



[2020] JMSC Civ 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 00159

BETWEEN	GREGORY MCINTOSH	CLAIMANT
AND	HECTOR REID	1ST DEFENDANT
AND	CORDINAL WARREN	2ND DEFENANT
AND	EVERTON BEVERLEY	3RD DEFENDANT
AND	ORAL PAYNE	4TH DEFENDANT
AND	CABLE & WIRELESS JAMAICA LIMITED	5TH DEFENDANT

IN CHAMBERS

Miss Kristina Beckford instructed by Kinghorn & Kinghorn for the Claimant

Stacia Pinnock Wright for the 4th and 5th Defendants

Mrs Claudine Stewart-Linton instructed by Burton-Campbell and Associates for the 3rd Defendant

Heard: February 17, 2020 and March 20, 2020

Application for Summary Judgment - Application for Striking Out – Question of Fact – Motor Vehicle Collision

T. HUTCHINSON, J (Ag.)

[1] The matter before me concerns an amended application for summary judgment which was filed on the 7th of November 2018 on behalf of the 4th and 5th

Defendants against the Claimant and 1st and 2nd Defendant. It was subsequently withdrawn against the 1st Defendant on confirmation that he had not been served with the Claim Form and as such was not a party to the Claim for the sake of these proceedings. In this application the following orders are sought;

1. Summary Judgment be entered against the Claimant, 1st and 2nd Defendants.
2. The Claimant's case against the 4th and 5th Defendants be struck out.
3. Costs to the 4th and 5th Defendants.
4. Such further and other relief as the Court deems fit.

[2] The Applicant relies on a total of 6 grounds in making this application the main ones for the purpose of my ruling are;

1. The Claimant was not a passenger in the 5th Defendant's vehicle
2. The it was 1st Defendant's vehicle that collided into the rear of the 5th Defendant's vehicle.
3. That the 1st and 2nd Defendant have no real prospect of a successful defence in this matter.
4. That the Claimant has no real prospect of succeeding on the claim against the 4th and 5th Defendants.

[3] The Application was opposed by Mr Kinghorn for the Claimant as well as Mrs Burton-Campbell for the 3rd Defendant. The second defendant was not in attendance for this hearing although proof of service of the application was provided.

[4] In relation to this application Mrs Pinnock for the 4th and 5th Defendants provided written submissions as well as a list of authorities. These have been thoroughly

reviewed by the Court and will be referred to in the course of my ruling but not in detail. No legal submissions were filed by other Counsel present but they have helpfully reminded the Court of the relevant legal principles as well as the evidence contained in the affidavits and the standard that must be met by the Applicant in order to succeed.

In treating with this application, I have taken note that the relevant rule for consideration is found at Part 15.2 CPR which states;

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.

- [5] This provision was examined by the Courts in the celebrated case of **Swain v Hillman [2001] 1 All ER 91** as well as in our local court of appeal decision of **Gordon Stewart et al v Merrick Samuels SCCA no. 2/2005** and the guidance provided by the respective Courts has been noted.
- [6] It is the contention of Counsel for the Applicant that the need for a trial involving the 4th and 5th Defendants has been rendered wholly unnecessary in light of the fact that the Claimant is unable to succeed in his case against them and the same is true of the 2nd Defendant.
- [7] In support of this position, she referred to and relied on the Affidavit of Oral Payne, the 4th Defendant in which he outlined being rear ended by the vehicle owned by the 1st Defendant. Reliance was also placed on an Accident Report prepared by the Police which she says bears the conclusion that it was the driver of the 1st Defendants vehicle who sought to overtake the vehicle belonging to the 5th Defendant and caused the collision. Counsel also made reference to the POC where the alleged actions of the respective Defendants was outlined.

- [8] A number of authorities were relied by Mrs. Pinnock and in the course of her submission the Court's attention was specifically drawn to the authority of ***NCB & Owen Campbell V Toushane Green [2014] JMCA 19***. The authorities referred to have all been carefully reviewed and the legal principles outlined therein have been noted and applied to my reasoning in the instant case.
- [9] It was Mrs Pinnock's contention that the Claimant's statement, at paragraph 7 of his Particulars of Claim, that the motor vehicle in which he had been travelling was collided into by the vehicle owned by the 1st Defendant is sufficient evidence that liability would lie with the 4th and 5th Defendants.
- [10] She also argued that the Claimant cannot prove on a balance of probabilities the negligence alleged against the 4th Defendant. Ms. Pinnock also contended that the 1st Defendant's motor vehicle then collided into the 3rd Defendants vehicle in which the Claimant was a passenger and which was being driven by the 2nd Defendant, this she submitted was further proof that the 4th and 5th defendants in no way contributed to the Claimant's injury and raised doubts as to whether he had a real prospect of succeeding on the claim against them.
- [11] It was also submitted by Mrs Pinnock that the 5th Defendants vehicle did not make contact with the vehicle in which the Claimant was a passenger and as such the claim against the 4th and 5th defendant is baseless and without merit.
- [12] In his succinct submissions on the point, Mr Kinghorn observed that on a review of Mr Payne's affidavit there is no mention of his duty as a driver being overtaken to keep to the near side of the road and allow the other traffic to pass as required at Section 52 of the Road Traffic Act.
- [13] He also indicated that while there is no issue that a collision occurred between the first defendant's vehicle and that of Mr Payne's it is a question of fact for a Tribunal of Fact whether Mr Payne had in fact complied with the requirements of Section 51 of the RTA.

- [14] He submitted that all drivers are bound by Section 51(2) of the Act to take action to avoid accidents as a breach of the Act by other drivers would not exonerate a driver who failed to comply with these obligations. He submitted that Whether or not Mr Payne acted as he ought to can only be fleshed out when all parties are before the Court and the evidence is tested. In relation to Mr Payne's affidavit evidence, Counsel observed that Mr Payne is entitled to his view that he isn't liable but it is only on the testing of that evidence at a trial can a determination be made if he is.
- [15] He concluded that in light of the fact that this Court isn't being allowed an opportunity to test Mr Payne's evidence and given the competing accounts this is not an appropriate case for SJ, it would only appropriate when there is substantial agreement on the facts in such a way that there is no need to test the evidence.
- [16] In her brief remarks Mrs Burton-Campbell endorsed the submissions of Mr Kinghorn. She also noted that the Court is being asked to consider this application on the basis of Mr Payne's affidavit and a police report. She submitted that she was not sure that the Court could make any finding of fact relying on the police report as this is hearsay evidence.

ANALYSIS

- [17] In keeping with the principles as noted in *NCB v Owen Campbell et al*, by filing this application for summary judgment, the burden rests upon the 4th and 5th Defendants to establish that there are good grounds for their belief that the Claimant has no real prospect of success on the claim. In examining the evidence on which they rely, I have reminded myself that an application such as this is not meant to dispense with a trial where there are issues which should be investigated at a trial.
- [18] In the instant matter the Applicants rely on two documents in support of their argument that the Claimant has no realistic prospect of success. The first document to which I will refer is the Police Report which has been prepared in this

matter and the second is an affidavit from the 4th Defendant who was the driver of one of the vehicles involved in the collision. In respect of the accident report the conclusion which has been arrived at clearly relies on the account of individuals who may have been involved in the accident as well as other eyewitness accounts, there is no indication that same had been observed by the officer himself. It was no doubt in recognition of this factor that Mrs Burton-Campbell opined that the document contains hearsay evidence.

- [19]** In respect of the Police Report the Court would have been greatly assisted if the sworn accounts of the individuals whose opinion may have been included in same had been made available instead of this document which could be said to merely contain the conclusions drawn by the officer.
- [20]** The Affidavit of Mr Payne, on which reliance has also been placed, is an untested account which may arguably be described as self-serving. Additionally, there is a paucity of detail in respect of the conduct of Mr Payne in response to being overtaken a factor which is of some importance given the duties outlined at Section 51(1) and (2) of the Road Traffic Act.
- [21]** The account of the Claimant on the other hand, which is outlined at paragraph 6 of the Particulars of Claim as well as under the heading Particulars of Negligence of the 4th Defendant, paints a picture which is contrary to that of Mr Payne as it outlined that he was driving at a fast rate of speed in circumstances where he was being overtaken, that he failed to allow motor vehicle registered PE0100 which was owned by the 1st Defendant to safely overtake his vehicle and that he failed to stop, slow down, swerve or otherwise conduct the operation of his said motor vehicle so as to avoid a collision. At paragraph 6 it is noted that it was subsequent to the collision between Mr Payne's vehicle and PE0100 that the latter then collided into the motor vehicle in which the Claimant was a passenger and this resulted in him sustaining the injuries outlined under the heading Particulars of Injury in his claim.

[22] The Court is then faced with a situation in which there are at least two divergent views as to the how the accident occurred. These different accounts would call for consideration of the evidence as to the manner of driving of the respective drivers in order to determine the question of liability, something that is a question of fact for a trial Court to determine through the calling of witnesses.

[23] In light of the foregoing, I have considered whether the claimant could be said to have a realistic prospect of success as opposed to a fanciful one or even a merely arguable case and I am of the view that on an examination of his account on a balance of probability the response to this question would be in the affirmative. Additionally, this is the type of matter in which the overriding objective requires that for justice to be done between the parties the matter should proceed to a trial for the issues to be fully ventilated and a finding made.

Striking Out

[24] In asking the Court to strike out the claim brought, the Applicant has placed reliance on the powers outlined at Part 26.3(1) of the rules with specific reference to 26.3(1)(c) and (d) which provides;

26.3 (1) 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

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

[25] It is clear that R 26.3(c) requires that if a COA discloses no reasonable grounds for bringing the claim the Court should act to have the matter struck out. This principle was stated in **Sebol Ltd etal v Ken Tomlinson etal SCCA 115/2007** by Dukharan Ja at page 13 paragraph 28 as follows:

“The focus of the new rules is to deal with the matters expeditiously and to save costs and time, if there are no reasonable grounds for bringing an action, then the Court ought to strike it out.”

[26] This provision was also examined by Batts J in ***City Properties Limited v New Era Finance Limited 2013 JMSC Civil 23*** where he stated;

“On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.”

[27] Although the submissions have largely focused on Summary Judgment, I have considered whether this matter should be struck out as had been requested in the alternative. On a careful review of the pleadings it is evident that the case against the 4th and 5th Defendant is grounded in the actions of the 4th Defendant at the point at which he was being overtaken a factor which the Claimant notes was a direct contributor to the collisions which occurred. In circumstances where it is not in dispute that the collision between 4th and 1st Defendants' vehicles occurred just prior to the latter's collision in the vehicle in which the Claimant was a passenger, it is clear that there were reasonable grounds for the bringing of this action by the Claimant and accordingly the application fails on this limb as well.

DISPOSITION

1. As such the application for summary judgment is denied.
2. The application in the alternative for the Claimant's case against the 4th and 5th Defendants be struck out is also denied.
3. Costs to the Claimant and 3rd Defendants to be taxed if not agreed.
4. Claimant's Attorney to prepare, file and serve order herein