[2020] JMSC Civ.106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV.04757

BETWEEN	**EASTON LOZANE**	**CLAIMANT/APPLICANT**
AND	**JUNIOR BECKFORD**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Ms. Shirley Richards instructed by Richards, Edwards Theoc & Associates for the Claimant/Applicant

Ms. Claudine Stewart-Linton instructed by Burton-Campbell and Associates for the Defendant/Respondent

Heard: April 20 and May 22, 2020

Civil practice and procedure– Application to Strike out- Application for Summary Judgment– Whether defence complies with rule 10.5(4) of the Civil Procedure Rules– Whether defence amounts to a bare denial or whether the defence of inevitable accident is made out

Stephane Jackson-Haisley, J

BACKGROUND

[1] This matter concerns an application to strike out and an application for summary judgment by Mr Easton Lozane (hereinafter "the Applicant") against Mr. Junior Beckford (hereinafter "the Respondent"). The Amended Notice of Application for Court Orders filed on the 3rd day of March 2020 seeks the following orders: -

> *"1. That the Defendant's statement of case be struck out;*

2. *That the Court gives summary judgment on the Claim;*

3. *A declaration that the Defendant's defence has not complied with rule 10.5(4) of the Civil Procedure Rules;*

4. *A declaration that the matter proceed to Assessment;*

5. *Costs of the Application to the Claimant to be taxed or agreed;*

6. *Such further and or other relief as may be just."*

[2] The grounds upon which the Applicant seeks the Orders are as follows: -

"1. The Defence filed by the Defendant discloses no reasonable grounds of defending the Claim;

2. *The Defendant has no real prospect of successfully defending the Claim;*

3. *The Defendant has no good defence to the Claimant's Claim;*

4. *The Defendant has not set out reason for denying the allegations in the Claim and Particulars of Claim and/or a different versions of events from that given by the Claimant;*

5. *It would be just for this Honourable Court to grant the order as prayed."*

[3] The Application is supported by the Affidavits of the Applicant filed on the 14th day of January 2020 and on the 3rd day of March 2020. The Respondent did not file any affidavits in response however opposed the application and set out his reasons for doing so in the form of submissions.

[4] The Applicant initiated proceedings against the Respondent by way of a Claim Form and Particulars of Claim both filed on the 29th day of November 2018 in which he seeks damages for negligence. He alleges that on the 12th day of June 2017 at around 7:00 a.m. he was walking along Cecelio Avenue from the direction of Half Way Tree when on reaching the section of the sidewalk that adjoins premises occupied by the St Andrew Preparatory School, he observed the Defendant's vehicle coming from the Half Way Tree area. The vehicle collided into a grey Honda Stream motor car which was in a line of traffic heading from Cecelio Avenue and then mounted the sidewalk and hit the Claimant pinning him to the metal fence which surrounds the St Andrew Preparatory School. The Claimant alleges that as a result of the accident he suffered serious injury causing him to suffer pain, loss and

expense. He annexed three (3) medical reports and a police report to his Particulars of Claim.

[5] The Respondent filed a Defence on the 14th day of March 2019 in which he indicated that the accident took place without any negligence on his part and notwithstanding the exercise of all reasonable care and skill in driving the motor car licensed 9874 HE. He further alleged that he was driving within the speed limit along Half Way Tree Road when suddenly and without any warning there was a pull on the steering wheel which caused him to lose control of the vehicle. The car went across the roadway onto Cecelio Avenue where it collided with a motor car and then with the Applicant.

[6] He further averred in his Defence that the motor vehicle had no known mechanical defect that would cause it to operate as it did. He admitted that the Applicant suffered injuries as detailed in the medical report from the Kingston Public Hospital dated the 24th day of January 2018 but put the Applicant to strict proof in relation to the injuries detailed in the other medical report as well as to the contents of the police report.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[7] Counsel on behalf of the Applicant made written submissions which can be summarized in point form as follows: -

1. The Defence cannot amount to an inevitable accident as the definition of inevitable accident excludes a circumstance where the cause of the accident originates with the Defendant. The Respondent admitted to losing control of the vehicle resulting in the accident. There was no reference to external factors which could have contributed to the Respondent operating his vehicle in the manner in which he did;

2. The Respondent failed to provide reasons as to why his actions were not negligent and a bare denial cannot stand on its own;

3. Reliance was placed on cases to include the Judgment of Rattray J in **Medine Forrest v Kevin Anthony Walker anor** [2019] JMSC Civ. 25 where the Defendant denied negligence in circumstances where the Claimant's vehicle was stationary. The Court found the Defence amounted to a bare denial and granted Summary Judgment. The Court relied heavily on the case of **Janet Edwards v Jamaica Beverages Limited**, Suit No. C.L 2002/E-037, a judgment delivered on the 23rd March, 2010 for what constitutes a bare denial.

4. In response to the Defendant's submissions, counsel distinguished the case of **Beckford v Blackwood** [2013] JMSC Civ. 1622 by highlighting that in this case both the Applicant and the Respondent agree that the Applicant suffered loss; and

5. The Respondent has no real prospect of successfully defending the Claim.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[8] Learned Counsel outlined the principles which govern applications for summary judgment and submitted that the application should be refused for the following reasons: -

1. The Defence complied with rule 10.5 (4) of the CPR, particularly paragraphs 4-6. The Defence does not constitute a bare denial;

2. The details of the Defence amounts to what can be properly termed as "inevitable accident" which can properly be raised in law;

3. Reliance was placed on **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th Edition, page 3 and the cases **Bolton Henry & others** [2012] JMSC Civ 25 and **Beckford v**

Blackwood (supra) in order to highlight the elements of the Defence of inevitable accident

4. The cause of the accident and the issue of liability are live and remains disputed between the parties. This can only properly be tested at a trial; and

5. The Defendant has a real prospect of successfully defending the Claim.

LAW AND ANALYSIS

[9] The submissions advanced by both sides revolved around whether or not the Court should grant Summary Judgment. To a lesser extent there were arguments made with respect to the application for striking out and so I will commence by examining the question of whether or not summary judgment should be granted.

Application for Summary Judgment

[10] In considering whether or not to grant an application for summary judgment the court must direct itself to the provisions outlined in rule 15.2 of the CPR coupled with the overriding objective contained in part 1 of the CPR in an effort to ensure justice is served between the parties. I have carefully analysed the pleadings and the evidence before the Court at this juncture. The overarching question to be answered is does the Respondent's statement of case disclose any real prospect of succeeding at trial.

[11] Part 15 of the CPR permits the Court to determine a claim or a particular issue in a claim without undergoing a trial. Rule 15.2 states as follows: -

> *'15.2 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.'

[12] Rule 15.6(1) also outlines the court's powers in granting summary judgment. It states: -

'15.6 (1) On hearing an application for summary judgment the court may-

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.'

[13] As it relates to the principles of law relating to summary judgment, so well-established so much so that they are now trite, it would be redundant for me to outline in any great detail the case law on the subject. I will however, highlight in brevity some of the essential principles from some of the leading authorities in order to establish the legal framework on which the application is being considered.

[14] In the well-known authority of **Swain v. Hillman** (supra) lord Woolf MR defined the words "real prospect of success" in the following terms: -

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is opposed to a 'fanciful' prospect of success…. It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible…. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial".

[15] Lord Hutton in **Three Rivers DC v. Bank of England** [2001] 2 All ER 513 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."*

[16] Lord Hope at page 542 stated: -

> *"The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in light of that evidence. To that rule there are some well-recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the fanciful basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence."*

[17] I also find guidance in the case of **Gordon Stewart et al v Merrick Samuels** SCCA no. 2/2005 at page 94 where Harrison J.A stated as follows: -

> *"The prime test being "no real prospect of success" requires that the learned trial judge to do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". 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. "Real prospect of success" is a straightforward term that needs no refinement of meaning".*

[18] From the authorities above I glean that in assessing whether the Respondent has a real prospect of success, it is necessary for me to form a conditional view of the outcome of the claim. However, I am restricted from conducting a mini-trial on disputed facts which, at this juncture have not been tested and investigated on the merits. I note that the question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof as illustrated in the case of **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297. It is noteworthy to state here, that, the burden of proof upon an application for summary judgment rests with the applicant, to adduce sufficient evidence, that the Respondent's Defence has no realistic prospect of success, if it

were to proceed to trial. To have a real prospect of success, a case has to carry some degree of conviction and has to be stronger than merely arguable as seen in the case of **Bee v Jensen** [2007] RTR 9.

[19] In applying the above stated principles to the instant application, what is clear is that the Respondent has raised the defence of inevitable accident. Central to the determination of the issue in this case is an understanding of the defence.

[20] The authors of Charlesworth & Percy on Negligence, 7th Edition on page 196, paragraph 3-83 stated as follows: -

> ***Generally****. In an action, based on negligence, it is open to a defendant to establish that there was no negligence on his part, in which event he will then succeed in defeating the claim. Where the facts proved by the plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negativing his liability, and one way, in which he can do this, is by proving inevitable accident.*
>
> ***Meaning of inevitable accident****. Inevitable accident is where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention on his part…"*

[21] In the case of **Ritchie's Car Hire Ltd. v Bailey** (1958) 108 LJ 348, the defendant advanced the defence of inevitable accident. The defendant disclosed that his early-morning collision with a kerbside tree had occurred as a result of a cat, suddenly and unforeseeably scurried out in the road in front of him from his near side. The defendant stated that he had swerved in an effort to avoid the said collision. The defence of inevitable accident which he advanced succeeded.

[22] In **Lloyd Wisdom v Janet Johnson** C.L. 1996/W.-240, there was a collision between the plaintiff's minibus and the defendant's motorcar. The defendant had contended that the collision was inevitable due to the presence of oil on a particular section of the roadway. The issue for the court was whether the defendant could avail herself of the defence of inevitable accident. The court ultimately held that for the defence to succeed, the defendant had to prove that something happened over which she had no control, the effect of which could not have been avoided by the exercise of care and skill.

[23] The case of **Fawkes v Poulson & Son** (1892) 8 TLR 725 is also another in which the defence succeeded. In that case the plaintiff was a boilermaker working in the hold of a ship. He was injured by a bale that slipped from a crane as it was being lowered into the hold of the ship. The defendants, a stevedoring firm, were successful on appeal in establishing the defence of inevitable accident. It was proven that preventing bales from always slipping was a practical impossibility.

[24] The case of **The Albano** [1892] P 419 is also another noteworthy one. Lord Esher, MR indicated that for the defence of inevitable accident to succeed, the defendant must satisfy the court that something over which he had no control happened, and the effect of which could not have been avoided by the exercise of care and skill.

[25] The cases cited demonstrate that the essence of the defence is whether the failed actions or precautions taken to prevent or avoid the accident were reasonable in all the circumstances of the case. I agree with Learned Counsel for the Applicant that the definition excludes a circumstance where the cause of the accident originates with the defendant, or where he invites or volunteers himself in the unfolding circumstances. It must be determined whether the actions of the Respondent were those that a reasonable man would have taken to avoid the accident? The terms of the Defence contending inevitable accident are set out in paragraphs 4-6 as follows: -

> *"4. It is denied that the accident is caused by the Defendant. The Defendant will say that he was driving along the speed limit along Half Way Tree Road in the parish of Saint Andrew when suddenly and without any warning there was a pull on the steering wheel which caused him to lose control of the vehicle. The car went across the roadway onto Cecelio Avenue where it collided with a motor car then with the Claimant.*
>
> *5. The Defendant will say that the motor vehicle had no known mechanical defect which would cause it to operate as it did.*
>
> *6. The Defendant will say that the accident took place without any negligence on his part and notwithstanding the exercise of all reasonable care and skill in driving the motor car."*

[26] Having examined the pleadings, I am satisfied that the Respondent has properly raised the defence of inevitable accident in that he provided the circumstances of

how the accident happened and asserted that he had no control over the event. A defect in the steering wheel as he contended would prima facie suggest that he would have lost control of one of, if not the most critical mechanism of directing the function of motor vehicle. The critical question however is whether actions or precautions taken to prevent or avoid the accident were reasonable in all the circumstances of the case. Could he have taken any evasive action or did he just volunteer into what was unfolding? His actions, however, are what the Court will use to decide whether he falls outside of the criteria of the defence he is seeking to raise. Such critical evidence must be resolved by an assessment of the evidence and the application of the relevant law.

[27] After an examination of rule 10.5 of the CPR, I find that he has, in an albeit short way, set out the facts on which he relies to dispute the claim. He has put forward reasons for resisting the allegation of negligence. Therefore, I do not agree that the Defence is a mere denial of the Applicant's Claim. However, from the cases previously cited, in which the defence of inevitable accident succeeded, it is clear that the Applicant's route to obtaining judgment is by no means clear-cut and straightforward in the circumstances.

[28] The Applicant has contended that the Respondent has failed to put forward any document that speaks to the alleged mechanical defect of the motor car. Whilst this will certainly bolster the Respondent's case, I am further guided by the learned authors of **Blackstone's Civil Practice**, 2012 where it is postulated that it is not required that the evidence be compelling, but simply enough evidence to give a real prospect of a contrary case. Further, the case of **International Finance Corporation v. Utexafrica S.P.R.L.** [2001] EWHC 508 discloses that "real prospect of success" does not require a party to convince the court that their case must succeed as the prospect of success may be real even if it is improbable. Mummery, L.J. said in **Bolton Pharmaceutical Co Ltd v. Doncaster Pharmaceuticals Group Ltd and others** [2006] EWCA Civ 661 that the court should hesitate to grant an application for summary judgment if *"reasonable grounds exist for believing that a fuller investigation into the facts of the case would*

add to or alter the evidence available to a trial judge and so affect the outcome of the case". I cannot say with conviction that the factual assertions of the Respondent are of no real substance. In the circumstances, I am not prepared to grant summary judgment.

[29] In the circumstances and in light of the Applicant's contentions I will briefly consider the option of striking out the statement of case. If there are no reasonable grounds for bringing an action, the court ought to strike it out pursuant to rule 26.3(1)(c) of the CPR which 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 –*
>
> *c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or ..."*

[30] The law in respect of striking out a statement of case is settled and the established legal position can be found in **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July, 2007, in which Harris, J.A. stated at page 29: -

> *"The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."*

[31] Similarly, in the case of **Drummond Jackson v British Medical Association and Others** [1970] 1 WLR 688, Lord Pearson opined at page 695 that: -

> *"Over a long period of years it has been firmly established by many authorities that* ***the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases****." [my emphasis]*

[32] As I outlined above, the Respondent has shown on credible grounds that he has a statement of case than is better than merely arguable in the circumstances. His defence of inevitable accident is sufficiently mounted and established at this stage.

[33] It bears emphasizing that the Defence of inevitable accident is not an easy one to prove. At trial the Respondent would be obliged to rely on some expert evidence to support his contention. No doubt, a report supporting the Defendant's contention would cement his defence. It was no doubt with that in mind that the learned Master who conducted the Case Management Conference on December 11, 2019 made an order listed as Order 3 in the following terms:

> *"The Defendant is to produce a report from the relevant traffic authority to indicate whether in June 2017 the Defendant's motor vehicle was presented for inspection after the accident and to indicate whether the motor vehicle was found to have any defect. The Defendant is to disclose the report to the Claimant's Attorneys-at-Law and to file same in the Court on or before January 17, 2020."*

[34] To date the Defendant has failed to comply with this Order. When I enquired of counsel for the Defendant how soon they expected to comply with this order I was advised that this would be done by the middle of June. I therefore formed the view that it would be appropriate in this situation to impose an unless order to sanction his failure to comply within the time provided and also to urge compliance.

[35] The imposition of an unless order is provided for in rule 26.4 of the CPR. Ward L.J. in the English decision of **Hytec Information Systems v Coventry City Council** [1997] 1 WLR 1666 stated as follows: -

> *'An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.'*

[36] In all the circumstances I am prepared to make an unless order for the Respondent to produce this report in compliance with the Order of Master Tania Mott Tulloch Reid dated December 11, 2019.

ORDERS AND DISPOSITION

[37] In the circumstances I make the following Orders: -

1. The application to strike out is refused.

2. The application for summary judgment is refused;

3. The Defendant/Respondent having failed to comply with Order 3 of the Case Management Orders made by Master, Mrs. Tania Mott-Tulloch-Reid on December 11, 2019, he is hereby required to comply with the said Order on or before June 22, 2020.

4. If the Defendant/Respondent fails to comply with Order 3 above on or before June 22, 2020 his case stands as struck out.

5. Costs to be costs in the Claim.