

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE

2014/CLE/gen/01654

IN THE MATTER of All that piece parcel or part of a larger lot of land situate to the North of Cowpen Road in the Western District of the Island of New Providence aforesaid which said piece parcel or part of a larger lot of land is bounded on the NORTH by land the property of one Thompson and running thereon Two Hundred and Eighty (280) feet on the EAST by land said to be the property of Lewis Alfred Scott and running thereon Seventy-five(75) feet more or less on the SOUTH by land the property of the late Benjamin Nesbitt but about to be conveyed to one Harriet Whymns and running thereon Two Hundred and Eighty (280) feet and on the WEST by a road reservation and running thereon Seventy-five(75) feet more or less

AND

IN THE MATTER of the Magistrate's Court Act, Chapter 52 of the Statute laws of the Commonwealth of The Bahamas (as revised)

BETWEEN

CATHERINE ANN MCPHEE

Plaintiff

AND

JOHN NESBITT

1st Defendant

AND

PAUL NESBITT

2nd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Jamal G. Davis of Oxford Law Chambers for the Plaintiff
Mr. Craig F. Butler of C.F. Butler & Associates for the Defendants

Hearing Date: 5 July 2016

Practice and Procedure – Summons to join parties in proposed Counterclaim-Order 15 Rules 2, 3, 6 of the Rules of the Supreme Court

The Plaintiff commenced this action by a Specially Indorsed Writ wherein she alleged that by virtue of a Deed of Assent dated 8 July 2013 and made in the Estate of the late Elijah Darling Nesbitt (“the deceased”), she is the owner and entitled to possession of a parcel of land situate to the north of Cowpen Road. She also alleged that the Defendants are trespassers on the property. She seeks a declaration that she is the owner of the property and an injunction restraining the Defendants’ continued trespass.

The Defendants filed a Summons seeking the joinder of two parties to their Counterclaim. The 2nd Defendant (the Plaintiff in the Counterclaim) alleged that the deceased asserted his legal and beneficial ownership of the property by virtue of a Deed of Gift which is a fraudulent document. In this regard, he submitted that the Estate of the deceased (“the Estate”) and North Cowpen Land Limited (“NCLL”) are necessary parties to this action because the Certificate of Title granted to the deceased and NCLL in 1976 was obtained by fraud perpetrated either/both of them.

The Plaintiff objects to the application joinder on the ground that the proposed Counterclaim discloses no reasonable cause of action against the Estate and/or NCLL.

HELD, granting the summons to join the Estate and NCLL as defendants to the Counterclaim and dismissing the application to strike out,

1. A Plaintiff is entitled to choose the person against whom to proceed and to leave out any person against whom she does not desire to proceed. Similarly, a defendant is entitled to counterclaim against a plaintiff and to add other parties if he believes that they are necessary parties to the action.
2. At such an early stage of the action, if the court prevents a plaintiff in a counterclaim to add any party to the said action, then that is tantamount to driving him from the judgment seat. It also seems contrary to legal principles that a court would prevent a party from bringing those persons who ought to be joined as parties.
3. The Summons for joinder seeks to have the court determine whether a fraud took place pursuant to section 27 of the Quieting Titles Act.
4. The Estate and NCLL are necessary parties to this action because the Certificate of Title granted to NCLL on 30 June 1976 is alleged to have been obtained by fraud perpetrated either by the deceased and/or NCLL.
5. A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: **Ian Peters v Robert George Spencer**, ANUHCVP2009/016 - Antigua & Barbuda Court of Appeal- per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.

JUDGMENT

Introduction

- [1] On 20 June 2016, the Defendants filed a Summons seeking leave of the court to join (i) the Estate of the late Elijah Nesbitt (“the deceased”) as the Second Defendant and (ii) North Cowpen Land Limited (“NCLL”) as the Third Defendant to this action under his proposed Counterclaim. The application is made pursuant to Order 15 Rules 2, 3, 6 (2) (b) (i) and (ii) of the Rules of the Supreme Court (“RSC”) and/or the inherent jurisdiction of the court.
- [2] The Plaintiff in the Counterclaim (for convenience, will be referred to as “the 2nd Defendant”) stated that the Estate and NCLL are necessary parties to this action because the Certificate of Title granted to NCLL on 30 June 1976 in Equity Action No. 53 of 1967 was obtained by fraud perpetrated either by the deceased and/or NCLL. Consequently, he seeks a setting aside of that title.
- [3] The Summons for joinder is supported by the affidavit of Maria Smith exhibiting a draft Defence and Counterclaim to the Plaintiff’s Specially Indorsed Writ of Summons filed on 20 May 2015.
- [4] The Plaintiff opposed the application and submitted that the 2nd Defendant’s proposed counterclaim discloses no reasonable cause of action against the Estate and/or NCLL.

Background

- [5] This case is shrouded in confusion as the Plaintiff commenced three separate actions, one in the Magistrate Court and two in the Supreme Court.
- [6] On 30 September 2013, the Plaintiff commenced Case Number 9237 of 2013 in the Magistrate Court seeking to recover from the Defendants a parcel of land situate at Cowpen Road in the Western District of New Providence (“the property”).

- [7] On 9 October 2014, the Plaintiff filed a Specially Indorsed Writ wherein she alleged that by virtue of a Deed of Assent dated 8 July 2013 and made in the Estate of the late Elijah Darling Nesbitt, she is the owner and entitled to possession of the property. She also alleged that the Defendants are trespassers on the property; in the case of the 1st Defendant, he has trespassed from or around October 2001 and with respect to the 2nd Defendant, he has trespassed since November 2003. She further alleged that prior to their trespass they were tenants and/or licensees of the property. Principally, the Plaintiff seeks (i) a declaration that she is the owner of the property; (ii) an injunction restraining the Defendants' continued trespass and (iii) possession of the property.
- [8] On 5 December 2014, the Plaintiff instituted an Originating Summons - 2014/CLE/gen/02024 - seeking, among other things, the transfer and removal of Case Number 9237 of 2013 from the Magistrate Court to the Supreme Court.
- [9] On 27 January 2015, the Plaintiff effected personal service of the Originating Summons on the law firm of C.F. Butler & Associates.
- [10] On 8 April 2015, the Plaintiff filed a Notice to hear Originating Summons on the ground that the Defendants have failed to enter an appearance.
- [11] On 6 May 2015, the parties with their respective Counsel appeared before Grant-Bethell J [Ag] [as she then was] and by consent, the learned judge ordered the following:
- 1) The Plaintiff's Summons filed on 25 November 2013 [sic] in the Magistrate Court be transferred and removed to the Honourable Supreme Court for hearing under the action herein;
 - 2) The action commenced by Originating Summons be converted into and tried as an action by Writ of Summons;
 - 3) The Plaintiff file and serve its Writ of Summons with a Statement of Claim indorsed thereon in the action on or before 20 May 2015;

- 4) The Defendants file and serve an Appearance to the said Writ on or before 3 June 2015 and their Defence and Counterclaim on or before 17 June 2015;
- 5) The 2nd defendant's action by Writ of Summons filed on 25 July 2014 being 2014/CLE/gen/01506 be consolidated with and tried at the same time therein and
- 6) Costs to be costs in the cause.

[12] A scrutiny of the court's file demonstrates that nothing of substance took place between 6 May 2015 and 14 June 2016. On the latter date, the parties appeared before me on a Summons for leave to enter Judgment in Default of Defence. With their consent, that Summons was withdrawn and leave was granted to the Defendants to file and serve an affidavit exhibiting their draft Defence and Counterclaim. The action was adjourned to 4 July 2016 for the hearing of the Defendants' Summons to join the Estate as the Second Defendant and NCLL as the Third Defendant in the proposed Counterclaim.

[13] As Mr. Butler for the Defendants correctly submitted, it is premature for the Plaintiff to challenge the proposed Counterclaim which has not even been filed on the ground that it discloses no reasonable cause of action against the Estate and/or NCLL.

The legal framework

Order 15 – Causes of Action, Counterclaims and Parties

[14] Order 15 Rule 6 speaks to misjoinder and non-joinder of parties. Any number of plaintiffs or defendants may be joined as parties to an action. Rule 6(2) gives the court the unfettered discretion at any stage of the proceedings to add, substitute or remove a party who has been improperly or unnecessarily joined.

[15] Order 15 Rule 2 (1) focuses on counterclaim against a plaintiff. It provides as follows:

“Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in

respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so he must add the counterclaim to the defence.”

[16] Order 15 Rule 3 deals with counterclaim against additional parties. It states:

“(1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject-matter of the counterclaim, or claims against such other person any relief related to or connected with the original subject-matter of the action, then subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made.

(2) Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person’s name to the title of the action and serve on him a copy of the counterclaim; and a person on whom a copy of the counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.”

[17] This rule has its genesis in O. 15, r. 3 of the RSC (UK). The application of the rule is “that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of proceedings concerning any of those matters avoided.”

[18] The Rule, however, only applies subject to the following conditions and circumstances. The plaintiff must be a defendant, as in the present proposed Counterclaim: **Harris v Gamble**, 6 Ch. D. 748; **Furness v Booth**, 4 Ch. D. 587. But the fact that a third party could not have been a defendant to the plaintiff’s claim makes no difference: **Turner v Hednesford Gas Co.** 3 Ex. D. 145.

The present application for joinder

[19] In the present application, the 2nd Defendant seeks leave of the court to file their proposed Counterclaim against the Estate of the deceased and NCLL. This is in consonance with well-established principles that a defendant who wishes to counterclaim against a person other than the plaintiff must apply to the court for

an order that that person be added as an additional party. Where the court makes such an order, it will give directions as to the management of the case.

- [20] The court has a very wide discretion as to whether to make the order. As with amendments generally it is likely that the application will be granted if it does not cause injustice to other parties which cannot be compensated by costs.
- [21] In the Defence, the Defendants denied paragraph 1 of the Statement of Claim as the deceased was an illegitimate son of the late Benjamin Nesbitt who claimed to have been granted the property by a Deed of Gift. They denied each and every allegation contained in paragraphs 1 to 5 of the Statement of Claim.
- [22] In the proposed Counterclaim, the 2nd Defendant alleged that his father purchased the property from Louis Alfred Scott on 22 January 1966 by Indenture which is lodged for record at the Registry of Records in Volume 1105 at page 373 to 376. He stated that his father died intestate on 16 September 1973 and that on 16 June 2003, the Supreme Court named him as the lawful eldest son of his deceased father.
- [23] The 2nd Defendant next alleged that the Plaintiff purports to be the owner of the property by virtue of a Deed of Assent from the deceased. He averred that the deceased asserted his legal and beneficial ownership by virtue of a Deed of Gift from Benjamin Nesbitt to Elijah Nesbitt dated 27 August 1970 and recorded on Volume 1637 pages 78 to 81.
- [24] The 2nd Defendant also alleged that the Deed of Gift is a fraudulent document and that the deceased' purported title has its root in Lewis Alfred Scott who was an adverse claimant in the Quieting Petition of Lawrence Livingston Lightbourn No. 53 of 1967.
- [25] At paragraph 19 of the proposed Counterclaim, the 2nd Defendant averred that the deceased used the fraudulent Deed of Gift pursuant to the Rules and the

procedure set out in the Quieting Titles Act to establish a right to the land in order to have a Certificate issued on the basis that he had a documentary title.

[26] At paragraph 20 of the proposed Counterclaim, the 2nd Defendant averred that on 21 January 1974, the deceased conveyed unto NCLL all the right title and interest in the land.

[27] At paragraph 22, the 2nd Defendant stated that the Certificate of Title was granted to NCLL by Mr. Justice James Smith on 30 June 1976. Consequently, the deceased became entitled to the property.

[28] The 2nd Defendant also stated that in 2006, he instructed the firm of Bethel Moss & Co. to determine the authenticity of the signature attached to the 1970 Deed of Gift and the said document was submitted to Norwich Document Laboratory in the State of Florida for examination. It was determined that the signature was not authentic.

[29] At paragraph 28 of the proposed Counterclaim, the 2nd Defendant particularized the fraud. He alleged that he is the legal and beneficial owner of the property since he is the heir-at-law of Benjamin Nesbitt.

Analysis

[30] Section 27 of the Quieting Titles Act, Ch. 393 (1959) provides that a Certificate of title obtained by fraud shall be null and void except as against a bona fide purchaser for valuable consideration without notice.

[31] As Mr. Butler correctly submitted the Plaintiff is entitled to choose the person against whom to proceed and to leave out any person against whom she does not desire to proceed. Similarly, a defendant is entitled to counterclaim against a plaintiff and to add other parties if he believes that they are necessary parties to the action.

- [32] At such an early stage of the action, if the court prevents a plaintiff in a counterclaim to add any party to the said action, then this is tantamount to driving him from the judgment seat. It also seems contrary to legal principles that a court would prevent a party from bringing those persons who ought to be joined as parties. The Summons for joinder seeks to have the court, pursuant to section 27 of the Quieting Titles Act, determine whether a fraud had indeed taken place. Fraud has to be specifically pleaded. At trial, the 2nd Defendant will have to prove that a fraud took place. If he is unsuccessful, then he will be condemned in costs.
- [33] According to Mr. Butler, the purpose of adding NCLL is because it was this company that applied to the court and obtained the Certificate of Title.
- [34] Given the foregoing, I will grant leave to the 2nd Defendant to join the Estate of the late Elijah Nesbitt as the 2nd Defendant and NCLL as the 3rd Defendant in the proposed Counterclaim.
- [35] Having reached this conclusion, it is now moot to address the Plaintiff's submission that the proposed Counterclaim discloses no reasonable cause of action against the Estate and/or NCLL and it should be struck out.
- [36] That being said, as a general rule, the court will not strike out a claim if it raises a serious live issue of fact which can only be determined by hearing oral evidence: **Ian Peters v Robert George Spencer**, ANUHCVP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.
- [37] In **Walsh v Misseldine** [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the

statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[38] In the present Summons, the allegation of fraud is raised. The Quieting Titles Act clearly provides that where a Certificate of Title was obtained by fraud other than a bona fide purchaser for value, the Certificate can be set aside.

[39] Thus, this action raises triable issues and in order to deal with them justly, it is necessary that the Estate of the late Elijah Nesbitt be joined as the 2nd Defendant and NCLL as the 3rd Defendant in the proposed Counterclaim.

[40] Costs will be costs in the cause.

[41] The Court proceeds to give Case Management Directions and confirms that the trial of this action will take place commencing Monday, 2 April 2019 with a time estimate of five days.

Dated this 28th day of February, A.D. 2017.

**Indra H. Charles
Justice**