COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2008/CLE/GEN/FP00223

ARNOLD PIERRE

Plaintiff

AND

HAVARD COOPER, SR

Defendant

BEFORE	The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES:	Miss Simone Brown for the plaintiff Ms Zia Lewis for the defendant
Hearing Dates:	2015: 5 and 24 November

DECISION

(Application for Summary Judgment)

Gray Evans, J

1. This is an application by the plaintiff, Arnold Pierre, for summary judgment pursuant to Rules of the Supreme Court ("RSC") Order 14 and/or, alternatively, judgment on admissions pursuant to RSC Order 27, against the defendant, Havard Cooper, Sr.

2. This action commenced on 30 September 2008 by a generally indorsed writ of summons in which the plaintiff claims damages for injuries suffered and loss he sustained on 17 October 2005 at Freeport, Grand Bahama, as a result of the negligence of the defendant.

3. The plaintiff's statement of claim was filed on 24 November 2010 and the defendant's defence on 5 February 2011.

4. The plaintiff alleges at paragraphs 1 through 4 of his statement of claim, and the defendant admits in his defence, that:

(1) The plaintiff was at all material times an employee of Roofing Experts Ltd, a company engaged by the defendant to carry on work on the roof of the defendant's house;

(2) The defendant agreed to and did provide a crane and operator to assist the plaintiff in the performance of his work;

(3) It was an implied term of the agreement that the crane was fully functional and not defective in any manner;

(4) On the morning of 17 October 2005 the plaintiff and another employee of Roofing Experts Ltd, in the course of their employment, were being carried in a basket of the crane provided and operated by the defendant, his servant or agent, when, while being lifted onto the roof of the defendant's house, the cable wire holding the said basket broke, causing the same and the plaintiff (along with the other employee) to crash to the ground.

5. At paragraph 5 of his statement of claim, the plaintiff alleges that the incident was caused by the negligence of the defendant. The defendant denies the plaintiff's allegations of negligence and avers instead that the incident was caused or contributed to by the plaintiff's negligence.

6. The defendant pleads in the alternative that any negligence was caused by the plaintiff's employer, Roofing Experts Ltd, for failing to provide any or any adequate supervision of the job site. The defendant does not admit the plaintiff's alleged particulars of injuries, pain, suffering and loss of amenity and special damages as pleaded by the plaintiff and puts the plaintiff to strict proof thereof.

7. The plaintiff applies by summons filed 27 March 2014, more than three years after the filing of the defence, for an order pursuant to RSC Order 14 for summary judgment against the defendant; and/or, alternatively, an order pursuant to RSC Order 27 rule 3for judgment on admissions; and costs.

8. The plaintiff's application is supported by his affidavit sworn on 2 July 2014 in which he avers as follows:

(1) That I am a Haitian national and in October of 2005 was a resident of the City of Freeport and an employee of Roofing Experts Limited, situated in the said City of Freeport.

(2) That by a contract dated 3 May 2005 between Roofing Experts Limited and the defendant Havard Cooper, Roofing Experts Limited was contracted to carry on roofing repairs to a dwelling house owned and/or occupied by the defendant and the defendant agreed to provide a crane and an operator for the removal of tiles from the roof thereof.

(3) That on 17 October 2005 whilst at work in performance of the said contract in the course of my employment as aforesaid, my co-worker, Pedro Bullard, and I were being lifted in a basket towards the roof of the multi-storey dwelling house by a crane provided by the defendant and controlled by an operator provided by the defendant.

(4) That whilst suspended in the air near the said roof the cable wire holding the basket popped and severed, causing the basket carrying Mr Bullard and me to crash to the ground.

(5) That as a result thereof, both Mr Bullard and I were seriously injured and taken to the Rand Memorial Hospital for treatment.

(6) That I was airlifted to the Princess Margaret Hospital for treatment of the same and was diagnosed as having suffered a fractured spine causing immediate paralysis to my lower limbs and legs.

(7) That by reason thereof I am totally paralyzed below the waist and am unable to walk or move my lower limbs.

(8) That on 30 September AD, 2008 I instituted a civil suit in the Registry of the Supreme Court commencing this civil action against the above-named defendant seeking damages for the loss that I suffered.

(9) That on 27 February 2011, I applied by summons and an affidavit in support thereof seeking the joinder and consolidation of this civil action to a civil action commenced by Pedro Bullard, which was given the file number 2007/CLE/gen/FP/00068, for the joint hearing of the issues herein.

(10) That the said application was consented to by all parties and a Consent Order was on 2 September 2013 signed by Justice Estelle Gray Evans and filed in the Registry of this Honourable Court.

(11) That the said joinder was ordered by way of consent since both cases were based upon the same facts and circumstances and arose out of the same incident on 17 October2005 when both Mr Bullard and I were injured.

(12) That the said defendant in admission of liability for the said incident settled the aforesaid action brought against him by Pedro Bullard and on 11 March 2013 caused a copy of the Writ of Summons in the matter to be marked "settled" and filed in the Registry of the Supreme Court of this honourable Court.

(13) That I verily believe that this is an admission of fact and liability which in the context of Order 27, Rule 3 of the Rules of the Supreme Court entitles the plaintiff herein to rely on the same in seeking an order of this Court finding the defendant liable in negligence for the incident of 17 October2005 in which both Mr Bullard and I were injured.

(14) That I hereby rely upon this admission and seek the judgment of this Court pursuant to Order 27, rule 3 and Order 14 of the Rules of the Supreme Court for a judgment against the defendant herein.

(15) I swear this Affidavit in support of my application pursuant to Orders 14 and 27, Rule 3 of the Rules of the Supreme Court and I do solemnly swear that the statements and assertions contained herein are to the best of my knowledge information and belief, true and correct.

9. The plaintiff also relied on his affidavit filed on 27 November 2015, in which he avers that he verily believes that the defendant has no defence to his claim.

10. The defendant opposes the plaintiff's application and relies on his aforesaid defence filed 5 January 2011 as well as the affidavit of Dwayne Fernander, an Associate with the firm of the defendant's attorneys, Messrs Graham Thompson, filed on 7 April 2014.

11. RSC Order 14 rule 1 provides, inter alia, 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 that defendant."

12. RSC Order 14 rule 2 provides, inter alia, 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."

13. RSC Order 27 rule 3 provides as follows:

> "Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by motion, or summons"

14. Ideally, applications for summary judgment are made after the entry of appearance and before the filing of a defence, since such applications are made on the premise that the defendant has no defence to the plaintiff's claim.

15. In this case, the defendant entered an appearance to the plaintiff's generally indorsed writ of summons on 18 August 2009. The plaintiff's statement of claim was filed on 24 November 2010. It is unclear when the statement of claim was served on the defendant but the defendant filed his defence on 5 January 2011, more than a month after the statement of claim was filed. No application was made at the time or shortly thereafter for summary judgment on the basis that the defence was a sham, or as counsel for the plaintiff now argues, a "mere denial and frivolous"; nor was any application made to strike out the defence on the ground that it disclosed no reasonable defence, or otherwise. Instead, an application was made by summons filed 17 February 2011, and the order there for consented to in or about April 2011, for this action to be consolidated with Supreme Court Action No. 2007/CLE/gen/FP/00068 ("the Bullard

Action") on the ground that both actions were against the same defendant and arose out of the same set of facts.

16. At the date of that order, the plaintiffs in both actions were represented by the same firm of attorneys, which firm still represents the plaintiff in this action. However, no further steps were taken by the plaintiff in either action to consolidate the actions or move the "consolidated action" forward. Indeed, the only filing in the "consolidated action" is the consent order which was not filed until 2 September 2013. By that date, a case management conference in this action had been held on 25 February 2013, at the request of counsel for the defendant, and directions given for the further conduct of this action. The order there for was filed on 29 May 2013 and the pre-trial review conference set for 11 July 2013. That conference was adjourned to October 2013. Neither the plaintiff nor his counsel appeared at the case management or the pre-trial review conferences, or on its adjournment.

17. In the meantime, the writ in the Bullard Action was marked "settled", on 11 March 2013, by another firm of attorneys.

18. Although in her written submissions, counsel for the plaintiff argued that the defence filed on 5 January 2011 was a "mere denial" and she sought to rely on purported admissions therein to support the plaintiff's application for summary judgment and or judgment on admissions, it is clear from the plaintiff's 2 July 2104 affidavit, that it was the settling of the Bullard Action that prompted this application.

19. At paragraphs (12) through (14) of his said affidavit, the plaintiff avers as follows:

> (12) That the said defendant in admission of liability for the said incident settled the aforesaid action brought against him by Pedro Bullard and on 11 March 2013 caused a copy of the Writ of Summons in the matter to be marked "settled" and filed in the Registry of the Supreme Court of this Honourable Court.
>
> (13) That I verily believe that this is an admission of fact and liability which in the context of Order 27, Rule 3 of the Rules of the Supreme Court entitles the plaintiff herein to rely on the same in seeking an order of this Court finding the defendant liable in negligence for the incident of 17 October 2005 in which both Mr Bullard and I were injured.
>
> (14) That I hereby rely upon this admission and seek the judgment of this Court pursuant to Order 27, rule 3 and Order 14 of the Rules of the Supreme Court for a judgment against the defendant herein.

20. Indeed, counsel for the plaintiff in her written submissions stated that the "plaintiff relies on the settlement of the action with Pedro Bullard as sufficient ground for summary judgment in his favour."

21. In Ellis v Allen [1914] 1 CL 904 the court found that in order to satisfy the requirements for judgment on admissions, the admission of facts upon which the applicant relies, either by pleading or "otherwise", could include letters between the parties which show that the defendant had no defence to the action. In that case, the defendant had admitted the breach of a covenant of the lease in a letter to counsel for the plaintiff, and on the basis of that admission, the court held that the plaintiff was entitled to judgment on admissions against the defendant.

22. In this case, the plaintiff argues that the settlement of the Bullard Action is an admission "otherwise." As I understand the plaintiff's argument, by settling the Bullard

Action the defendant is deemed to have admitted liability not only in the Bullard Action but also in this action.

23. The defendant disagrees.

24. In his 7 April 2014 affidavit, Mr Fernander for the plaintiff, avers that any settlement made with respect to the Bullard Action is confidential and its terms unrelated to this action and that such settlement is neither an admission of liability on the part of the defendant in the Bullard Action nor in this one.

25. Counsel for the defendant also echoed those sentiments in her submissions.

26. In my judgment, a settlement of one claim does not, without more, act as an admission of liability with respect to any other claim arising from the same incident. So, in the absence of any authority to the contrary (although counsel for the plaintiff was given an adjournment to permit her to produce some authority for the plaintiff's contention in this regard), or evidence that the plaintiff, in settling the Bullard Action, did in fact expressly admit liability for the incident, the subject of this action, I am not able to find that the settlement of the Bullard Action was an admission by the defendant of liability in this action.

27. Although not evidenced in his said affidavits, the plaintiff, through his counsel's submissions, also contends that the defendant made certain admissions in his said defence which entitle the plaintiff to judgment. In that regard, counsel for the plaintiff, referring to the defendant's defence filed 5 January 2011, pointed out that the defendant admitted, inter alia, as alleged by the plaintiff, that he provided the crane and its operator to lift the plaintiff in a basket to the roof of the defendant's house for the purpose of repairing the same; that the crane was to be operational and free from defect; that while the crane was being operated, the wire holding the basket broke, causing the basket, the plaintiff and Mr Bullard to crash to the ground.

28. As a result of those admissions counsel for the plaintiff argues that the following facts are established and proved and, therefore, require no further evidence:

(1) The defendant was the provider of the crane and responsible for its operation, including the acts and or omissions of the crane's operator;

(2) The responsibility extended to a duty to ensure that the crane was fully operational and free from defect;

(3) This duty was breached when the basket of the crane crashed to the ground after being suspended in the air with the plaintiff inside.

And in counsel for the plaintiff's submission, those facts disclose a prima facie case of negligence against the defendant. Alternatively, counsel for the plaintiff submits, the doctrine of 'res ipsa loquitur' applies, since the provision of the crane was solely the responsibility of the defendant, his servant and or agent, and he provided no alternative version as to how the incident could have occurred.

29. Counsel for the defendant does not deny that the defendant admits that the accident happened in the manner alleged by the plaintiff in his statement of claim. However, she submits, and I accept, that an acceptance of the facts as to how an incident occurred is not an admission of negligence or liability there for.

30. Moreover counsel for the defendant submits, while the defendant does not deny that the incident happened as the plaintiff alleges, the defendant not only denies that the incident was caused by his negligence, but he also alleges that the incident was caused

or contributed to by the plaintiff's negligence, and or, alternatively, by the negligence of the plaintiff's then employer, Roofing Experts Ltd.

31. In that regard, the defendant alleges that the plaintiff was negligent in failing to wear a safety harness and failing to ensure that the safety harness was secured to the roof; and that the employer was negligent in failing to provide any or any adequate supervision of the job. By those allegations, counsel points out, the defendant raises the issue of contributory negligence, a triable issue.

32. In response, counsel for the plaintiff argues that the defendant does not say how a safety harness would have prevented the basket crashing to the ground, which was the cause of the plaintiff's injury and in her submission, the failure of the defendant to articulate and or allege any alternative set of facts to those alleged by the plaintiff is firstly, fatal to any legitimate attempt to defend this action; and secondly, justifies the court exercising its power under RSC Order 18 rule 19 to strike out the purported defence and to make an order for summary judgment in favour of the plaintiff against the defendant on the issue of liability with damages to be assessed.

33. However, as pointed out by counsel for the defendant, the plaintiff's application is for summary judgment and not to strike out the defendant's defence.

34. It is accepted that the purpose of Order 14 is to enable a plaintiff whose application is properly constituted to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. (Notes 14/3-4/5 1997 White Book - Roberts v Plant [1895] 1 QB 597 C.A.).

35. It is also accepted that Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such case to be put on terms...and where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court by, inter alia, having judgment entered against him. (Jacobs v Booth's Distillery Co.(1901) 85 LT 262).

36. So, while I agree with counsel for the plaintiff that nowhere in his defence does the defendant say how the wearing of a harness by the plaintiff or the proper supervision by the plaintiff's employer could have prevented the incident, he does raise the issue of contributory negligence. In that regard, I note that the plaintiff is seeking damages for personal injuries sustained in the said incident. It seems to me that even if wearing a harness or attaching it to the roof may not have prevented the cable wire from breaking or the basket from falling to the ground, it may have affected the plaintiff's fall, as well as the type and or severity of injury suffered by him during the incident.

37. In that regard, I agree with counsel for the defendant that the issue of contributory negligence raised by the defendant provides the defendant with a bona fide defence to the plaintiff's claim and is an "issue or question which ought to be tried".

38. As regards the plaintiff's application for judgment on admissions pursuant to RSC Order 27 rule 3, I find that the plaintiff's settlement of the Bullard Action is not an admission of liability in this action; and secondly, that the defendant's admission of the facts as to how the incident occurred is not an admission of negligence or liability there for as envisioned by RSC Order 27 rule 3.

39. In the result, the plaintiff's application for summary judgment pursuant to RSC Order 14 and or, alternatively, judgment on admissions pursuant to RSC Order 27 rule 3 is dismissed with costs to be paid by the plaintiff to the defendant to be taxed if not agreed.

DELIVERED this 22nd day of January A.D. 2016

Estelle G. Gray Evans

Justice