPLICATION TO STRIKE OUT CLAIM – FAILURE OF 2ND CLAIMANT TO ATTEND MEDIATION – IMPORTANCE OF SETTING OUT GROUNDS OF APPLICATION IN WRITTEN APPLICATIONS FOR COURT ORDERS – FAILURE TO SET OUT ANY OR ANY SUFFICIENT PARTICULARS OF CLAIM IN STATEMENT OF CASE – STRIKING OUT OF A PARTY’S STATEMENT OF CASE ONLY TO BE USED BY COURT AS A MEANS OF LAST RESORT

ANDERSON, K. J

The background

- [1] In this claim brought by the claimants against the defendant, it is important to firstly note, that the 1st claimant has discontinued his claim. He filed a Notice of Discontinuance in that regard, on May 13, 2015.
- [2] On July 17, 2015, the defendant filed an amended application to strike out the claimants' claim. Since the 1st claimant had, prior to July 17, 2015, discontinued his claim against the defendant, it follows inexorably, that when their amended application was filed, the 1st claimant's claim against them, no longer remained extant and therefore, could not then have been, nor can it now be, struck out.
- [3] Interestingly, the defendant had, on February 9, 2015, filed an application for court orders, which has set out therein, as the orders being sought: That the claimants' claim against the defendant be struck out; or in the alternative, that summary judgment be entered for the defendant; costs; and such further and/or other relief as this court deems fit. That original application set out a number of grounds upon which it was sought, to constitute the basis for the granting by the court, of those orders.
- [4] In the defendant's amended application filed on July 17, 2015, the orders sought were that the claimants' claim be struck out and that judgment be entered against the claimants in favour of the defendant and that there be such 'and further relief or directions as the court may seem just.' There was only one ground set out in that amended application. That single ground, reads as follows:

'That rule 74.14 (5) provides that where the report of the mediator indicates that the defendant party did not attend the mediation, the court may, on the application of the claimant, strike out the defence and enter judgment against that defendant.'

- [5] The defendant has also filed yet another application for court orders. They filed same on May 13, 2015 and surprisingly, that is worded precisely the same as their amended application which was filed on July 17, 2015. Accordingly, when

this matter came before this court, in a chambers hearing, on June 3, 2015, counsel for the defendant, unsurprisingly, then informed this court, that the defendant's amended application which was filed on July 17, 2015, was filed in replacement of the defendant's application of May 13, 2015. This court will address its mind, firstly, to that amended application, prior to addressing the defendant's other application, which was filed on February 9, 2015 and will address same, once this background information has been completed.

[6] At that chambers hearing over which I presided, on June 3, 2015, the defendant was represented by attorney Philip Bernard, whereas, the 2nd claimant was, for the most part, unrepresented.

[7] They were, 'for the most part, unrepresented,' because, although there exists counsel on record for them, namely: H. Charles Johnson and Company, Attorneys-at-law and, counsel from that law firm, namely: Dwayne Houston, Attorney-at-law, did attend upon part of the proceedings in chambers on June 3, 2015, that counsel never addressed this court on any of the matters arising from any of the defendant's aforementioned court applications.

[8] Mr. Houston informed the court during the hearing in chambers, that he had another court matter to attend to and therefore, he left the chambers, before the actual submissions were made by defence counsel, on any of the defendant's applications. That was entirely inappropriate of counsel and this court hopes that such conduct, on the part of counsel, will not be repeated.

[9] What made matters worse in that particular respect though, was that when Mr. Houston addressed this court, in chambers, on that occasion, he then informed the court that he did not know who he was then representing. This court found that to be astounding and entirely inappropriate legal conduct. In the final analysis therefore, it was the 2nd claimant's representative – Mr. Baldwin Smith, who attended on this court, as a lay person and who made oral submissions in response to the defendant's applications for court orders.

Defendant's application to strike out claim, arising from the claimant's failure to attend mediation

[10] After the defendant had filed its application to strike out the claim on the sole basis that the claimants had failed to attend mediation, it is important to note that, by order of this court, made by Miss Justice Edwards, on December 18, 2015, mediation was dispensed with.

[11] Affidavit evidence filed by the defendant and deponed to, on their behalf, by Attorney Philip Bernard, has revealed, without there being any affidavit evidence filed by either claimant, stipulating contrary, that this claim was referred to mediation and the parties had selected a mediator and initially, agreed on a date and time for mediation. There was though, a cancellation of that original mediation date that had been agreed upon and in place thereof, it was agreed that mediation would be held on April 23, 2015 and Miss Josina Jackson would be the mediator. On that date, when the mediation hearing was called up, by the mediator, the claimants were not present and accordingly, the mediator's report reflects that since at least one party did not attend the mediation, the same was aborted. It is as a consequence thereof, that the defendant has sought to strike out the claimant's claim, as per their amended application for court orders, which was filed on July 17, 2015.

[12] Rules of court, require that all parties and their Attorneys-at-law (where represented), '*must attend all mediation sessions.*' **See: Rule 74.9 (1) of the Civil Procedure Rules (CPR)** in that regard, which is a rule imposed under **Part 74 of the CPR.**

[13] **Rule 74.14**, which is another rule under **Part 74 of the CPR**, provides in paragraphs (1) to (6) thereof, that –

'(1) In the event that a party, an Attorney-at-law representing a party or a mediator shall fail to comply with any of the requirements of this Part, any other

party or the mediation referral agency may apply to the courts;

- (2) The application must be supported by an affidavit setting out the nature of the alleged failure;*
- (3) Notice of the Application and a copy of the affidavit must be served on every other party;*
- (4) The court may make such order and impose such sanctions as may be permitted under these rules, including, but not limited to, costs.*
- (5) Where the mediator's report indicates that the claimant party did not attend the mediation, the court may, on the application of a defendant party, strike out the claim.'*

[14] The defendant has been in full compliance with those paragraphs of **rule 74.14**, as quoted above and in addition, has complied with **rule 74.14 (7) of the CPR**, by having provided to this court, affidavit evidence as to the claimants having failed to attend the scheduled mediation and that the claimants had notice of the date, time and place of mediation. Accordingly, the defendant is, arising from the claimant's failure to attend mediation, seeking to have their claim, be struck out. Since at present, it is only the 2nd claimant's claim that remains extant, that is the only claim that can properly be struck out.

[15] This court though, is by no means, obliged to accede to the defendant's application in that regard. Whether this court accedes to same or not, is a matter for the discretion of this court and **rule 1.1 of the CPR** requires that this court exercise its discretion in accordance with, 'the interests of justice,' in every case wherein the rules of court require or permit a discretion to be exercised.

[16] The striking out of a party's statement of case, is always, only to be ordered by a court, in exercise of that court's discretion, as a measure of last resort. Striking out of a party's statement of case, ought not to be used as an instrument of

punishment, arising from, for example, the failure of the opposing party to comply with a particular rule of court, on a single occasion. See: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1.

- [17] In the case at hand, mediation has been dispensed with. Accordingly, a Judge has drawn the conclusion that as at the date when that order was made, mediation would have served no useful purpose. Prior to that order having been made, it would have been a matter of course, that mediation was required to be engaged in, by the parties, as there exists a Practice Direction issued by the Honourable Chief Justice, requiring same.
- [18] Overall, in the circumstances, this court does not believe that it would be just, for the claimant's statement of case to be struck out, arising from a failure to attend mediation, on a single occasion, in circumstances wherein after that had occurred, this court had concluded that mediation would serve no useful purpose.
- [19] The amended application to strike out therefore, which was filed by the defendant, on July 17, 2015, is denied, but this court will make no order as to the costs of that application, since it was the 2nd claimant's failure to attend mediation, which precipitated the making of that application. In the circumstances even though costs normally, 'follow the event,' in this particular case, it would be appropriate to depart from that typical approach *vis-a-vis* the award of costs.

Defendant's application to strike out pursuant to rule 23.1 of the CPR

- [20] This court will now move on to address issues pertinent to the defendant's application for court orders which was filed on February 9, 2015. By means of this claim, the 2nd claimant has sought to recover damages for loss of interest on a loan which would have been given to the 1st claimant. They also seek damages for defamation.

- [21] They have not, at all, set out, in their Particulars of Claim, any particulars surrounding their defamation claim. Their failure to do so, is in breach of **rule 8.9 (1) of the CPR**. Such particulars were necessary, to enable the defendant to properly, not only be able to defend themselves, if they chose to do so, but also, to enable the defendant to decide, as to whether they agreed with those particulars as stated and furthermore, whether they could properly defend the claim, in that context. The failure to provide sufficient or worse yet, any particulars of their claim in that regard, has effectively precluded the defendant from adequately, or at all, responding to the 2nd claimant's claim.
- [22] The defendant has applied to strike out the 2nd claimant's claims as aforementioned, both of which are being pursued as part of this claim – Claim No. 2014 HCV 05915. They have applied to strike out same, pursuant to **rule 26.3 (1) of the CPR**, in that, *inter alia*, 'the claimants' statement of case discloses no reasonable grounds for bringing a claim against the defendant.
- [23] The 2nd Claimant's Particulars of Claim, forms part and parcel of their, 'statement of case.' See the definition of the phrase – 'statement of case,' as set out in **rule 2.4 of the CPR**, in that regard.
- [24] This court is of the considered opinion, that since the 2nd claimant has failed to particularize its claim against the defendant, for damages for defamation, it follows inexorably, that the 2nd claimant's statement of case, has disclosed no reasonable grounds for bringing the claim. This court is empowered, by **rule 26.3 (1) (c) of the CPR** to strike out the 2nd claimant's statement of case, or part of it, on that ground.
- [25] This court grants the defendant's application, as regards the 2nd claimant's claim, which the defendant filed on February 9, 2015 and will strike out the 2nd claimant's defamation claim.

[26] The 2nd claimant has also though, claimed for loss of interest on a loan which it has stated in its Claim Form, would have been given to the 1st claimant. The particulars of that intended loan, have not been set out in the Claimants' Particulars of Claim. Also, the 2nd claimant has not particularized anything as regards its suggested loss of a chance in the granting of that supposed loan to earn interest on same.

[27] In the circumstances, for precisely the same reasons as already set out above, with respect to the 2nd claimant's defamation claim, the 2nd claimant's claim for loss of interest, is also struck out. As such, the claimant's entire statement of case, is struck out.

Conclusion

[28] In the circumstances, the defendant's amended application to strike out this claim, which was filed on July 17, 2015, is denied. No costs will be awarded to the 2nd claimant in respect of that application. The defendant's application for court orders, which was filed on February 9, 2015, is granted and the 2nd claimant's statement of case, is struck out and costs of the claim, inclusive of the costs of their application for court orders which was filed on February 9, 2015, will be awarded to the defendant as against the 2nd claimant only, with such costs to be taxed, if not sooner agreed.

Orders

1. Pursuant to the defendant's application for court orders, which was filed on February 9, 2015 and which is granted, the 2nd claimant's statement of case is struck out and the costs of that claim, inclusive of the costs of their application for court orders which was filed on February 9, 2015, are awarded to the defendant, with such costs to be taxed, if not sooner agreed.
2. The defendant's amended application for court orders, which was filed as an amendment of their application for court orders, which was filed on May 13, 2015, is denied. No order is made as to the costs of the defendant's application filed on May 13, 2015 and as amended and filed on July 17, 2015.
3. The defendant shall file and serve this order.

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Hon. K. Anderson, J.