In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017 No: 4

BETWEEN:

DEAN ORLANDO SMITH

Plaintiff

And

CLARIEN BANK LIMITED

Defendant

RULING
(IN CHAMBERS)

Date of Hearings: 1 June 2017 and 22 June 2017
Date of Ruling: 30 June 2017

Plaintiff: Litigant in Person
Defendant: Kai Musson (Taylors)

Application to Strike out Writ of Summons (RSC O.18/19)

RULING of Registrar S. Subair Williams

Introductory

1. This matter has come before the Court on the Defendant's summons filed 27 February 2017 to strike out the Plaintiff's Writ of Summons on the basis that it discloses no reasonable

cause of action; it is scandalous, frivolous and/or vexatious; it may prejudice, embarrass or delay the fair trial of the action; and/or it is otherwise an abuse of the process.

Background

2. By a Generally Indorsed Writ of Summons filed on 6 January 2017 the Plaintiff claimed for damages in the sum of $1,500,000.00 for breach of contract and extortion. The Particulars of Claim read as follows:

   "*Never had my contract, once I asked for contract I was denied by the bank. Bank tried to repossess vehicle which did not belong to them. Had a meeting with the Bank and they agreed there (sic) unethical behavior*."

3. The Plaintiff filed an affidavit dated 18 January 2017 in support of his writ. The said affidavit, without dispute from the Defendant, loosely stood as a Statement of Claim.

4. The Generally Indorsed Writ of Summons was served on 23 January 2017 and a Memorandum of Appearance was filed belatedly on 7 February 2017.

5. I refused to the grant the Defendant's application for Judgment in Default for reasons explained to the Plaintiff in the 16 March 2017 Thursday Chambers hearing.

6. It is against this background that the Defendant filed a summons to strike out the claim. This summons was supported by the affidavit evidence of Nina Ebbin who is a Relationship Manager at Clarien Bank.

The Facts

7. The Plaintiff entered into a loan agreement with the Defendant, Clarien Bank Limited ("the Bank") for the sum of $100,000.00. It was agreed between the parties that the Plaintiff would make monthly payments in the sum of $1,300.00. The loan was set to mature on 27 June 2013.

8. The security for the loan was made in the form of a Mitsubishi model taxi ("the Mitsubishi taxi").

9. The Defendant continuously defaulted on the loan agreement as evidenced by party correspondence put before the Court by both sides.

10. A point came, when the parties agreed that the Plaintiff's taxi permit would be pledged as further security for the loan in light of the previous defaults on the loan.

11. Subsequently, the Plaintiff further defaulted on the loan and the Bank sought to repossess the Mitsubishi taxi which both parties agree was the security for the loan.

12. Preparatory to the Bank's attempt to realize the chattel lien attached to the loan, an inspection of the Mitsubishi taxi was concluded. Here the Defendant submitted that the inspection divulged that the Mitsubishi taxi had been severely comingled. The Plaintiff, on the other hand, stated that the taxi inspected was a different vehicle altogether which gave no rise to any possessory rights by the Bank.

13. The Plaintiff further contended that Mitsubishi taxi had come into such disrepair that it eventually ceased to exist as a taxi. In his words: "*it no longer existed*". He referred the Court to email correspondence he sent to the Bank dating back to 5 December 2013 wherein he wrote the following:

    "*Good day*

    Today I am forwarding this correspondence as I am seeking advice for my future. Capital G has been helpful to me over the course of the past 15 years and I hope this may continue. Since the first week of August my taxi that we are in partnership with has had mechanical problems. If I gave you the list this email would go on forever. In order for me to get the taxi running and ready for TCD it will cost me around $6000. Unfortunately the insurance cost me over $1000 a year for the taxi and the vehicle which is valued at $4800. As a result of this I'm inclined to inform you that the Bermuda Economic Development Cooperation has offered to assist me with trying to secure a new vehicle. With a new vehicle I will be able to enhance my level of Taxi service and the BEDC supports my idea as raising the Bar within my field going forward. Thank you and patiently I await your response!"

14. The Plaintiff relies on this email as proof of his notice to the Bank that they no longer had any valuable security in the Mitsubishi taxi. The Plaintiff quite fairly argued that any new vehicle he purchased would not automatically serve to replace the security the Bank had in the Mitsubishi taxi. The Plaintiff's case is that the taxi which the Bank deemed to be comingled was in fact a newly possessed and different vehicle altogether, for which the Bank had no possessory rights.

15. It is agreed between the parties that the Bank assumed possession of the taxi, notwithstanding, and caused it to be sold for the sum of $10,000. This sum of money was

reimbursed in full to the Plaintiff. Notably, the Plaintiff complained that the Bank initially paid him $5,000 for the purchase of the taxi. The parties were agreed on the fact that the Plaintiff highlighted the underpayment leading to his reimbursement of the remainder $5000 sum.

16. It is also common ground that the taxi permit was realized and sold for the sum of $100,000 with the assistance of the Plaintiff who secured a purchaser for the Bank.

The Plaintiff's Case:

Allegation of Breach of Contract

17. The Plaintiff, with much emphasis, complained that he was never provided with a copy of the loan agreement for his own records until he secured an attorney's assistance in this regard. He accepts that he was provided with a copy of the agreement after his attorney intervened.

18. The Plaintiff also argued that the delayed delivery of a copy of his contract constituted a breach of contract. Notably, the Plaintiff did not direct my attention to the loan agreement or any specific term therein which he says was breached by the Defendant.

19. In my view, the pleaded claim for breach of contract on its face is both frivolous and vexatious. I do not think this cause of action is arguable on any of the argued grounds or facts pleaded.

20. Conversely, it is clear that the Plaintiff was in breach of the said loan agreement and that the Bank was entitled to act accordingly. Both parties readily accepted that the Plaintiff defaulted on the agreement and that the taxi permit was agreed security for the loan.

Allegations of Extortion and Duress

21. Mr. Smith suggested that the Bank was liable for extortion in allowing him to sign a disadvantageous loan agreement during his youthful age. He told the Court that he did not review the contract before signing it and that he had been effectively taken for advantage by the Bank.

22. While the Plaintiff did not specifically plead 'duress' he included reference to it in his arguments. The Plaintiff further argued that the accumulative effect of the following occurrences established a foundation for his claims:

(i) The Bank's attempt to repossess both the 'comingled' taxi and the taxi permit;
(ii) The Bank's initial attempt to reimburse Mr. Smith in the sum of $5,000.00 for its sale of the second taxi, notwithstanding that another $5,000.00 was paid to him thereafter;
(iii) The Bank's delay in providing the Plaintiff with a copy of his contract;
(iv) The Plaintiff's interaction with one or more personnel of the Bank who advised him that his matter was handled poorly/unethically and should have been dealt with differently (not an agreed fact between the parties);

23. Even if I accept every contentious assertion advanced by the Plaintiff, I find that he would still fall woefully short of establishing a glimpse of an arguable case under these causes of action or any other cause of action based on these facts.

24. In my view, the Plaintiff has not shown any evidential basis upon which he could reasonably argue that he suffered loss as a result of the Bank's repossession of the taxi. The taxi was sold for $10,000 and that sum was fully repaid to him days or a week later, as he informed the Court. In any event, he did not assert any consequential losses arising out of the sale of the taxi.

25. Both parties accepted that the Bank had valid security in the taxi permit and the Plaintiff himself actively and successfully partook in securing a purchaser for the permit for the sum of $100,000.00. The Plaintiff did not allege loss as a result of the sale of the taxi permit.

26. For these reasons, I find that the Plaintiff has not established an arguable case.

The Law:

Strike out

27. Order 18, rule 19(1) of the Rules of the Supreme Court 1985 ("RSC") provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of the writ in the action, or anything in any pleading or in the indorsement, on the ground that:
    a) it discloses no reasonable cause of action or defence, as the case may be;
    b) it is scandalous, frivolous or vexatious; or
    c) it may prejudice, embarrass or delay the fair trial of the action; or
    d) it is otherwise an abuse of the process of the court;

    and the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

28. Reference to the 1999 edition of the White Book at 18/19/10 provides further guidance as follows:

"*A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …*"

29. Justice Meerabux in *The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31* considered the meaning of 'frivolous' and 'vexatious':

"*…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277.*

Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at 642."

Decision

30. I find that the Plaintiff's pleaded and argued case has no chance of success. In my view this is not a weak case which ought to be decided by a Judge, but rather a case which has no chance of success whatsoever. I further find that each pleaded limb of the claim under the writ is frivolous and vexatious.

31. For these reasons, the Writ of Summons is struck out.

32. I will hear the parties as to costs.

Dated this 30th day of June 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT