2020 JMSC Civ 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 03275

BETWEEN	**BUSINESS VENTURES & SOLUTIONS INC**	**1st CLAIMANT**
AND	**ANTHONY THARPE**	**2nd CLAIMANT**
AND	**BERESFORD RUDDOCK**	**1st DEFENDANT**
AND	**THE BIG APPLE ROOMS HOTEL ET AL**	**2st DEFENDANT**

IN CHAMBERS

Claimants unrepresented. The second Claimant appears in person and as the representative of the first Claimant.

Miss Suzette Spence on behalf of the First and Second Defendants.

Heard: October 7, 2019, and January 22, 2020

ORAL JUDGMENT

Application for Unless Order- Application to Strike Out Defence- Application to add Parties

PETTIGREW-COLLINS J.

THE APPLICATIONS

[1] The claimants filed a Notice of Application for Court Orders (NOCA) on the 8th of November 2016. In that NOCA, they seek an order to strike out the defendants' defence

or alternatively "*entry of summary judgment on the non-defamation part of the claim….*" In a NOCA filed on the 20th of September 2018, the claimants ask that the court grants an unless order as well as an order permitting them to substitute certain individuals as parties in place of the 1st claimant. The 2nd claimant, who purports to be the representative of the 1st claimant, again included the orders sought in the November 2016 application in this later application.

NO LOCUS STANDI

[2] In response to all the applications, Ms. Spence for the defendants submits that Mr. Tharpe has no locus standi to bring these applications. She accepts that at the time the claim was filed on the 3rd of August 2016, Mr. Tharpe was in fact a director of the 1st claimant. Counsel, perhaps unwisely so, provided an affidavit in the very matter of which she has conduct.

[3] In that affidavit, she exhibited an order made on the 26th of July 2017 by a judge in a United States Bankruptcy Court of the Southern District of Florida approving the sale of Mr. Tharpe's right, title and interest in the 1st claimant. She exhibited a number of other documents which I do not find it necessary to give details about.

[4] Ms. Spence directed the court to the provisions of Rule 24.4(1), (4) and (5). For completeness, it is necessary to have regard to 24. (2) and (3) as well. These rules state as follows:

> *(1) Subject to any statutory provision to the contrary, a duly authorized director or other officer of a body corporate may conduct proceedings on its behalf.*
>
> *(2) A body corporate must be present by an Attorney-at-Law at any hearing in open court unless the court permits it to be represented by a duly authorized director or other officer.*

(3) Permission to represent the body corporate at the trial should wherever practicable be sought at a case management conference or pre-trial review.

(4) In considering whether to give permission the court must take into account all the circumstances including the complexity of the case.

*(5) In paragraphs (1) and (2) "**duly unauthorised"** means authorised by the body corporate to conduct the proceedings on its behalf.*

[5] Ms. Spence's argument in part is that Mr. Tharpe is no longer a duly authorized director nor an officer of the 1st claimant and he cannot, therefore, act as a representative of, nor conduct proceedings on behalf of the 1st claimant. Her further argument is that the 2nd claimant in his personal capacity has no interest in the property with respect to which there are alleged breaches.

[6] Mr. Tharpe contends that whatever documents which emanated from proceedings in a court in the United States which Ms. Spence might have, are not relevant to the present proceedings. According to him, those foreign documents should be struck out, as Ms. Spence did not give the required notice that she intended to rely on foreign law. He stated further that the outcome of those proceedings in the foreign court was based on fraudulent information presented to the court in those proceedings.

[7] I should point out that it is not disputed that the 1st claimant is a company incorporated under the laws of the United States. There is prima facie evidence that Mr. Tharpe was divested of his interest in, and directorship of the 1st claimant by virtue of proceedings brought in the United States and is therefore no longer a director of the 2nd Claimant and would therefore no longer have locus standi to continue proceedings brought on behalf of the second Claimant. That position is of course subject to the view that a court in this jurisdiction will take as to the applicability/enforceability of the orders of a foreign court in this jurisdiction. I note that the affidavit evidence indicate that the order was made in a court within the jurisdiction where the 2nd claimant was incorporated. Mr Tharpe included in the claim form and particulars of claim, a claim for

damages for defamation and damages for breach of constitutional rights. There can be no question of his locus standi in relation to that aspect of the claim, so far as he claims that his own constitutional rights have been breached and that he has been defamed.

[8] For the purposes of these proceedings, I do not find it necessary to come to any conclusion one way or the other as to Mr. Tharpe's locus standi as it relates to other aspects of the claim. The applications made by Mr. Tharpe can very easily be addressed without doing so.

SUBSTITUTION OF PARTIES

[9] The bases on which this application to substitute parties was brought according to Mr. Tharpe, is that Business Ventures, the second claimant, is a foreign corporation which has been dissolved and therefore cannot engage in any business activities other than the winding-up process. Further, that the winding-up process has been completed and thus all property rights and interests formerly belonging to Business Ventures have passed to other parties. These other parties the explanation continues, are equity holders who are the successors of all the legal and security interests in Business ventures. It is noted that there was no affidavit filed in support of this application up to the morning when the hearing commenced. I should point out that upon resumption of the hearing after the luncheon adjournment, Mr. Tharpe advised the court that an affidavit had been filed during the luncheon adjournment. At that stage, the hearing of the application was almost completed. The applications had been made and the applicant/claimant was being allowed to respond to certain matters raised by the defendants' Attorney- at-Law. The court refused to have regard to the affidavit.

[10] Mr. Tharpe says further that no order of a foreign court can take effect outside the jurisdiction where that order is made. He also states that he has been appointed by a judge of this court to represent the 1st claimant in other proceedings that are pending. He made lengthy submissions both orally and in writing that I do not find it necessary to refer to for the purpose of coming to a decision.

[11] I accept submissions made on behalf of the defendants to the effect that having regard to the absence of evidence setting out the basis on which the order should be made, then the court should decline to make any such order. The defendants' Attorney at Law observed that the consent of the persons who are to be made parties in place of Business Ventures in this claim were not filed. I note that Mr. Tharpe has filed consent of persons whom he says are to replace Business Ventures in a claim numbered 2010 HCV 02692. Among the myriad of documents appended to submissions filed by him on the 23rd of April 2019, are to be found consent from one Hope Sterling and one Delroy Tharpe. They both state in their respective affidavit that they are equity partners in real estate developments "that have been damaged".

[12] The defendants' Attorney at Law has also argued that in accordance with the provisions of Rule 19.4(2), the substitution of a party may only be made while the relevant limitation period is current. She states further that the relevant 12-year period in relation to the recovery of land and the 7-year period allowed for disputing a boundary have expired. She noted that the claim was filed on August 20, 2016 and that the causes of action in relation to the trespass arose some 29 years ago, therefore any rights the claimants had in relation to the areas encroached upon would have been extinguished.

[13] Even if I were to accept these propositions, it is to be remembered that there are other aspects to the claim which are not affected by limitation. In any event, it is unclear to me the basis on which Ms. Hope Sterling and Mr. Delroy Tharpe could be substituted as parties in this claim.

[14] Further, in circumstances where it appears that the 2nd claimant has been divested of his interest in, and directorship of the 1st claimant, this court would be hard pressed to grant an order on the application of the 2nd claimant and 1st claimant in circumstances where the very question of the capacity of the 2nd claimant to act on behalf of the 1st claimant looms large. For these reasons, I decline to grant the order.

APPLICATION FOR UNLESS ORDER

[15] Mr. Tharpe filed an affidavit on the 23rd of April 2019 in support of his application for an unless order. He states that he is seeking this order pursuant to Rule 26.4 of the CPR, on the basis that the defendants have violated more than one order of the court and the court, therefore, has the inherent power to issue an unless order. He claims that the defendants have not complied with the order of Anderson J. made on the 15th of December 2016.

[16] Mr. Ruddock filed an affidavit in response on the 16th of November 2018. In essence, it is not denied that there was a breach of Anderson J's order. The order in question states:

> *"The status quo as presently exists with respect to the property which is the subject of this claim shall be maintained until further order of this court as regard the same."*

[17] It is not disputed that subsequent to the making of the order of Anderson J., the defendants took steps to remove the section of the building which admittedly encroached upon property owned by the first-named claimant, Business Ventures and Solutions Ltd. This encroachment forms a part of the basis of the claim itself.

[18] In response to this aspect of the application, the defendants' Attorney-at-Law pointed to the application made by the defendants to discharge the order of Anderson J. She directed the court to the order of Laing J made on the 5th day of March 2018. This order states:

> *"Order number 2 of the orders of Anderson J. made on the 1st day of December 2016 and any injunctive relief which is founded thereon is discharged on the undertaking of counsel given on behalf of her clients, the applicants, to remove the encroaching area of the building and foundation by the 19th of March 2018."*

[19] Counsel argues that that order, if complied with, would have the effect of curing any breach of the order of Anderson J. I agree with this contention. She further contends that the order of Laing J. has been complied with. She directed the court's attention to the affidavit of Mr. Grantley Kindness filed on the 9th of September 2019. Without going into the details of the affidavit provided by Mr. Kindness, it is stated at paragraph 13 that all encroachments on the land have been rectified. Mr. Kindness said further, that subsequent to his inspection of the property on the 20th March 2017, he never informed Mr. Tharpe or anyone that the encroaching foundations on the land comprising Certificate of Title registered at Volume 665 Folio 11 were still in place. Of course, that land refers to the land registered to the first named claimant.

[20] The basis for Mr Kindness' last mentioned averment is the assertion of the 2nd claimant in his affidavit that Mr. Kindness in a conversation with him, which took place at the subject property, acknowledged that the foundation of the offending building remained in place. This was after according to the 2nd claimant, he Mr. Tharpe pointed out the remaining part of the foundation which was clearly visible. Mr Tharpe did not state precisely when this happened.

[21] It is not disputed that Mr. Tharpe commissioned a survey which was carried out by the said, Mr. Kindness. The sketch plan of that surveyor's report was exhibited by Mr. Tharpe to his affidavit filed on the 23rd of April 2019. At the bottom of that plan, it is stated that

> *"The concrete pavement and foundation runs along the registered boundary."*

Mr. Tharpe asked the court to say that this evidence is proof that the foundation of the building is still encroaching on property registered at Volume 665 Folio 11. He emphasized that the order from Laing J. was specific to the removal of the foundation.

[22] Mr. Tharpe insists that an "Unless Order" be made. He has not been specific as to the terms of the order he seeks.

[23] An "Unless Order" is a form of sanction. Rule 26.4(1) provides

> *"Where a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "Unless Order."*

Rule 26.4(5) provides:

> *An "Unless Order" must identify the breach and require the party in fault to remedy the default by a specified date."*

[24] This court does not accept Mr. Tharpe's interpretation of that which is stated at the foot of the plan exhibited by him. What is stated there is not in my view evidence that the offending building remains on the property registered to the 1st claimant. This court is loath to accept Mr. Tharpe's evidence as to what Mr. Kindness allegedly told him in the absence of cross-examination of Mr. Kindness, in circumstances where Mr. Kindness' affidavit evidence is that all encroachments upon the land have been rectified. It should be pointed out that Mr. Kindness exhibited diagrams of three different surveys done, the first of which showed the encroachment, whereas the other two, based on what is gleaned from looking at the diagrams, show no encroachment. Further, in paragraph 15 of his affidavit, Mr. Kindness sought to clarify that what exists, (he did not specifically say on the property) is a paved piece of concrete platform on the ground level. He said it does not go underground and in his opinion is not considered as an encroachment.

[25] For the reasons stated above, as well as that which was observed at paragraph 14 of this judgment, this court sees no basis upon which the request for an "Unless Order" sought by Mr. Tharpe and the 1st claimant with Mr Tharpe as its representative, should be granted.

STRIKING OUT OF THE DEFENCE/ ENTERING SUMMARY JUDGMENT

[26] The relevant rule when considering an application to strike out a claim is rule 26.3. Rule 26.3(1) states:

> *"In addition to any other powers under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court:-*
>
> *(a) ….*
>
> *(b) ….*
>
> *(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;*
>
> *(d) …"*

[27] The application for summary judgment is governed by Part 15 of the Civil Procedure Rules (CPR). Rule 15.2 states that:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that*
>
> *(a) …*
>
> *(b) The defendant has no real prospect of successfully defending the claim."*

[28] In accordance with rule 15.4(1), the claimants filed this application after the defendants filed their defence. No issue has been taken with service of the application, therefore it is taken that service was effected in a timely manner, hence rule15.4(3) was complied with. This aspect of the claimants' application was supported by affidavit as required by rule 15.5 (1) (a).

[29] In **Swain v Hillman** [2001] 1 All ER 91, applied in numerous local cases including **Caribbean Outlets Limited v Beverly** CL 2002 C 145, the distinction was

made between a real prospect as distinct from a fanciful prospect of success Mr. Tharpe cited part 15 of the CPR. He says the defendants have no prospect of succeeding in the claim or on any of the issues. I think he meant to say that the defendants have no real prospect of successfully defending the claim. He states further that the defendant Mr. Ruddock admits to the non-defamation parts of the claim.

[30] The claimants claim encompasses various matters. Without attempting to itemize the various aspects of the claim, Mr Tharpe alleges breaches of the claimants' constitutional rights. Presumably this includes supposed constitutional rights of the company as well as his own constitutional rights since he has repeatedly made reference to the **claimants'** constitutional rights. (emphasis on the plural). He also claims that the defendants are in breach of certain restrictive covenants and he has sought to recover the sum of $USD10,000,000.00 or $JMD1.2 billion on account of what he termed "economic damages". He claims that the defendants have trespassed on the property of the claimants. He even seeks orders against entities not parties to the claim.

[31] The defendants filed a defence traversing the rather lengthy claim. I should point out that although Mr Tharpe alleges breaches of constitutional rights in the claim, he has not stated in the claim or the particulars of claim a statement of the facts on which he relies to substantiate this aspect of the claim, as he is required to do by virtue of the provisions of Rule 8.9 (1) of the Civil Procedure Rules (CPR). It would therefore be difficult for the defendant to respond to those aspects of the claim. The defendant has nevertheless attempted to do so. In any event proceedings for redress under the constitution cannot be the subject of summary judgment as per rule15.3(4) of the CPR.

[32] In relation to breaches of restrictive covenants alleged, the defendants deny that restrictive covenants have been violated. Except to the extent that breaches of such covenants result in a trespass upon the claimant's property or in some way affect the claimants' property rights, the claimants have no locus standi to bring a claim in relation to same. Even assuming that Business Ventures has a claim in this regard, as observed earlier, the question of whether Mr. Tharpe can continue the claim on behalf of Business Ventures is a live issue.

[33] As far as the claim for trespass by virtue of the alleged encroachment is concerned, the defendants have shown that there is a reasonable prospect of successfully defending that aspect of the claim. The defence put forward is that the claimants would by now be estopped from asserting claim to ownership by virtue of provisions of. of sections 3, 4(a) and 30 of the Limitation of Actions Act. The defence of limitation is open to the defendants in the circumstances alleged by the claimants. So far as the trespass on account of the objects placed upon the land is concerned, the defendants have in essence asserted a defence of licence and stated further that when it was evident by virtue of the conduct of Mr Tharpe that the licence was revoked, the defendants promptly removed the offending items.

[34] The defendants have raised the question of the claimants' locus standi to maintain the claim. That particular defence was never pleaded. However, it is the affidavit evidence of Ms. Spence that the circumstances changed after the claim was instituted. There is no evidence that the defendants have filed an amended defence to address that issue. It would still be open to the defendants to seek permission to do so.

[35] It follows that if the court is of the view that the defendants have a real prospect of successfully defending the claim, then there would be no basis for striking out the defence or to grant summary judgment in favour of the claimants. That application too is refused.

[36] The costs of these applications are awarded to the 1st and 2nd defendants to be taxed if not agreed.