COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLE/gen/00801

BETWEEN

HIGGS CONSTRUCTION COMPANY

Plaintiff

AND

PATRICK DEVON ROBERTS

First Defendant

SHENIQUE ESTHER RENA ROBERTS

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Richette C. Percentie of Kingdom Law Advocates for the Plaintiff

Mr. Geoffrey W. Farquharson for the Defendants

Both Defendants present

Hearing Date: 5 March 2020

Civil Procedure - Defendants entered appearance - No Defence filed within time limited for doing so or at all – Plaintiff incorrectly filed Judgment in default of defence – Admission by Plaintiff

Summary Judgment – Test for summary judgment - Defendants raised oral preliminary objections – No Statement of Claim filed – General endorsement and special endorsement - No jurisdiction of Court to hear summary judgment application - No submission to jurisdiction by Defendants – No evidence of breach of contract – No pleadings by Defendants - Order 14 Rule 1 and 5 of the Rules of the Supreme Court 1978

The Plaintiff sued the Defendants for breach of contract and claims damages in the sum of $65,058.17, interest and costs.

The Defendants entered an appearance on 27 July 2017. To date, the Defendants have not filed a Defence. On 31 August 2017, the Plaintiff filed a Judgment in Default of Defence which it acknowledged was incorrectly obtained. Subsequently, on 23 November 2017, the Plaintiff filed

a summons for summary judgment. It was supported by the affidavit of Magolda Higgs, contractor of the Plaintiff Company, on 15 December 2017.

As previously stated, the Defendants only entered an appearance and did not file a Defence. At the hearing, the Defendants raised some oral preliminary objections namely (i) the Plaintiff has not filed a Statement of Claim; (ii) there is already a Judgment in Default of Defence so the Court has no jurisdiction to hear the summons for summary judgment; (iii) The Defendants have not submitted to the jurisdiction of the Court and had they filed any submissions today, it meant that they were further submitting to the jurisdiction and (iv) the Plaintiff did not plead that there is a contract between the parties.

HELD: entering judgment for the Plaintiff on its summons for summary judgment with costs summarily assessed at $5,000 plus interest from the date of the judgment to the date of payment.

1. Nearly 2 ½ years after entering an appearance, the Defendants have failed and/or refused to file a Defence to the claim. It is for the Defendants to show that there should be a trial: see: Ackner LJ in **Banque de Paris et des Pays-Bas (Swiss) SA v de Naray** [1984] 1 Lloyd's Rep. 21, CA at 23.

2. Had the Defendants filed a Defence and the pleaded case of the parties indicate that there are factual issues to be tried, which if proved in favour of the defendants might result in a decision in their favour, then the preemptive power of the Court should not be used.

3. The oral preliminary issues raised by the Defendants are without merit and must fail.

4. There are two types of endorsement: general endorsement and special endorsement. In this case, the Writ of Summons was specially endorsed with a Statement of Claim. **Geelong Retreads Pty Ltd v Allstates Transport Pty Ltd** (1973) 22 F.L.R. 255 considered.

5. Procedural irregularities may not be fatal. In this case, the Plaintiff acknowledged that it incorrectly filed a Judgment in Default of Defence which ought to be withdrawn. The fact that it was not withdrawn does not mean that the Court lacks the jurisdiction to hear the summons for summary judgment. Procedure is a servant and not the master: Lord Collins in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 at para 1.

6. The starting point must always be the pleadings. Submissions, however powerful they may be, do not rise to the level of pleadings: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 relied upon.

7. The practice of appearing before the Court when an application is being heard and take all parties including the judge by "ambush" is a thing of the past. Lawyers have to be better prepared to argue cases by presenting written submissions in advance of the hearing.

RULING

Charles J:

Introduction

[1] By Summons filed on 23 November 2017, the Plaintiff seeks Summary Judgment against the Defendants pursuant to Order 14 Rule 1(1) of the Rules of the Supreme Court, 1978 ("RSC").

[2] On 5 March 2020, I heard this application and entered judgment for the Plaintiff in the principal sum of $65,058.17, interest at the statutory rate of 6.25 % from the date of judgment to the date of payment and costs of $5,000.

[3] I promised to give a written ruling and I do so now.

Background facts

[4] On 29 June 2017, the Plaintiff filed a Specially Endorsed Writ of Summons with a Statement of Claim seeking, in the main, damages of $65,058.17 for breach of a construction contract. The Defendants filed a Notice of Appearance and Memorandum of Appearance on 3 August 2017.

[5] On 31 August 2017, the Plaintiff filed a Judgment in Default of Defence. The Plaintiff has admitted that the Judgment in Default of Defence was incorrectly filed.

[6] The Plaintiff was unaware that the Defendants had filed a Notice of Appearance and Memorandum of Appearance as these documents were not served on the Plaintiff. The Plaintiff only learnt of this after a search was carried out. An affidavit of search was filed on 19 September 2017.

[7] The Plaintiff later filed a Summons for Summary Judgment on 23 November 2017 supported by the Affidavit of Magolda Higgs, the Plaintiff's contractor, filed on 15 December 2017.

[8] The Plaintiff alleges that numerous attempts were made to serve the Defendants' Attorney on record, Mr. Farquharson with the Summons and Affidavit for Summary Judgment. However, those attempts proved unsuccessful.

[9] On 1 October 2019, the Plaintiff effected personal service on both Defendants: see Affidavits of Service filed on 15 October 2019.

[10] Then on 21 January 2020 at approximately 2:15 p.m. Mr. Farquharson was personally served with the Summons and Affidavit for Summary Judgment at Saffrey Square, Bank Lane.

[11] On 5 March 2020 at 2:30 p.m., I commenced the hearing of the summary judgment application. Mr. Farquharson and the Defendants were not present but appeared about 20 minutes late.

The pleadings

[12] The only pleading before the Court is the Plaintiff's Writ of Summons endorsed with a Statement of Claim.

[13] In the Statement of Claim, the Plaintiff averred that it is and was at all material times carrying on the business of construction and building supply services at its location on Barracks Street in Harbour Island. The Defendants were at all material times owners of a parcel of land being Lot No. 17 of the New Dunmore Subdivision located at Ripley Street in Harbour Island.

[14] In paragraph 3, the Plaintiff pleaded that on or about 17 January 2012, the Defendants requested that the Plaintiff provide them with an estimate to complete the construction of a two-storey private residence on the said lot as per the plan provided by the Defendants for the estimated sum of $172,655.00.

[15] The work to be completed is detailed in paragraph 4 of the Statement of Claim. In paragraph 5, the Plaintiff averred that the parties agreed to the estimated sum and the Plaintiff begun the construction work on the residence in 4 stages.

[16] In paragraph 6, the Plaintiff averred that after each stage was completed and in particular up to Stage 2, the total sum of $41,437.20 was disbursed to the Plaintiff by the RBC Royal Bank (Bahamas) Ltd in accordance with the estimated sum. However, during Stage 2, the Plaintiffs discovered some defects on the house and verbally notified the Defendants of those defects. The Plaintiff further asserted that the First Defendant was notified that additional works need to be done and he agreed that the Plaintiff carry out those works.

[17] The Plaintiff averred, in paragraph 7, that after completion of the additional work and during Stage 3, the Plaintiff provided the Defendants with the statement of account but the Defendants failed and/or refused to pay the outstanding sum and the Plaintiff on or about July 2013, discontinued the work on the house.

[18] In paragraph 8, the Plaintiff averred that the Defendants provided the Plaintiff with a letter dated 7 October 2013 requesting that the plaintiff discontinue any further work on the house.

[19] In paragraph 9, it is pleaded that by letter dated 3 December 2015, the Plaintiff demanded payment from the Defendants of the outstanding sum of $65,058.17.

[20] The Plaintiff stated that despite the demand and in breach of the contract, the Defendants have wrongfully failed and/or refused to pay the amount outstanding or any part thereof to the Plaintiff thereby causing damages and loss.

[21] In the prayer, the Plaintiff claims (i) the sum of $65,058.17; (ii) interest and (iii) costs.

[22] To date, the Defendants have not filed a Defence; not even a draft Defence to demonstrate to the Court that they may have a case to go to trial.

The summary judgment test

[23] Order 14 sets out the procedure by which the Court may decide a claim or a particular issue without a trial.

[24] O .14 r 1(1) of the RSC provides as follows:

> **"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant."**[Emphasis added]

[25] Rule 2 (1) provides as follows:

> **"An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed."** [Emphasis added]

[26] Under O. 14 r 5, the test to be applied by the Court is whether there is any "*triable issue or question*" or whether *"for some other reason there ought to be a trial"*. If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.

[27] It is a well-established principle of law that the Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

Preliminary objections by the Defendants

[28] If I understood well learned Counsel Mr. Farquharson, his oral submissions raise the following preliminary objections namely:

1. The Plaintiff has yet to file a Statement of Claim;
2. Since there is a Judgment in Default of Defence which has not been withdrawn, the Court has no jurisdiction to hear the summons for summary judgment;
3. The Defendants have not submitted to the jurisdiction of the Court and;
4. The Plaintiff did not plead that there is a contract between the parties and in any event, there was an agreement that any dispute will be resolved between the parties rather than resorting to litigation.

Statement of Claim

[29] As to the statement of claim, if it is not included in the writ then it must be served on the defendant either with the writ or else not later than 14 days after the defendant enters an appearance to the writ. (O. 18, r. 1.) The statement of claim must "state specifically the relief or remedy which the plaintiff claims", although the details of costs claimed need not be listed. (O. 18, r. 15.) Each cause of action stated in the statement of claim must also be listed in the writ, unless the cause of action arises from the same facts as already mentioned in the writ. However, the statement of claim may extend, modify, or alter claims made in the writ.

[30] It is trite law and really does not need any further elucidation except that it is raised by learned Counsel for the Defendants. He submitted that there is no Statement of Claim. In my opinion, the Writ of Summons in this action is endorsed with a Statement of Claim. It is referred to as a Specially Endorsed Writ of Summons. The reason for me coming to this conclusion is set out below.

[31] There are two types of endorsement: general endorsement and special endorsement.

[32] A general endorsement is not a pleading, rather it is a general statement which puts the defendant on the notice of the claim and foreshadows a statement of claim. General endorsement will not be sufficient.

[33] A special endorsement is a statement of claim that is contained within the Writ which pleads the cause of action. It must show that the plaintiff has a right to relief and plead all the material facts: **Geelong Retreads Pty Ltd v Allstates Transport Pty Ltd** (1973) 22 F.L.R. 255.

[34] On 29 June 2017, what the Plaintiff filed is a Specially Endorsed Writ of Summons with a Statement of Claim because it alleges all of the requirements that constitute the cause of action. Put another way, this is because the cause of action upon which the Plaintiff relies have been pleaded in the statement of claim.

[35] It is my firm view that in the present action, the Statement of Claim alleges all of the factors that constitute the cause of action.

[36] I therefore find that the submissions advanced by Mr. Farquharson are without merit.

Judgment in default of defence

[37] Learned Counsel for the Plaintiff Ms. Percentie admitted that the Plaintiff incorrectly filed a Judgment in default of Defence on 31 August 2017.

[38] Learned Counsel Mr. Farquharson argued that this Court lacks the jurisdiction to hear the summary judgment application because there is an incorrectly filed Judgment which has not been withdrawn. He provided no authority to substantiate his submission.

[39] Based on the Plaintiff's admission that the Judgment in Default of Defence was incorrectly filed, I will make an order that it be withdrawn.

[40] As I see it, this is a procedural inadvertence. It is not fatal to the present action and for the court to hear the summary judgment summons. In this regard, I remind

myself of the judicious words of Lord Collins in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46. At paragraph 1, he stated:

> **"It has often been said that, in the pursuit of justice, procedure is a servant and not a master."**

[41] This preliminary objection fails.

Submission to jurisdiction

[42] Learned Counsel Mr. Farquharson submitted that the Defendants have not submitted to the jurisdiction of this Court.

[43] The brief facts are that the Defendants filed a Notice of Appearance and Memorandum of Appearance on 3 August 2017. If the Defendants intended to dispute the jurisdiction of this Court for reasons which escape me, they could have entered a conditional appearance. They are not outside of the jurisdiction and the evidence demonstrates that both Defendants were properly served.

[44] In my opinion, this objection is untenable and must fail.

No breach of contract pleaded

[45] Learned Counsel Mr. Farquharson argued that the Plaintiff ought to plead and present the contract upon which it relied. He next argued that, in the contract, there was an agreement which prevents and excludes litigation.

[46] From these oral submissions, I extrapolate that the Defendants are alleging in submissions, not in pleadings, that there is a term in the agreement that prohibits the parties from resorting to litigation.

[47] If this is the case, the Defendants needed to file their Defence and plead such allegation. Submissions are not pleadings. Nearly 2 ½ years later, no defence has been filed.

[48] Time after time, our courts have stressed the necessity for proper pleadings. Not so long ago, in **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At para. 39 of the judgment, Sir Michael Barnett JA as he then was stated:

> **"The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**
>
> > **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed:**
> >
> > > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties.'"** [Emphasis added]

[49] At paragraph 40 of the Judgment, Sir Michael had this to say:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[50] In the present case, the Defendants have not filed a Defence. Put differently, they have advanced no evidence in this case. Submissions by Counsel, however powerful they may be, do not rise to the level of pleadings. In fact, the Court was tolerant to permit Counsel to raise oral submissions. The practice of appearing before the Court when an application is being heard and take all parties including the judge by 'ambush' is a thing of the past as we strive to deliver justice in a more efficient and timely manner. Lawyers have to be better prepared to argue cases by presenting written submissions in advance of the hearing. This is also in keeping with the objectives of Order 31A.

[51] The result is that since the Defendants have not filed a Defence or any evidence whatsoever, submissions advanced by Counsel remain just that. They are not pleadings.

Analysis and Conclusion

[52] Having found that the preliminary objections raised by learned Counsel for the Defendants have no merit and having comprehensively set out the summary judgment test, I now turn to the pleadings, of course, very conscious that I should not apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. In other words, I am cautioned that I should not conduct a mini trial.

[53] Stripped to its bare essentials, the Statement of Claim alleges, that there was an agreement between the parties for the Plaintiff to begin the construction work on the Defendants' unfinished residence in 4 stages. Work commenced but was not completed due to, as the Plaintiff asserts, a failure and/or refusal of the Defendants to honour some outstanding sums. The Plaintiff discontinued the work. The Defendants also wrote to the Plaintiff to discontinue any further work on the house. The Plaintiff alleges that a sum of money is outstanding for breach of contract. It claims that amount as well as interest and costs.

[54] In my opinion, the Statement of Claim in the Specially Endorsed Writ of Summons pleads all the material facts and the relief which the Plaintiff seeks. If it did not and it is incurably bad, the Defendants had a recourse of applying to strike it out under RSC O.18 r.19. It appears to me that the Defendants have sat idly for over 2 ½ years on any rights that they may have. They have now turned around and raise weak preliminary objections, all in an effort, in my view, to frustrate the hearing of the summary judgment application.

[55] Order 14 serves to prevent delays in cases where there is no defence, as in the present case. In **National Westminster Bank plc v Daniel** [1994] 1 All ER 156, 160, the question that arose was:

> **"…[i]s there a fair or reasonable probability of the defendants having a real or bona fide defence? Lloyd J posed the test: is what the defendants says credible? If it is not, then there is no fair or reasonable probability of him setting up a defence."**

[56] In the absence of contrary evidence, the Court ought to act on the evidence that was presented. The onus is on the Defendants to show that there should be a trial: **Banque de Paris et des Pays-Bas (Swiss) SA v de Naray** [1984] 1 Lloyd's Rep 21, CA per Ackner LJ at (23) where he stated:

> **"The Court must look at the whole situation and ask itself whether the Defendant has satisfied the Court that there is a fair or reasonable probability of the Defendant's have a real bona fide defence."**

[57] The Defendants having failed to file and serve a Defence, I will grant summary judgment to the Plaintiff in the sum of $65,058.17 with interest at the statutory rate of 6.25% per annum and costs which I have assessed at $5,000. It is worthy to mention that learned Counsel Mr. Farquharson, who put forward no written submissions, asserted that if he is successful, he will be seeking costs of $7,500. I therefore consider the costs of $5,000 to the Plaintiff to be very reasonable.

Dated this 6th day of March, A.D., 2020

Indra H. Charles
Justice