



[2018] JMSC Civ. 5

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2014 HCV 06105**

<b>BETWEEN</b>	<b>LORRAINE WHITTINGHAM</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ODETTE MCNIEL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>KENNETH MAXWELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Ms. Colleen Franklin instructed by Marion Rose-Green & Co., for the Claimant

Mr. Giovanni Gardner instructed by Archer Cummings & Co., for the Defendants.

**HEARD: 8<sup>th</sup> and 12<sup>th</sup> of January, 2018**

**Oral judgment**

***Application for extension of time to file Defence – Summary Judgment – whether there is real Prospect of successfully defending claim – Rule 15.2 of the Civil Procedure Rules***

**PALMER HAMILTON, J. (AG.)**

**Background**

[1] On the 29<sup>th</sup> January 2009 Ms. Whittingham was driving her motor vehicle licensed 6969DA along the Haughton Court Main Road in the parish of Hanover while preparing to turn into her driveway motor vehicle licensed PC3700 collided into the rear of her motor vehicle. The motor vehicle licensed PC3700 was owned by the First named Defendant, Odette McNiel and was being driven by the Second named Defendant, Kenneth Maxwell, the permitted driver of the said motor vehicle and/or the servant of the First named Defendant. With respect to

Ms. Whittingham's claim, the property damage was settled by the First named Defendant's insurers, Advantage General Insurance Company in May 2009 and a claim was filed in the Supreme Court on the 12<sup>th</sup> day of December 2014. The First and Second named Defendants filed their defence on April 16, 2015 and March 5, 2015 respectively.

### **Applications**

[2] Two applications were dealt with before me. One by the Claimant for Summary Judgment and the other made by the first Defendant for extension of time to file Acknowledgment of Service and Defence. The applications were "symbiotic" in that the decision in one –would automatically impact the other.

### **The Issues are twofold:**

- [3] (a) Should the application for extension of time to file a defence be considered in isolation? and
- (b) Does the Respondent/Defendant in the application for Summary Judgment have a real prospect of successfully defending the claim or issue based on rule 15.2 of the Civil Procedure Rules (CPR)?

### **Defendants' Submissions**

[4] Learned Counsel for the Defendants, Mr. Giovanni Gardner, submitted that what is really in issue is whether for the Defendants there is a reasonable prospect of defending this claim. He added that this would mean whether or not there are any issues relating to liability or quantum which the Defendant expressly addresses. He further submitted that the defence ought to be admitted based on rule 15.4(2) of the Civil Procedure Rules (CPR) and the defence should be taken as filed, since the application for Summary Judgment was filed after their defence was filed. Rule 15.4 (2) states:

*“If a claimant applies for summary judgment before a defendant against whom the application has been made has filed a defence, that defendant’s time for filing a defence is extended until 14 days after the hearing of the application.”*

As a result of this rule, Mr. Gardner opined that though the defence was filed after the application for Summary Judgment, the defence should be “automatically” permitted to stand as filed.

### **Claimant’s Submissions**

[5] On the other hand, learned counsel for the Claimant, Ms. Colleen Franklyn contends that the defence as filed (though late) puts forward no issue as to fact or law and what is evident are admissions which are consistent with the Claimant’s case. Ms. Franklyn invited the court to examine the 1<sup>st</sup> Defendant’s affidavit filed March 3, 2015 at paragraph 8 where it was admitted that the Claimant received injuries as a result of the collision. The 1<sup>st</sup> Defendant at paragraph 8 stated *“that although it is admitted that the accident occurred and the Claimant may have suffered injuries, I strongly believe that the Claimant’s injuries are being exaggerated as I live in close proximity to the Claimant and I have seen her on numerous occasions as early as a few weeks after the accident manoeuvring her goats without any sign of suffering from the pains which she alleges in her Particulars Claim.”*

[6] Ms. Franklyn further submitted that at no time did the 1<sup>st</sup> Defendant’s affidavit, challenge the Defendants’ liability or give a contradictory view of how the accident occurred. Ms. Franklyn added that paragraph 12 of the 1<sup>st</sup> Defendant’s affidavit makes it clear that there is no issue as to liability but only one as to quantum of damages.

## **Law and Analysis**

- [7] I have carefully examined the Defences of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' and juxtaposed them with the Claim and Particulars of Claim. The issues raised by the Claimant were not addressed, refuted or contradicted in the Defences filed. Even if the Defendants wished to be as brief as possible, the Defendants ought to have at least stated their version of the incident. The Defences lack substance.
- [8] In considering the application for Summary Judgment, it should be granted if the Defendants have not met the threshold of establishing that they have a "real prospect of successfully defending a claim." I will deal with this aspect further on in my judgment. In the light of the dearth of material upon which the court can act in considering a defence, I also examined the affidavit filed by the 1<sup>st</sup> Defendant in support of her application for extension of time. It is noteworthy that the Defendants did not think it prudent to file an affidavit in response to the application for Summary Judgment, but instead chose to rest on the affidavit filed in support of the application for extension of time to file their defence.
- [9] In examining the affidavit of the first Defendant, Ms. Odette McNeil, paragraph 12 expressly states:

"That accordingly I do verily believe that I do have a reasonable prospect of successfully defending the Claim herein on quantum of damages, if any." (My emphasis)

In my judgment, there is no other interpretation for what was pellucidly expressed by the 1<sup>st</sup> Defendant, that she believes there is a reasonable prospect of her successfully defending the claim as to quantum of damages. It is clear the 1<sup>st</sup> Defendant is implicitly admitting liability but seeks only to limit her exposure to damages.

[10] I have also examined the affidavit of the Claimant filed in support of the Application for Summary Judgment and paragraph 10 is quite instructive. It states as follows:

“That I am very surprised at the Defendants position, as the second defendant in the presence of police officer (sic), who was investigating the accident, apologized to me for causing the accident and admitted that the accident was his fault.”

The Defendants did not even venture to state in their defence whether that admission was in fact true or false. As such, it would stand as being uncontested or accepted by the Defendants.

[11] In the case of **Fiesta Jamaica Ltd v National Water Commission**, [2010] JMCA Civ 4 there was a thorough analysis of part 15 of the Civil Procedure Rules (CPR) as it relates to Summary Judgment applications and the definition in **Swain v Hillman**, [2001] 1 ALL ER 91 (the locus classicus) of the phrase “no real prospect of succeeding.” Harris, JA in considering whether an extension of time to file a defence ought to be granted, looked at this area of the law in conjunction with whether a Summary Judgment application should have been successful. Having also analysed **Three Rivers District Council v Governor and Company of the Bank of England**, [2001] UKHL16, she stated that the important question is whether there was material which demonstrated that there are issues to be investigated at trial.

[12] I also examined the case of **Amos Virgo v Steve Nam**, Claim No. 2008 HCV 00201, which was relied on by the Defendants. Evan Brown, J (Ag.) (as he then was) stated:

*“In what may be regarded as the locus classicus, **Swain v Hillman** [2001] 1 ALL ER 91, Lord Woolf MR. said- “No real prospect of succeeding” was self-explanatory. The word ‘real’ directs the court to ascertain whether there was a realistic prospect, in contradistinction to a ‘fanciful’ prospect of*

*success. The phrase is said not to mean 'real and substantial' prospect of success. Neither does it mean that summary judgment will only be granted when the claim is 'bound to be dismissed at trial.' The Defendant's prospect of successfully defending this claim, in light of his several admissions, must surely be fanciful, if not delusional. While it is uncommon for summary judgment to be entered in negligence claims, it is not without precedent. In fact, **Dummer v Brown**, supra, was itself a negligence action in which summary judgment, was entered. There, as here, the application for summary judgment was grounded on the defendant's ex ante confession of guilt. That confession in the instant case is further supported by the defendant's contemporaneous admission and the ex post facto indemnification in respect of the property damage. So, if summary judgment was properly entered there, a fortiori (sic) summary judgment may be entered in this case."*

- [13] Evan Brown, J. (Ag.) went further to state with respect to the effect of an admission that:

***"An admission made anywhere is good everywhere. Even if that admission is to be weighed in the balance according to learning in J.W. Stupple, its admissibility is not thereby impugned in any way"***

The case of **Virgo v Nam** did not assist the Defendants.

- [14] I also examined whether the defences filed conformed to rule 10.5 of the Civil Procedure Rules which states:

***"(1) the defence must set out all the facts on which the defendant relies to dispute the claim.***  
***(2) such statement must be as short as practicable.***  
***(3) in the defence the defendant must say -***

- (a) *which (if any) of the allegations in the claim form or particulars of claim are admitted;*
  - (b) *which (if any) are denied; and*
  - (c) *which (if any) are neither admitted or denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
- (4) *Where the defendant denies any of the allegations in the claim form or particulars claim:-*
  - (a) *the defendant must state the reasons for doing so; and*
  - (b) *if the defendant intends to prove a different version of events from that given by the claimant.*
  - (c) *the defendant's own version must be set out in the defence.*
- (5) *Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –*
  - (a) *admit it; or*
  - (b) *deny it and put forward a different version of events,*
  - (c) *the defendant must state the reasons for resisting the allegation.*
- (6) *The defendant must identify in an annex to the defence any document which the defendant considers to be necessary to the defence.*
- (7) *A defendant who defends in a representative capacity, must say-*
  - (a) *what that capacity is; and*
  - (b) *whom the defendant represents.*
- (8) *The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12.”*

[15] With respect to learned Counsel for the Applicant/Respondent, I am unable to make an assessment or determination of the issues to be investigated without material that should be borne out in the defence. In remaining faithful to the

overriding objective of the Civil Procedure Rules, I cannot give favourable consideration to the 1<sup>st</sup> Defendant's application for an extension of time to file her defence. The material advanced in the proposed defence does not pose any answer to the claim. In my view, the proposed defence raises no triable issues. This application therefore fails and is refused.

### **Whether the Criteria for the grant of Summary Judgment have been met**

[16] The long established principle pertaining to Summary Judgments is that the decision whether or not to grant an application for summary judgment is discretionary. As Lord Hutton in the **Three Rivers case** [2001] stated:

*“The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give Summary Judgment. It is a ‘discretionary’ power; that is, one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no ‘real prospect’ he may decide the case accordingly.”*

[17] Also in the case of **National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green** [2014] JMCA Civ. 19 Brooks, JA stated:

*“In considering applications for summary judgment, the judicial officer is not required to conduct a mini trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case. There is authority for the principle that parties to litigation must know at the earliest opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application.”*

- [18] An application for Summary Judgment is decided by applying the test of whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly (See text by Stuart Sime - **A Practical Approach to Civil Procedure, 5<sup>th</sup> edition**). The phrase “real prospect of success” does not mean “real and substantial” prospect of success. Nor does it mean that summary judgment will only be granted if the defence is “bound to be dismissed at trial.” Summary Judgments are not meant to dispense with the need for trial where there are issues which should be considered at trial and these hearings should not be mini trials. They are simply Summary hearings to dispose of cases where there is no real prospect of success.
- [19] The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof. (See **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297).
- [20] If the 1<sup>st</sup> Defendant in the case at Bar had filed a defence on the merits then the defence would seek to show a defence with a real prospect of success by establishing any of the following factors as adumbrated in the text “A Practical Approach to Civil Procedure” by Stuart Sime, (5<sup>th</sup> edition, page 217 paragraph 19.6.3):
- “(a) A substantive defence for example, volenti non fit injuria, frustration, illegality, et cetera.*
  - (b) A point of law destroying the Claimant’s cause of action.*
  - (c) A denial of the facts supporting the Claimant’s cause of action.*
  - (d) Further facts answering the Claimant’s cause of action, for example, an exclusion clause, or that the defendant was an agent rather than a principal.”*

I find that the Defendants were unable to cross the above mentioned threshold.

[21] The Defendants also relied on the case of **City Properties Ltd v New Era Finance Ltd.**, [2013] JMSC Civil 23. My only comment on this case, which was merely addressing an application made for the Statement of Claim to be struck out, is that there was a reasonable basis for a defence disclosed in the pleaded defence. This case also does not assist the Defendant because as Batts J stated:

***“the question is whether the statement of case filed by the Defendant discloses reasonable grounds for bringing or defending the claim.”***

[22] To borrow the sage words of Evan Brown, J at paragraph 26 of the **Virgo Case**:

***“the admissions made by the Defendant make the case against him impregnable, the statement of case could have been struck out that is, the defence is wholly unfit to go to trial. Surely it would bring the administration of Justice into disrepute if a Defendant were allowed to admit liability in respect of the property damage arising from a motor vehicle accident but deny liability in respect of the personal injury claims.”***

### **Disposition**

[23] Therefore, in my opinion, the proposed defence was unmeritorious and the application for the Summary Judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is granted.

### **Orders**

1. Notice of Application for Court Orders dated and filed March 13, 2015 is refused and dismissed.

2. Order in terms of Notice of Application for Court Order for Summary Judgment dated and filed May 27, 2016.
3. Action to proceed to assessment of Damages.
4. Defendants are allowed to file a defence limited only to quantum of damages
5. Assessment of Damages is set for a date to be fixed by the Registrar.
6. Claimant's Attorney-at-law to prepare, file and serve orders made herein.