In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 355

BETWEEN:

ANTHONY CHARLES BURGESS

Plaintiff

-v-

OLIVE LENORA BURGESS-SALINA

1st Defendant

-and-

GAYNELLE PENISTON WILLIAMS

2nd Defendant

RULING ON APPLICATION TO SET ASIDE JUDGMENT ON COUNTERCLAIM

(in Chambers)

Date of Hearing: January 14, 2016
Date of Ruling: January 25, 2016

Mr. Jaymo Durham, Amicus Law Chambers Ltd., for the Plaintiff
Mr. Ray De Silva, Moniz & George Ltd, for the Defendants

Background

1. The present application arises from a dispute concerning the interests in a family property jointly "owned" by the parties but originally occupied by the Plaintiff until it was repossessed by the mortgagee in or about June 2014 ("the Property").

2. On October 14, 2014, the Plaintiff (acting in person) applied by Originating Summons for relief essentially asserting rights to occupy the Property. By a Summons dated November 4, 2014, the Defendants applied to strike out the Plaintiff's claim. On December 8, 2014, directions were ordered on that Summons. The Defendants on November 18, 2014 filed a Counterclaim seeking damages in the amount of $129, 115.68 under a loan agreement dated February 18, 2010 ("the Agreement"). The Plaintiff's current attorneys were apparently retained on or before November 20, 2015. A Defence to Counterclaim was due on December 1, 2014 but was not served. On April 20, 2015 the Plaintiff was given leave to discontinue his action and costs were awarded to the Defendants.

3. Meanwhile, the Defendants agreed to extend time for the Plaintiff to file his Defence to Counterclaim and warned by email dated May 1, 2015 that that if his Defence to Counterclaim was not served by Monday May 11, 2015, the Defendants would seek judgment in default. With consummate courtesy, the Defendants' attorneys on May 12, 2015 advised the Plaintiffs' attorneys that they would be seeking a default judgment. They did not make the requisite filing until May 18, 2015, six days later. On that date, Judgment in Default of Defence to Counterclaim was entered in favour of the Defendants in the amount of $130,668 plus interest at the statutory rate until payment.

4. The Plaintiff filed his Defence to Counterclaim at 4.35pm on May 18, 2015, only two hours after the Defendants' application for Judgment in Default. However this was seven days after the last deadline set by the Defendants by way of extension of a deadline for filing under the Rules which had expired over five months ago. Although it is unclear precisely when the Default Judgment was served on the Plaintiff, an application to set aside was not filed until May 29, 2015 and then without any affidavit in support. The Plaintiff's Summons was issued on June 2, 2015 returnable on June 18, 2015. The Defendants on June 2, 2015, without prejudice to their Default Judgment, filed a Reply and Defence to Counterclaim.

5. On June 18, 2015, the Plaintiff sought and was granted 14 days (i.e. until Thursday July 2, 2015) to file his evidence in support of his application to set aside. His Second and his wife's First Affidavit were filed on July 3, 2015, one day late. This evidence supported the merits of his Defence to Counterclaim but advanced no explanation whatsoever for the delay in filing the pleading. The Defendants were required to file their evidence in answer with 14 days, but did not do so until August 24, 2015, the

day before the first scheduled hearing for the application to set aside before Hellman J. The August 25, 2015 hearing was delisted by consent.

6. On October 19, 2015, the Defendants' attorneys wrote the Court with convenient dates for the hearing of the Plaintiff's application to set aside. A fresh Notice of Hearing was promptly issued by the Court on October 23, 2015. In the course of the hearing on January 14, 2016, the Plaintiff's counsel sought leave to file the Plaintiff's Third Affidavit, over seven months after the time limited for him to file evidence in support of his application to set aside by this Court's June 18, 2015 Consent Order. The Plaintiff's Third Affidavit advanced for the first time an explanation for the delay in filing his Defence to Counterclaim.

7. Against this background, the Plaintiff sought not merely to set aside the Judgment in Default of Counterclaim, relief sought under his Summons dated June 2, 2015. He also sought by way of submission to obtain a stay of the proceedings in any event by way of enforcement of the arbitration clause under the Agreement.

The arbitration stay application

8. Clause 13 of the Agreement provides as follows:

> "*All questions or differences whatsoever which may at any time hereafter arise between the parties hereto touching this agreement or the subject matter thereof arising out of or in relation thereto respectively and whether as to the construction or otherwise shall be referred to an Arbitrator appointed by the President for the time being of the Bermuda Chamber of Commerce and shall be considered submission to Arbitration within the meaning of the Arbitration Act 1986 or any re-enactment or statutory modification thereof for the time being in force and shall be subject to and governed in all respects by the provisions as* [sic] *such Act aforesaid.*"

9. Mr Durham relied upon the following provisions of the Arbitration Act 1986:

> "7. *If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were*

commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings." [Emphasis added]

10. I reject the suggestion based on *Halki Shipping Corporation -v- Sopex Oils Ltd* Times Law Reports 19 January 1998 that section 7 of the 1986 Act confers a positive right to a stay. That case was considering a mandatory stay provision expressed in wholly different terms substantially the same as the provisions made for international arbitrations by section 8 of the 1986 Act[1]. It is clear on the face of section 7 of the 1986 Act that this Court has a discretion to grant a stay which may be exercised, where one party to an arbitration agreement sues in court in respect of a matter governed by an arbitration agreement, when the following additional conditions are met:

    (a) the application for a stay must be made before taking any step in the proceedings; and

    (b) there must be no sufficient reason why the matter should not be referred; and

    (c) the applicant for a stay must have been ready to arbitrate when the proceedings were commenced and remain ready to arbitrate.

11. This straightforward reading of section 7 is confirmed by the findings reached by Meerabux J in a case not referred to in argument, *Minister of Works and Engineering -v- Village Hotels of Bermuda Ltd* [1995] Bda LR 63 at pages 25-26:

"*I hold that the Defendant has proved that the proceedings in respect of which a stay is sought are of a type to which section 7 of the 1986 Act applies, that the application is made in an appropriate manner, that is, that the Defendant is a party to the arbitration agreement, that the Defendant is the applicant and is a party to the legal proceedings, that the application is made after the applicant has entered an appearance but before he has delivered any*

[1] Section 8 provides as follows:

"*(1)If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.*" [Emphasis added]

pleadings or taken any other steps in the proceedings, that he was arid is ready and willing to do all things necessary to the proper conduct of the arbitration, that there is no sufficient reason why the dispute should not be referred to arbitration.

In light of the above I am of view that the Defendant has a prima facie right to stay and this Court has jurisdiction to grant one and will grant one unless the Plaintiff persuades the Court that there are good reasons why one should not be granted: Mustill and Boyd at 467."

12. In the present case the Plaintiff has:

(1) himself commenced proceedings in relation to matters arguably caught by the arbitration clause;

(2) after the Defendants had filed their Counterclaim which expressly relied upon the Agreement containing the arbitration clause, taken a step in the action by consenting to directions on the Defendants' strike out Summons;

(3) after the Defendants had filed evidence in support of their strike out Summons and Counterclaim in February 2015 exhibiting the Agreement, taken a further step in the proceedings by consenting to discontinue his own claim without challenging the right of the Defendants to pursue their Counterclaim;

(4) filed a Defence to the Counterclaim;

(5) after realising a Default Judgment had already been obtained filed an application to set aside with a view to defending the Counterclaim on its merits; and

(6) finally sought a stay by way submission without filing a formal application over one year after the Defendants commenced their Counterclaim.

13. I accordingly am bound to find that the Plaintiff has failed to establish a *prima facie* case that he is entitled to a stay. His application to stay the present proceedings under section 7 of the Arbitration Act 1986 is accordingly refused.

The application to set aside

Governing legal principles

14. There was no controversy as to the governing principles applicable to an application to set aside a default judgment which has been regularly obtained. Mr Durham relied upon the leading English Court of Appeal authority of *Alpine Bulk Transport Co. Inc. –v-Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep 221. I most recently applied the guidance provided by that case in *S Smith-v- N Stoneham et al* [2015] SC (Bda) 42 Civ (29 June 2015) where I stated:

> "*8.The relevant principles are set out at in the judgment of Sir Roger Ormrod at page 223 where he says this:*
>
> > '*The following 'general indications to help the Court in exercising the discretion" (per Lord Wright at page 488) can be extracted from the speeches in Evans v Bartlam (1937) A.C. 473 , bearing in mind that 'in matters of discretion no one case can be authority for another' (ibid, page 488):*
> >
> > *(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;*
> >
> > *(ii) the Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the court should not 'lay down rigid rules which deprive it of jurisdiction' (per Lord Atkin at page 486);*
> >
> > *(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;*
> >
> > *(iv) the primary consideration is whether the defendant 'has merits to which the Court should pay heed' (per Lord Wright at page 489), not as a rule of law hut as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown 'merits' the Court will not, prima facie, desire to let a judgment pass on which there has 'been no proper adjudication' (ibid. page 489 and per Lord Russell of Killowen at page 482).*
> >
> > *(v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant 'found himself bound by a judgment regularly obtained to which he could have set up some serious defence' (per Lord Russell of Killowen at page 482).'*
> >
> > *In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In. the*

> *course of his argument Mr Clarke Q.C. used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v Kendel (1977) 1 Ll.L.R. 554 and Vann v Awford). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their lordships in Evans v Bartlam. All of them clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. (In Evans v Bartlam there was an obvious defence under the Gaming Act and in Vann v Awford a reasonable prospect of reducing the quantum of the claim). Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction."* [Emphasis added]

15. To the extent that Mr De Silva invited the Court to have regard to the overall pattern of delay and to note that no attempt to even explain the default had been made until the day of the present hearing, it is helpful to recall the following legal principles I was guided by and used to supplement the primary "*real prospects of success*" test in *Simmons-v-McCann and Bosch* [2014] Bda LR 96:

> "*5. Ms. Hanson invited the Court to have regard to the manner in which the 2nd Defendant has defended the present claim and to refuse the application to set aside judgment in any event following the approach adopted in Wakefield and Accardo-v-Marshall et al [2010] Bda LR 53, where Wade-Miller J held:*
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> > *'Additionally, in arriving at a decision the court is entitled to look at the First Defendant's conduct and statements and ascertain if in the circumstances it should disentitle him from proceeding. Delay in itself is not a bar to proceedings but the nature of the delay and any disadvantage to the other side caused by the delay can be taken into account."*

The Counterclaim and the proposed Defence

16. The Counterclaim is clear and simple. Under the Agreement, a loan was made by the Defendants in the amount of $125,000 for repayment of debts owed by the Plaintiff to

third parties including the mortgagee of the Property. The Plaintiff breached the Agreement by failing to make payments to the mortgagee or to the Defendants. The mortgagee had as a result repossessed the Property. The Defendants accordingly sought to recover the sum of $125,000 plus interest at the rate of 2.75% per annum.

17. The proposed Defence to Counterclaim admits the loan but avers as follows. Firstly, it is alleged that the 1st Defendant prevented the Plaintiff from carrying out renovations to the northern part of the property to generate rental income from April 1, 2010 as was contemplated by the Agreement (clause 7). Secondly it is alleged that the 1st Defendant did not pay over rental income which was collected from the property to the mortgagee as was agreed. And thirdly it is alleged that the Plaintiff in fact repaid the full sum claim both through cash payments to them and "*by way of absorbing the full cost of the mortgage balance*".

18. The Plaintiff's Second Affidavit was filed in support of the Defence. He exhibits various receipts issued by the mortgagee mostly predating the Agreement and none of which support payments made by him pursuant to the mortgagee or to the Defendants. The post-Agreement receipts exhibited all evidence payments by the 1st Defendant to the mortgagee. The Plaintiff's wife deposes that in March/April 2014 the 1st Defendant twice told her that the Plaintiff "*does not owe me anything, and I do not expect him to pay me back any money from that loan*". In what is properly to be characterised as a cross-claim, the Defence to Counterclaim also avers that the 1st Defendant deprived him of his share of the proceeds of sale of a Sandy's Parish property. The Plaintiff's Second Affidavit also supports this allegation without specifying when the sale took place.

19. The 2nd Defendant's Second Affidavit acknowledges that the Plaintiff made payments totalling $12,050 as acknowledged in the Counterclaim. She avers that the 1st Defendant, their mother, was the sole legal owner of the Property and was entitled to reside on it and disputes the suggestions that rents were not applied to the mortgage and that the 1st Defendant told the Plaintiff's wife that he owed the Defendants nothing. It is averred that any rental income collected was collected by the Plaintiff. As to the Sandys property, the 2nd Defendant avers that the 1st Defendant was initially the sole owner and that all working family members contributed to its upkeep. It was voluntarily conveyed to the 2nd Defendant in 2007 subject to a life interest in favour of the 1st Defendant. The Sandy's property was sold in 2008, over six years ago, and the proceeds of sale used to settle the mortgage and further charges relating to funds advanced at the instance of the Plaintiff to carry out renovations which he never completed.

20. The 2nd Defendant also explains an important feature of the Agreement in her Second Affidavit. Their mother had prior to the Agreement intended to devise the Property to the Plaintiff based on the understanding that he would bear all expenses in relation thereto. Accordingly, the Agreement acknowledged that the Plaintiff had an equitable

interest in the Property in the Property and that in the event of a sale by the 1st Defendant based on a breach of the Agreement by the Plaintiff, the Plaintiff would be entitled to receive 80% of the sale proceeds would be divided. This strongly suggests that the Plaintiff was primarily responsible for ensuring that the mortgage was paid as he had the largest commercial interest in the Property.

21. The Plaintiff's Third Affidavit exhibits further receipts in respect of payments made to the mortgagee, most of which pre-dated the Agreement and none of which supported payments made by the Plaintiff himself. He asserts that some family members occupied the Property and paid rent to the 1st Defendant. He does not dispute that the Sandys property was sold in 2008. He also offers the following explanation for the delay in filing the Defence to Counterclaim. When his attorney advised him he needed to file a responsive pleading, he sought assistance from a former lawyer and family friend to save costs. This former lawyer (who is in fact disbarred) helped to prepare affidavits, a process which took longer than expected and involved collecting more evidence than was in fact required by the Plaintiff's attorney of record. This process was only completed by the last date when the Defence to Counterclaim was due to be filed.

Findings: is there a defence with real prospects of success?

22. Mr De Silva's primary submission was that the proposed Defence was not credible on its face, particularly because of the point in time when it was raised. If the Plaintiff had in fact fully discharged his obligations under the Agreement and the Defendants were in breach, he ought logically to have raised these complaints when the mortgagee initiated possession action (at the earliest) or as part of his initial claim against the Defendants when he had been evicted (at the latest). He also argued that the very existence of the Agreement, in a family context, was striking evidence of the previous delinquency of the Plaintiff and the Defendants' desire to avoid further loss through informal family arrangements.

23. These were compelling submissions to which there was no coherent answer. The Defence to Counterclaim (read together with the supporting evidence), both on its face and in light of the circumstances in which the Defence has been raised, seems inherently implausible. The Defence is also unsupported by any obviously relevant documentary evidence. The proposed defence may be marginally arguable, but it entirely lacks conviction and does not disclose real prospects of success. It beggars belief that if the Defendants through breach of their obligations had resulted in the Plaintiff losing a substantial equitable interest in the Property that he would not have initiated appropriate legal action against them rather than waiting until after the Property had been lost to raise the complaints in defence to their own claims against

him. The averments about the Sandys property do not even raise an arguable defence; they raises an independent cause of action which appears to be time-barred.

24. One narrow evidential issue merits specific attention. The 2nd Defendant's denial that the 1st Defendant admitted that nothing was owing to the Plaintiff's wife was not a direct or convincing rebuttal of the Plaintiff's wife's evidence as to what she was told. Even if the 1st Defendant did verbally say that the Plaintiff (her son) did not owe her anything, such statements would be insufficient to constitute a waiver of her right to assert the claims she subsequently did in the present action. If she said that she did not "expect" the Plaintiff to pay her anything that would be entirely consistent with a state of affairs according to which she believed something was owing to her but did not believe that the Plaintiff would ever actually repay her. In short, the evidence of the Plaintiff's wife is credible on its face but is too ambiguous and peripheral to convert an arguable defence into one with conviction.

25. Mr Durham argued that the Court should treat the delay in filing the Defence and Counterclaim as being very short. The chronology set out above shows that the delay overall ran into months rather than days and that, in hindsight, the Defendants' counsel was overly generous with his consensual extensions of time. Obtaining legal assistance from a disbarred lawyer to save costs cannot in any event constitute a reasonable excuse for failing to file through your attorney of record a pleading within time. There was no excuse which justified this Court treating the default as one which ought to be forgiven, (despite the absence of a defence with real prospects), a residual jurisdiction which this Court occasionally exercises in the wider interests of justice.

Summary

26. The Plaintiff's oral application to stay the present proceedings in favour of arbitration under section 7 of the Arbitration Act 1986 is refused because the Plaintiff had already taken substantive steps in the present proceedings. The Summons to set aside the Judgment in Default of Defence to Counterclaim is dismissed because the Plaintiff has failed to disclose a defence with real prospects of success.

27. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to the Defendants to be taxed if not agreed.

Dated this 25th day of January 2016 _____

IAN RC KAWALEY CJ