



[2022] JMSC CIV. 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV03332

BETWEEN	SABRINA RUSSELL	CLAIMANT
AND	TIZIANA DOSHI	DEFENDANT

IN CHAMBERS

Miss Tamiko Smith instructed by Smith Afflick and Robinson Partners for the Claimant

Ms. Karen Russell for the Defendant

March 23, 2022 and July 15, 2022

What is the effect of a mediation agreement; can a mediation agreement be enforced by way of notice of application; imposition of court sanction for failure to perform mediation settlement agreement – application to set aside mediation agreement

Stephany C. Orr (Ag)

THE APPLICATION

[1] The facts of this case ask the Court to consider two questions:

- (i) What is the effect of a mediation settlement agreement as between parties;
and
- (ii) How is such an agreement to be enforced?

- [2] The parties in this claim are no strangers. They once operated a business together, Best Travel Limited. Their business relationship has come to an end and has resulted in this litigation.
- [3] The Claimant, Sabrina Russell, commenced this claim in August 2016, wherein she sought “inter alia, declarations that the Defendant Tiziana Doshi was operating the business in a way that was detrimental to the company and to my interest”, to use her words as stated in her statement of case.
- [4] After the defence was filed, as is prescribed by CPR 74.3, the parties were referred to and attended mediation. Mediation was successful in that the parties arrived at a partial mediation agreement as embodied in the form M5 which was duly filed in court by the mediator pursuant to CPR 74.11. The mediation agreement was also reduced to an agreement signed by both parties on April 3, 2019.
- [5] On June 1, 2020, counsel for the Claimant filed a document entitled “Consent Order”. This document, though undated, was signed by both counsel. It outlined the terms of the mediation agreement arrived at as between the parties in partial settlement of this claim.
- [6] On July 2, 2020 counsel for the Claimant filed a Notice of Application seeking the following orders:
- 1) *A Declaration that the Defendant is in breach of the terms of the Consent Order signed by the Parties and filed herein on the 1st of June 2020.*
 - 2) *The Defendant is to immediately comply with the terms of the Consent Order by fulfilling her obligations under paragraph 3A-G forthwith, subject to any direction given by this Honourable Court.*
 - 3) *An order for an account from the Defendant in accordance with her obligations under the Consent Order.*
 - 4) *The Proceedings herein be stayed until the Defendant is compliant with the terms of the Consent Order.*

- 5) *Further or in the alternative, an Order that unless the Defendants (sic) complies with Orders 2 and 3 above within thirty (30) days of the date of this Order the Counterclaim stands struck out.*
- 6) *Costs of this Application to the Claimant.*
- 7) *Such further or other relief as the Honourable Court deems just.*

[7] This application was heard on June 21, 2021. Neither the Defendant nor her counsel was present. The court, being satisfied that notice of the application had been provided to counsel for the Defendant, proceeded to hear the application in the Defendant's absence.

[8] At the conclusion of the hearing, the following orders were made:

- 1) *The Defendant is declared to be in breach of the terms of the Consent Agreement signed by the parties and filed on the June 1, 2020;*
- 2) *The Defendant is to comply with the terms of the Consent Agreement, which was filed on June 1, 2020, by fulfilling her obligations under paragraph 3 a-g on or before July 16, 2021;*
- 3) *The Defendant is required to provide the Claimant with an account, in accordance with her obligations under the Consent Agreement which was filed on June 1, 2020, on or before July 16, 2021;*
- 4) *Unless the Defendant complies with paragraphs 2 and 3 of this Order within the time stipulated therein, then the Defendant's statement of case shall stand struck out without any further need to revert to the Court;*
- 5) *The costs of this Application are awarded to the Applicant/Claimant against the Respondent/Defendant and are to be taxed if not sooner agreed;*
- 6) *Mesdames Ramsay Smith are to prepare, file and serve the Orders made herein.*

[9] By Notice of Application filed on July 14, 2021 the Defendant sought an order setting aside the Unless Order made by this court on June 21, 2021. The application prays in the alternative that the Consent Order entered on June 1, 2020 be struck out.

- [10] The contents of the mediation settlement agreement are not relevant as this application concerns the procedure to enforce a mediation agreement arrived at as a result of court referred mediation. I have therefore not included the terms of the mediation settlement.
- [11] At the hearing both counsel made oral submissions, and written submissions were also filed on behalf of both parties. I have considered these submissions but have not found it necessary to repeat these submissions here.
- [12] It should be noted, that after the hearing concluded, in preparing this judgment, I discovered that the document entitled "Consent Order" which was filed pursuant to CPR 42.7 was never executed by a Judge. Counsel were notified of this fact and asked to file further written submissions in relation to this unsigned document and any effect this likely would have on the application before the court.

ANALYSIS

- [13] There are several preliminary issues that must be resolved in considering the Defendant's application to set aside the order made in her absence and to answer the questions I posed earlier.
- (i) What is the procedure to embody the terms of a mediation agreement into an order of the court pursuant to CPR?
 - (ii) What is the effect of the mediation agreement where no order is made by the court?
 - (iii) Is a mediation agreement enforceable by a court order?

Rule 74.11(2) provides that:

"Where an agreement is reached between the parties, the signed written agreement shall accompany the report or be filed at the registry not later than 30 days after the completion of mediation, unless it is a term of the agreement that it remains confidential."

Rule 74.12 provides that:

“(1) Where an agreement has been reached the court must make an order in the terms of the report [pursuant to rule 42.7]”

[14] Mediation is a recognised form of alternative dispute resolution. The inclusion of Part 74 in the civil procedure rules is the recognition and acceptance by the court that not all claims can and need to be resolved by a judicial officer or at trial.

[15] Mediation also provides an opportunity for litigants to negotiate a settlement that best reflects their own wishes. They also enjoy savings in time and cost as in most instances, litigation is far costlier and time consuming than mediation.

[16] Where the parties are able to negotiate a mediation agreement or settlement, the rules require the parties to return to court so that this agreement can be embodied in an enforceable order of the court.

[17] In ***Patrick Allen v Theresa Allen*** [2018] JMCA Civ 16 Phillips, JA (as she then was) provided an extensive review of the mediation process. Importantly, despite the dissenting view expressed, all three judges agreed that once the mediation agreement is negotiated, it must be embodied in a Consent Order.

[18] CPR 74.12 stipulates the action that must take place once an agreement has been reached at mediation and the mediator has filed the mediation report. It also stipulates the type of order that the court is to make. It provides as follows:

(i) “Where an agreement has been reached, the court must make an order in the terms of the report [pursuant to rule 42.7]”

[19] The necessity for the requirement under CPR 74.12(1) and that the court reduce the settlement agreement into a Consent Order is that in the absence of such an Order, the settlement agreement is unenforceable by the court.

[20] In ***Greene v Rozen*** [1955] 2 All ER 797, which was accepted and relied on by the Court in ***Magwall Jamaica Limited & Others v Glenn Clysdale and Anor*** [2013] JMCA Civ 4, Lord Denning said that:

“When an action is compromised by an agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the writ in the first action must be the subject of a new action. The plaintiff, in order to get judgment, has to sue on the compromise. That is the only course which the plaintiff can take in order to enforce the settlement...”

- [21] In **Frank Gayle v Maria Miletic** 2009HCV03497 (unreported) decided March 29, 2011, the mediator had forwarded a report of the settlement agreement to the Court however there was no order formalizing the settlement.
- [22] Beswick, J said that “In my view therefore, this mediation settlement is not to be regarded as an order of the Court, and therefore cannot be enforced as an Order of the Court.”
- [23] She went on to say that; “This mediation settlement agreement may be interpreted to mean that each party freely agreed to do certain things in return for defined benefits in which event it may be considered to be a contract between the parties and enforceable as such”
- [24] In the absence of a court order, the agreement arrived at mediation is unenforceable. Where either party breaches the mediation agreement, the other party would have to commence a new claim in contract to enforce the agreement.
- [25] On the other hand, provision is made in the rules to enforce the Consent Order arising out of the mediation agreement at CPR 42.7. Thus, once the court embodies the terms of the mediation agreement in a Consent Order, where one party breaches the terms of the order the other party moves to enforcement of the order pursuant to CPR 42.7.
- [26] King, J (as he then was) in **Neville Atkinson v Olamae Hunt** [2015] JMSC Civ 14 reasoned that the action taken by the court in converting the mediation agreement into a court order, though exercising a judicial function, would be an administrative act. He said that:

“[s]uch orders are therefore completed by a mere administrative act without the need for judicial intervention.”

[27] In *Patrick Allen v Thelma Allen* (*supra*) in making reference to this statement Phillips, JA (as she then was) said that:

“If by that King J meant that the judge would make the order, but by way of an administrative act, and not by way of a judicial hearing or process, I would agree with him, but the order must be made by a judicial officer, and once that is the case, it is a judicial act.”

At paragraph 98 of her judgment Phillips JA (as she then was) also pointed out that:

*“Based on the procedure set out in the CPR, with regard to orders made in respect of mediation agreements (Parts 74 and 42), there is no requirement under the rules for the parties to attend court when the consent order is made reflecting the mediation agreement. This is so despite the fact that in this case the registrar of the court had issued notices of appointment to approve mediation settlement to the parties, informing them of the date set for the order to be made reflecting the terms of the mediation agreement. **What is clear is that there are no provisions requiring either or any party to make application to the court, and to give notice to the other party for approval of the mediation agreement**”. (emphasis mine)*

[28] It would therefore seem that when a Consent Order is duly filed by Counsel, pursuant to CPR 42.7(5), the Registrar must place the Consent Order before a Judge together with the mediator’s report so that the order can be perfected. Once perfected it should be dispatched to the Attorney or the litigant in person that filed the Consent Order.

[29] What is clear is that the filing of a “Consent Order” without more cannot capitulate that document into an Order of the Court. The Consent Order filed by counsel for the Claimant, was never signed by a Judicial Officer. Thus when the Claimant’s notice of application seeking to enforce the terms of the “Consent Order” was heard by the Court, there was no Consent Order which the Claimant could seek to enforce. All that existed between the parties was the mediation agreement that could only be enforced by the Claimant commencing a new claim in contract.

[30] As between Ms. Russell and Ms. Doshi all that remained after mediation was the settlement agreement which was filed in court by the mediator along with his report, as he was required to do. (CPR 74.11)

- [31] This agreement could not be enforced, as the Claimant sought to do by way of a notice of application seeking a declaration that the Defendant was in breach of the agreement.
- [32] Before the Claimant could seek to enforce the mediation agreement, it had to be made into an order of this court and this was never done.
- [33] The Order of the Court arising from the Claimant's notice of application also included a sanction in the form of an unless order, that resulted in the Defendant's statement of case being struck out where she failed to perform certain obligations under the said mediation agreement by a specified time.

CPR 26.4(1) provides that

"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""

- [34] Indeed, the court can also impose unless orders on its own initiative. The basis of the imposition of this unless order or any other sanction must be that the offending party upon whom the sanction is imposed has breached a rule or order of the court.
- [35] When the unless order was made against Ms. Doshi, there was no procedural breach on her part. She was not in breach of any rule or order of this court. At the hearing of the Claimant's application seeking a declaration that the Defendant is in breach of the Consent Order, while there was affidavit evidence that Ms. Doshi had not performed her obligations under the mediation agreement arrived at by the parties, that agreement was never the subject of any court order or rule for which Ms. Doshi was in breach and which could result in any sanction of the court.
- [36] In any event, the settlement agreement being a partial settlement of this claim, in relation to the unsettled aspect of the claim, the Registry should have set a date for a case management conference. The partial settlement had no bearing on the remainder of the parties' claim. It was concluded in a separate agreement at

mediation and could therefore have no bearing on the remainder of Ms. Russell's statement of case before the court such that it could be struck out as ordered.

- [37] Ms. Russell, counsel for the Defendant, has asked that the court set aside the settlement agreement in its totality on the basis that the Defendant did not understand and could not therefore agree to the terms of the settlement. She has also argued that the terms are vague and therefore cannot be performed.
- [38] I was not persuaded by these arguments. Miss Doshi was represented by counsel at mediation and throughout the process, albeit that Miss Doshi has retained new counsel for this application. There is no evidence of any objection made by Miss Doshi during the mediation process that would indicate that she did not understand the proceedings. Her former Attorney-at-Law duly signed the consent order which was filed and outlined the terms of the settlement agreement, there was also unchallenged evidence from the Claimant that there was part performance of the agreement by Miss Doshi.
- [39] The parties therefore remain bound by the agreement they created at mediation and which they duly executed, indicating their agreement to the terms.
- [40] Miss Doshi has at all times shown an intention to be heard in relation to the order made in her absence. Her previous Attorney-at-Law filed an application for relief from sanction within the prescribed period under the rules.
- [41] While that application is not before me for determination, I only reference it to note that in the affidavit in support of the application, her counsel indicates that Miss Doshi's absence was due to an error in counsel's diary.
- [42] Her present Attorney-at-Law opted against pursuing that application and subsequently filed this application in an attempt to set aside the order made on June 21, 2021.
- [43] While she is out of time on this latter application as it was filed beyond the prescribed 14-day period after service of the order, (see CPR 11.18(2)) the Court

has the jurisdiction to extend the time to comply with the rules under CPR 26. I would therefore extend the time as it would be unjust in the circumstances to allow the order imposing the sanction to remain where Ms. Doshi is not in breach of any court order. Similarly, the orders made to enforce the mediation agreement must also be set aside as the Claimant could not seek to enforce this agreement by way of a notice of application for court orders.

[44] The Consent Order filed on June 1, 2020 is to be signed as reflecting the agreement between the parties.

[45] In the result, the order of this court is as follows:

- (1) The order made on June 21, 2021 in the Defendant's absence is set aside.
- (2) The costs of the application to set aside the order of June 21, 2021 are to the Defendant to be taxed if not sooner agreed.
- (3) The Defendant's Attorney-at-law is to prepare file and serve this order.

Orr, J (Ag)