



[2018] JMSC Civ.22

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

**CIVIL DIVISION**

**CLAIM NO. 2015HCV02540**

<b>BETWEEN</b>	<b>DINSDALE PALMER</b>	<b>APPLICANT</b>
<b>AND</b>	<b>CARICOM HOME BUILDERS COMPANY LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>DEVON EVANS</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>WILLIAMS McKOY AND PALMER</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**IN CHAMBERS**

Mrs. Denise Senior Smith instructed by Oswest Senior-Smith and Company for the Claimant

Ms. Carissa Bryan instructed by Phillipson Partners for the 1<sup>st</sup> Defendant

Mr. Mark Williams instructed by Williams, McKoy and Palmer for the 3<sup>rd</sup> Respondent.

January 22, 2018

A. Nembhard, J (Ag.)

**[1]** The court was asked to hear an Amended Notice of Application for Court Orders which was filed on December 8, 2017. Therein, the Applicant/Claimant, Dinsdale Palmer, sought the following Orders:

- I. That there be summary judgment entered against the 1<sup>st</sup> Respondent/1<sup>st</sup> Defendant in respect of Order 3 of the Amended Particulars of Claim filed herein.

- II. Costs of this Application be awarded to the Applicant.
- III. Such further and/or other relief as this Honourable Court deems just.

### **BACKGROUND**

- [2] An amended Claim Form was filed in this matter on March 24, 2017, in which the claimant, Dinsdale Palmer, claimed against the 1<sup>st</sup> Defendant, Caricom Home Builders Company Limited, a company registered under the Laws of Jamaica, and the 2<sup>nd</sup> Defendant, Devon Evans, and the 3<sup>rd</sup> Defendant, Williams McKoy and Palmer, for Specific Performance and/or in the alternative, Damages for breach of contract.
- [3] The Claimant contends that the 1<sup>st</sup> Defendant has breached the Agreements it entered into to sell and transfer two (2) apartments, situate at No. 7 Dukharan Avenue, Kingston 10, in the parish of St. Andrew, to the Claimant.
- [4] The Claimant contends further that, having fulfilled all his obligations under the said Agreements, the 1<sup>st</sup> Defendant has refused and/or failed to honour its obligations thereunder and, along with the 3<sup>rd</sup> Defendant, has refused to transfer the said apartment to the Claimant.
- [5] The Claimant also claims Damages for Fraud and Slander against the 2<sup>nd</sup> Defendant, who, was at all material times acting as an agent and/or servant of the 1<sup>st</sup> Defendant in respect of the said Agreements.
- [6] The Claimant therefore claims:-
  - i. Specific Performance and/or in the alternative Damages for breach of contract against the 1<sup>st</sup> Defendant;
  - ii. Damages for fraud and slander against the 2<sup>nd</sup> Defendant;
  - iii. An Order that the 3<sup>rd</sup> Defendant delivers up the Duplicate Certificate of Title in its possession to the Claimant:

- iv. Special Damages in the sum of US\$2,000.00, JA\$2,150,000.00 and the sum paid for the Vendor's half costs in respect of the said apartment;
- v. Costs;
- vi. Interest at the commercial rate;
- vii. Such further and/or other relief as this Honourable Court deems just.

### **THE APPLICATION FOR SUMMARY JUDGMENT**

- [7] The hearing of the Amended Notice Application, for Court Orders filed on December 8, 2017 come before the Court in Chambers on January 22, 2018.
- [8] At that time learned counsel Ms. Carissa Bryan indicated that she was not in a position to proceed with the hearing of the Notice of Application as she was served on January 15, 2018 with a further affidavit in support of the Notice of Application by the Applicant's / Claimant's Attorneys-at-Law.
- [9] Learned counsel, Ms. Bryan indicated further, as the court understood her that she had begun to take instructions from her client, with a view to preparing an Affidavit in response, but had not been able to complete that process.
- [10] She asked that the hearing of the Application be adjourned.
- [11] Learned counsel Ms. Senior-Smith strenuously objected to the application for an adjournment. She agreed that an affidavit in support of this application was filed and served on Phillipson Partners on January 15, 2018 but suggested that the content of the said Affidavit was not pertinent to the Application to be heard.
- [12] Ms. Senior-Smith encouraged the court to commence the hearing of the application even if it had to be part heard.
- [13] Learned Counsel Ms. Bryan vehemently disagreed with the position advanced by learned counsel Ms. Senior-Smith that the content of the Affidavit filed on January 15, 2018 was not pertinent / relevant to the application that was to be heard.

- [14]** The Court formed the view that, in the interest of the justice among the parties to the matter and having regard to the overriding objective of the Civil Procedure Rules 2002, the 1<sup>st</sup> defendant ought properly to be afforded an opportunity to respond to the Applicants'/claimants' Affidavit which was filed on January 15, 2018.
- [15]** The Court also formed the view that the hearing of the application should be adjourned for the 1<sup>st</sup> Defendant to prepare and filed and served its Affidavit(s) in Response. The Court did not believe that, in all the circumstances, it would have been prudent to embark on a hearing of the Application in circumstances where the Applicant/Claimant, a week before, had filed and served an Affidavit to which the 1<sup>st</sup> Defendant had not yet completed his response.
- [16]** The Court had regard to the need to allot to the hearing of this Application an appropriate share of the Court's resources while taking into account the need to allot resources to other cases. Rule 1.1 (2)(e) CPR 2002.
- [17]** Where the content of the Applicant's / Claimant's Affidavit, which was filed on January 15, 2018, is said to directly touch and concern the issue for consideration in the Application for Summary Judgment, it is imperative that the 1<sup>st</sup> Defendant be afforded an opportunity to respond.
- [18]** The Court notes that the 2<sup>nd</sup> Defendant filed an Affidavit on the morning of January 22, 2018 which has not yet made its way to the Court's file nor has it been served on the Applicant's / Claimant's Attorneys-at-Law.
- [19]** The matter was consequently adjourned for a date to be fixed by the Registrar as the Attorneys were of the view that, that would enable them to secure an earlier date for the hearing of the Application.

**THE ISSUE AS TO COSTS**

- [20] Learned Counsel Ms. Senior-Smith made an application for costs (for the day) owing to the fact that the adjournment was at the request of learned counsel Ms. Bryan for the 1<sup>st</sup> Defendant.
- [21] Learned counsel Ms. Bryan objected to the application for costs on the basis that it was the Applicant/Claimant who did not file or serve this last Affidavit until Monday, January 15, 2018.
- [22] The Court considered the divergent views very carefully, again having regard to the justice among the parties.
- [23] The Court did not form the view that the Applicants' /Claimants' filing and serving an Affidavit in support of the Amended Notice of Application for Court Orders, one (1) week before the Application was listed to be heard, was unreasonable.
- [24] The 1<sup>st</sup> Defendant would have had one (1) week within which to prepare file and serve an Affidavit / Affidavits in response.
- [25] The Court formed the view that learned counsel Ms. Bryan's explanation as to the reason(s) that an affidavit in response could not have been filed was very vague.
- [26] The Particulars of Fraud as alleged by the Claimant/Applicant and to which the Affidavit of the Claimant/Applicant which was filed on January 15, 2018 speaks, were detailed in the Amended Particulars of Claim filed on March 24, 2017. The 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant would therefore have been aware of the Claimant's/Applicant's contentions and the particulars of fraud, as alleged, would not have been raised for the first time.
- [27] The Court also noted that the 2<sup>nd</sup> Defendant had prepared an Affidavit, pertinent to this application, which was neither filed nor served up to the point of the hearing of the application.

- [28] While it was in the interest of justice among the parties to adjourn the hearing of the matter the Court formed the view that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were tardy in their preparation for the hearing of the Application and granted the Applicant's /Claimant's application for costs.
- [29] The Court ordered costs to the Applicant/Claimant to be taxed if not agreed.

**Order**

- 1) The Defence of the 3<sup>rd</sup> Defendant filed on September 26, 2017 is to stand as though filed within time. (There was no objection raised by the Claimant's/Applicant's Attorneys-at-Law.)
- 2) The hearing of the Amended Notice of Application for Court Orders filed on December 8, 2017 is adjourned for a date to be fixed by the Registrar.
- 3) The Affidavit of Deron Evans filed on January 28, 2018 is to be served on the Claimant's Attorneys-at-Law
- 4) No further Affidavits are to be filed or served after Monday, January 29, 2018.
- 5) Costs to the Applicant/Claimant to be taxed if not agreed.
- 6) Leave to appeal in relation to the Order as to costs is granted.
- 7) Claimant's / Applicant's Attorneys-at-Law to prepare file / serve the Orders within.