

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

No 1626 of 2007

Between

R L SEALE & CO LTD

PLAINTIFF

AND

EDWIN WORRELL

DEFENDANT

Before the Honourable Mr. Justice Randall Worrell, Judge of the High Court

2008: November 28

2013: May 24

Mr. Bryan Weekes of Messrs Weekes & Kisson for the Plaintiff

Mr. Andrew Thornhill of Messrs George Walton Payne & Co. for the Defendant

DECISION

Introduction

[1] By Writ of Summons dated 30th August 2007, the plaintiff claimed \$220,395.76 being the proceeds of money lent to the defendant on or about the month of April 2002. An Acknowledgment of Service was filed on 6th September 2007 and a defence was filed on 31st October 2007.

[2] In his defence, the defendant stated *inter alia* that the plaintiff never lent him the amount as pleaded and further denied every allegation made by the plaintiff.

SUMMARY JUDGMENT AND THE AFFIDAVIT EVIDENCE

[3] On 21st November 2007, the plaintiff filed a Summons for Summary Judgment in which it sought, pursuant to **Order 12 Rule 3** of the then **Rules of the Supreme Court 1982**, final judgment. The application was supported by the affidavit of **Sir David Seale** who deposed that he was employed by the plaintiff as its Chairman and Managing Director.

[4] Sir David Seale deposed further that under an agreement between the plaintiff and the defendant, the plaintiff loaned the sum of \$923,214.34 to the defendant on account of proceeds of purchase of a property situate at Saint Michael's Row in the City of Bridgetown. When the property was conveyed, the sum of \$702,818.58 was repaid leaving a balance of \$220,395.76 which the defendant should have paid out of the proceeds of sale of another property.

THE DEFENCE

[5] In reply, the defendant deposed that he was the Managing Director of **Budg-Buy Food Fair Ltd (Budg-Buy)** and that Budg-Buy owed the plaintiff a trade debt in the sum of \$2,358,500.00 for the purchase of stock. He deposed further that he was also a Director of **E & L**

Company Ltd, a company which owned a piece of real property situate at Saint Michael's Row.

[6] The defendant stated that in order to settle the debt owed by Budg-Buy to the plaintiff, it was agreed that the property at Saint Michael's Row owned by E & L Company would be sold to the plaintiff and that the trade debt would be settled out of the proceeds of sale. He stated that by letter dated 19th April 2002, the plaintiff wrote to him as Managing Director of Budg-Buy and indicated that there was an over-payment of \$220,395.75 on the basis that the calculations of the mortgagee bank showed a disbursement of \$712,818.59. The defendant stated further that at no time was there any money lent to him by the plaintiff.

[7] On 3rd April 2008, the summons for Summary Judgment was heard in chambers by this court and subsequently dismissed. It was held that the defendant was at liberty to defend the matter as there were issues raised in the defence which could be tried.

[8] Consequent upon that ruling the plaintiff filed a summons on 3rd July 2008 in which it sought to make substantial amendments to the Writ of summons filed 30th August 2007. In the proposed amended Writ of Summons, the plaintiff gave much greater detail as to the course of dealings between the defendant, the companies for which the defendant was Director and itself. The plaintiff sought additionally to join Budg-Buy as another defendant.

[9] On 10th September 2008, the defendant filed another summons in which he sought pursuant to **Order 18 Rule 19 1(a) (b) and (d)** to have the statement of claim filed 30th October 2007 struck out on the grounds that it, *inter alia*, disclosed no reasonable cause of action, was frivolous and vexatious, could be prejudicial and was otherwise an abuse of power.

ISSUES

[10] Thus there are two issues before this court. Firstly, whether to allow the plaintiff's application to amend the Writ of Summons filed 30th August 2007 and secondly, whether to strike out this action as per the defendant's application.

DISCUSSION

[11] The defendant's affidavit disclosed the full nature of the relationship between the parties and a copy of the agreement concerned. It stated that the purpose of the agreement was, in part, to facilitate the clearing of a trade debt and it was agreed that a piece of property would be sold. The documents indicate that the defendant was intimately involved in the process in his capacity as a Director of the companies involved and as the officer signing the agreement.

[12] Consequent upon this agreement, a cheque was made payable to the defendant who in turn made it payable to the company on deposit. When the overpayment was realised the plaintiff requested of the company, by virtue of its written demand to the defendant, that the surplus amount be repaid.

[13] On the face of it, it appears to the court that the question of whether the defendant had the capacity and authority to repay the funds and whether the failure to do so rests with him are issues upon which legal argument is necessary. Was it reasonable to assume that the defendant would have been on notice that an overpayment occurred? Is he culpable either personally or jointly with the company for any wrongful acts committed?

[14] These are all undetermined issues and given that the defendant has deposed in his affidavit evidence that no moneys were loaned to him, it is also an issue as to whether he is excused from responsibility when the company for which he is a Director fails to repay moneys which it legally owed.

[15] The Court must then consider whether the interest of justice is served in this case by allowing or denying the amendment requested. It is clear that the Writ of Summons as filed on 30th August 2007 is weak but this must be balanced against the defendant's affidavit evidence in reply which clearly raises issues as to his responsibility personally vis-à-vis his responsibility as a Director of the company.

[16] It is this court's considered opinion that the questions raised warrant full and extensive ventilation and that can only be achieved if the plaintiff's application is allowed to succeed. It is clear that the defendant has a close connection to the subject matter of this suit and it is even more pellucid based on the defendant's affidavit in reply that the questions raised are questions fit for the court to render judgment on. If the court allows the plaintiff's amendment, it follows therefore that the application to strike out must be denied.

DISPOSAL

[17] Accordingly, the plaintiff's application to amend the Writ of Summons filed 30th August 2007 is approved. The company 'Budg-Buy' shall be joined as a defendant in this matter.

[18] The defendant's application to have the Statement of Claim struck out is hereby denied.

[19] Costs to be costs in the cause.

Judge of the High Court