



[2024] JMSC Civ. 113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

**IN CIVIL DIVISION
CLAIM NO. SU2023CV03446**

**BETWEEN JOY ELLIS CLAIMANT
A N D SEAN PAUL GILBERT DEFENDANT**

IN CHAMBERS (VIA ZOOM PLATFORM)

**Mr. Richard Reitzin instructed by Reitzin & Hernandez Attorneys-at-Law for the
Claimant/Applicant**

Ms. Shannon Scott Attorney-at-Law for the Defendant/Respondent

HEARD: July 23, 2024 and September 24, 2024

***Civil Practice and Procedure – Application for Summary Judgment – Whether the
Defendant has a Defence With a Real Prospect of Success in Whole or in Part
Concerning Whether or not the Claimant was Involved in the collision or injured
in the Collision***

STAPLE J

BACKGROUND

[1] On the night of June 25, 2023 there was a collision between the Defendants motorcycle and a motor vehicle in which the Claimant was travelling along East Dulwich Drive in Kingston.

[2] The Defendant does not dispute the fact of the collision. Nor does he dispute that it was his riding of his motor cycle that caused the collision¹. What he did dispute,

¹ See paragraph 4 of his Amended Defence filed on July 19, 2024.

in that Defence, was the Claimant's involvement in the collision and that the Claimant suffered any injuries as a consequence of the said collision.

- [3] The Claimant filed this present application for Summary Judgment and supported it with an affidavit from herself. The Court made orders for the Defendant (and the Claimant) to file affidavits in support of their positions (the Claimant and the Defendant's initial affidavits were both irregular) and this was done.
- [4] The Court is now called upon to decide whether to award summary judgment for the Claimant against the Defendant. It is to be noted that the Court is empowered to grant summary judgment on any issue that it feels warrants same and to disallow it where appropriate.

THE LAW ON SUMMARY JUDGMENT

- [5] The Claimant has applied, pursuant to CPR Rule 15, for entry of summary judgment against the Defendant on the basis that the Defendant's case, as pleaded, has no real prospect of success.
- [6] CPR Rule 15.2 sets out the test for Summary Judgment:

"The court may give summary judgment on the claim or on a particular issue if it considers that –

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue." (Emphasis supplied)

- [7] The issue of what is meant by a "real prospect of success" has now been firmly settled since the case of **Swain v Hillman**.² A case with a real prospect of success

² [2001] 1 All ER 91

is one that has a realistic chance of success at trial. Realistic as opposed to fanciful.

- [8] It is for the Claimant to show that the Defendant's claim has no real prospect of success³. According to Edwards JA in the ***Blackwood v Lyew et al*** decision at paragraph 55 of the Judgment, "This means that, in the light of Part 15 of the CPR and the overriding objective of dealing with cases justly, the court should examine the case which will ultimately go to trial, and if a case is so weak that it has no reasonable prospect of success "it should be stopped before great expense is incurred" (see *Three Rivers* at page 260, paragraphs 91 to 93, and 95)."
- [9] Edwards JA also went on to set out, at paragraph 69 of the said judgment, some material factors that the Court should consider when examining whether to enter summary judgment or not.
- [10] Edwards JA said, "In order to have a real prospect of success, a defence must be more than merely fanciful or arguable. If the defendant's case taken at its highest shows a distinctly improbable defence, it will be right to enter summary judgment. On an application for summary judgment, a defendant may seek to show a substantive defence in law, a point of law which destroys the cause of action, a denial of the facts on which the claimant relies to set up the cause of action, or further facts which answer the claimant's cause of action. Where a statement of case is contradicted by contemporaneous documents or materials on which it is based, summary judgment is appropriate (see *Three Rivers* at paragraph 95). In the case of ***ED & F Man***, as well as in ***Sagicor Bank v Taylor-Wright***, a defence which otherwise may have had some success was destroyed by clear written admissions by the defendants."

³ See the case of *Blackwood v Lyew et al* [2022] JMCA Civ 17

[11] I remind myself that I am not to engage in a mini trial or a protracted examination of highly complex legal arguments that may be more appropriate for a full trial. Though it is equally true to note that if the question turns on the interpretation of a statute or term of a contract, it may not necessarily be a bar to summary judgment. One such case was *Jamaica Public Service Co. Ltd v Rosemarie Samuels*⁴. This case concerned the interpretation and application of a document being relied upon by the Appellant to have and maintain an electricity distribution tower on the Respondent's land. Despite the complex issues involved in the resolution of the dispute (the Court had to interpret the document as well as consider whether there was a contractual license expressly or implicitly created and so forth), the matter was properly resolved using summary judgment.

THE EVIDENCE

[12] The Claimant's affidavit evidence is quite detailed. She gave a full description of the collision and the circumstances leading up to same; and where she was positioned in the vehicle at the time of the collision. What she did not say in her affidavit was that she sustained any injury as a consequence of the collision in which she was involved.

[13] This is in circumstances where she knew or ought to have known that the Defendant was disputing her involvement in the collision as well as the fact of her being injured as a consequence.

[14] The Defendant's evidence is that he admitted to the collision, but not to the Claimant's involvement nor her sustaining damage in the vehicle. His affidavit was sworn on the 26th June 2024.

[15] The Defendant then filed the Amended Defence on the 19th July 2024 and in that Amended Defence he stated at paragraph 5 that he saw all passengers leave from

⁴ [2012] JMCA Civ 42

the vehicle and none of them complained of being injured. What I found curious about this is that he still has yet to explicitly say that the Claimant was not amongst those persons in the vehicle. This is after the Claimant would have deponed to an affidavit as well as pleaded in her Particulars of Claim that she was a passenger.

DOES THE DEFENDANT HAVE A REAL PROSPECT OF SUCCESS IN HIS DEFENCE?

Was the Claimant in the Car?

- [16] On the question of the Claimant's involvement in the collision, in my view the Defendant has no Defence with a real prospect of success. The Defendant has not produced any evidence to refute the Claimant's pleading **and** evidence of her presence in the vehicle at the time of the collision.
- [17] His evidence, in his affidavit, amounts to a non-admission. This is even worse than a bare denial. There is no explanation from the Defendant as to why he cannot say, for certain, whether or not the Claimant was involved in the collision. He has not said he had faulty memory and so cannot remember the details of the faces of the persons in the car. His Amended Defence does state that at least 1 female was a passenger in the car at the time of the collision.
- [18] In the absence of any evidence or pleading specifically denying the presence of the Claimant in the car at the time of the collision, the Defendant ought to have said something in evidence as to why he could not traverse the Claimant's case as to her presence. Rule 10.5(3)(c) states that a defendant which of the allegations raised in a particulars of claim are neither admitted nor denied **because the Defendant does not know whether or not they are true...**(emphasis mine). In paragraph 5 of his Affidavit evidence all he does is say he does not admit. He does not go further to say that he does not admit because he does not know whether the assertion of the Claimant that she was in the car was true.

[19] So concerning the presence of the Claimant in the vehicle at the time of the collision, I am minded to grant summary judgment to the Claimant on this issue.

Was the Claimant injured as a Result of the Collision?

[20] In my view, the Claimant fails on this ground. It is true that she has pleaded that she was injured in her Particulars of Claim as well as attached a medical report. However, she has not given any evidence of same in her affidavit in support of her application.

[21] Mr. Reitzin cited the case of ***ASE Metals NV v Holiday of Elegance Limited***⁵ in support of his application. But I am not of the view that it helps him much.

[22] The simple fact is that a Claimant, having asserted that the Defendant has no real prospect of successfully Defending the Claim, must then put forward the affidavit evidence on which they are relying to make such a claim. In a personal injury claim, the evidence must show that they were injured as a consequence of the Defendant's action. Here, the Claimant has not put that in evidence.

[23] However, she has pleaded same and attached a medical report. This pleading has been properly traversed by the Defendant. In those circumstances therefore, I am of the view that this aspect of the claim has to be resolved at trial.

CONCLUSION

[24] The Claimant has succeeded in establishing that she should get summary judgment on the issue of whether or not she was in the motor vehicle at the time of the collision. She has pleaded it, put it squarely and properly in her evidence

⁵⁵ [2013] JMCA CIV 37

and she has not been challenged in this regard by the Defendant in either his pleadings or his evidence. So he has no real prospect of successfully defending this issue.

[25] However, on the issue of whether or not the Claimant was injured as a result of the collision, I am not satisfied that the Defendant's case has no real prospect of success.

DISPOSITION

- 1 The Claimant is granted summary judgment on the issue of whether or not the Claimant was a passenger in the taxi which collided with the Defendant's motor cycle on the 25th June 2023 along East Dulwich Drive in Kingston.
- 2 The Claimant is not granted summary judgment on the issue of whether she was injured as a result of the collision.
- 3 Costs to the Claimant on the application to be taxed if not agreed
- 4 The matter is set for case management on the 20th November 2024 at 11:00 am before Staple J for 40 minutes.
- 5 Any applications that the parties wish to make shall be filed and served within time to heard at the case management conference.
- 6 Claimant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 4th October 2024 by 4:00 pm.

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Dale Staple
Puisne Judge (Ag)