

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2009/CLE/GEN/FP/00320

BETWEEN

GUY BUTLER ARCHITECT, LLC.

Plaintiff

AND

NEW HOPE HOLDING COMPANY LIMITED

Defendant

BEFORE The Honourable Mrs Justice Estelle GrayEvans

APPEARANCES: Mr Sean Callender for the plaintiffs

Mr Hal O. Tynes for the defendant

HEARING DATES: 2013: 3 June; 28 June

DECISION

Evans, J.

1. The plaintiff by summons filed herein on 4 January 2013 seeks an order pursuant to Order 14 of the Rules of the Supreme Court ("RSC") for summary judgment for the sum of \$894,133.00, together with interest pursuant to Section 3 of the Civil Procedure (Award of Interest) Act, 1992 at the rate of 10% per annum and costs.

2. The said sum of \$894,133.00 comprises a default judgment in the sum of \$628,946.00 obtained by the plaintiff against the defendant in the Circuit Court of the Ninth Judicial Circuit in and for Orange County in the State of Florida in the United States of America together with accrued interest in the sum of \$265,187.00.

3. The application is supported by the affidavit of Mr William Todd Demetriades filed on 16 May 2013 in which he deposes, inter alia, as follows:

- 1) I am an attorney with the law firm of Winderweedle, Haine, Ward & Woodman P.A. of 390 No. Orange Avenue, Suite 1500, Orlando, Florida, USA. I am a member of the Florida Bar and have practiced law in the state of Florida aforesaid since 1996. I am authorized to practice in state court and all federal courts in the State of Florida.
- 2) I have reviewed the defense filed by the defendant on September 19, 2012. I note the defendant does not admit paragraph 2 of the Statement of Claim filed in this action which provides the Circuit Court of the Ninth Judicial Circuit in and for Orange County in the State of Florida in the United States of America was duly constituted and held in accordance with the laws of the State of Florida and had jurisdiction to determine the matter.
- 3) As a member of the Florida Bar and practicing attorney in the State of Florida I hereby confirm the said Court was at all material times and is duly constituted and is held and exist in accordance with the laws of the State of Florida as noted in the attached exhibit WTD 1. There is now produced and shown to me and marked "Exhibit WTD 1" and attached hereto a true copy of the relevant sections of Chapters 26 and 34, Florida Statutes (2008).
- 4) I represented the plaintiff in the said action referred to in paragraph 1 of the Statement of Claim (hereinafter called "the Florida Action").
- 5) A complaint was filed in the Florida Action on February 8, 2008 and subsequently amended on July 16, 2008. I refer to the Amended Complaint exhibited to my Bahamian Affidavit marked "Exhibit WTD 2" and filed in this action on January 17, 2012 (hereinafter called "my Bahamian Affidavit").
- 6) The Amended Complaint alleged three causes of action against the defendant, namely breach of contract, quantum meruit, and account stated. The counts were alternative counts (which is permitted in Florida) and claimed the same amount in damages.
- 7) The Amended Complaint alleged that there was a contract between the plaintiff and the defendant and that the defendant failed to pay amounts that were due and owing to the plaintiff for work performed under the contract. See paragraphs 15, 20 and 21 of the Amended Complaint.

- 8) The Amended Complaint further explained how the contract amount was determined in paragraph 17 thereof.
- 9) The Amended Complaint further alleged that the plaintiff was unaware of any amount having been paid to a Bahamian design professional and therefore, the plaintiff sought the entire balance.
- 10) The defendant never submitted any evidence in the Florida Action that a Bahamian design professional has been paid.
- 11) Mr. Preben Olesen and the defendant hired James Toscano, Esq. to represent them in the Lawsuit. Mr. Toscano is a lawyer with the Orland law firm of Lowndes, Drosdick, Doster, Kantor and Reed.
- 12) In the Florida Action, Mr. Olesen was the primary contact and the corporate representative for the defendant in the Florida Action.
- 13) Per court order dated July 28, 2008, the parties and their counsel were required to attend a case management conference which was held on November 12, 2008 before the presiding Judge, Frederick J. Lauten. I refer to the Order on Case Management exhibited to my Bahamian Affidavit marked "Exhibit WTD 3".
- 14) The defendant and Preben Olesen requested that he be allowed to appear at the case management conference by telephone. The court granted the request. See paragraph 2 of the Order on Case Management dated November 5, 2008. I refer to the said Order exhibited to my Bahamian Affidavit and marked "Exhibit WTD 4".
- 15) In addition to requiring the parties and their counsel attend the Case Management Conference, the Order on Case Management also required the parties and their counsel to submit a Joint Case Management Report providing a factual statement of the case and identifying pleading issues including "theories of liability damages claimed and applicable defenses" at paragraph 2 thereof. The parties jointly filed the Case Management Report on October 31, 2008. I refer to the Case Management Report exhibited to my Bahamian Affidavit and marked "Exhibit WTD 5".
- 16) On November 12, 2008, the Case Management Conference was held in the Florida Action. I attended the conferences as counsel for the plaintiff. Guy Butler attended as the corporate representative of the plaintiff. Mr. Toscano attended as counsel for the defendant.
- 17) Mr. Olesen appeared by telephone as the corporate representative of the defendant and in his individual capacity.
- 18) On February 10, 2009, Mr. Toscano requested that he be allowed to withdraw due to irreconcilable differences between the defendant, Mr. Olesen and his firm. Mr. Toscano also requested that the Court allow 30 days for New Hope and Olesen to retain new counsel. I refer to the Motion for withdrawal exhibited to my Bahamian Affidavit and marked "Exhibit WTD 6".
- 19) The defendant never obtained new counsel and failed to avail itself of the opportunity to dispute the Florida Action. Accordingly and in consequence, the Florida Court entered a Judgment against the defendant. I refer to the final judgment exhibited to my Bahamian Affidavit and marked "Exhibit WTD 1" (hereinafter called "Final Judgment"). A copy of this Final Judgment was served on Phillip Galanis Receiver of the defendant by immediately posting the same to him and advising him telephonically.

- 20) Had the defendant sought to challenge the Judgment in the Florida Action, there were several procedural avenues available to it. At the trial court level, it could have moved for rehearing within "10 days after The filing of the judgment..." Florida Rule of Civil Procedure, 1.530 (a) & (b). It could have also requested relief from the Judgment pursuant to Florida Rule of Civil Procedure 1.540 due to mistake, inadvertence, excusable neglect, etc... provided that it filed such motion within one year after the judgment was entered. The defendant did none of these things.
- 21) The defendant could have also sought review of the Judgment by an appellate court by filing a notice of appeal within 30 days of the rendition of the Judgment under Florida Rule of Appellate Procedure 9.110. However, the defendant chose not to do so. I refer to the said Rules exhibited to my Bahamian Affidavit and marked "Exhibit WTD 7".
- 22) The defendant has failed to avail itself of any of the opportunities it had to challenge the Florida Judgment.
- 23) In the circumstances, the state of Florida had jurisdiction to determine the matter and it so ruled.
- 24) I note the defendant does not admit paragraph 3 of the Statement of claim. I hereby confirm he said Honourable Frederick J. Lauten, Circuit Court Judge did in fact make the Order for Entry of Default Final Judgment. There is now produced and shown to me and marked "Exhibit WTD 2" and attached hereto a true copy of the Order of Default dated June 2, 2009. A copy of this Order was served on Phillip Galanis, Receiver as aforesaid by immediately posting the same to him and advising him telephonically.
- 25) The said Order provides the defendant is subject to the personal jurisdiction of the state of Florida and that Orange County is the proper venue for this action and a default was entered against the defendant on all claims as charged in the Amended Complaint for failure to defend the action and a true copy of the Amended Complaint is referred to above and appears as "Exhibit WTD 2" in my Bahamian Affidavit. The said Amended Complaint prays for damages.
- 26) The Final Judgment confirms the defendant owes the plaintiff the said damages plus interest as alleged in paragraph 3 of the Statement of Claim.
- 27) I note the defendant does not admit it has failed to pay the plaintiff the Judgment sum plus accrued interest. I am advised by the plaintiff and verily believe it has not received the sums appearing in paragraph 4 of the statement of claim or at all.
- 28) I note the defendant denies paragraph 5 of the Statement of Claim wherein the plaintiff alleges it is entitled to the judgment sum plus the interest accrued pursuant to the Final Judgment. As indicated earlier and in accordance with Florida law as aforesaid the plaintiff is indeed entitled to the said Judgment sum and interest. Further, I am informed by and verily believe Sean B. Callender, Bahamian Counsel of the plaintiff, that under Bahamian law the plaintiff is also entitled to Judgment and interest claimed in paragraph 5 of the Statement of Claim based upon the same being awarded in the State of Florida having regard to the circumstances affecting the parties hereto.
- 29) The defendant had ample opportunity to defend the action in the United States and to appeal the Final Judgment made against it in favor of the plaintiff in the Florida Action but wholly failed to do so.

30) In the premises the defendant appears to have no lawful and/or meritorious defense to this action and I respectfully urge this Honorable Court to grant the application for Summary Judgment brought at the instance of the plaintiff as against the defendant.

31) That the contents of this Affidavit are true and correct in every respect.

4. The plaintiff also relies on the affidavit of Mr Richard Guy Arthur Butler, filed on 16 May 2013, in which Mr Butler simply adopts and confirms the statements deposed to by Mr Demetriades in his aforesaid affidavit.

5. The defendant opposes the plaintiff's application and relies on the affidavits of Preben Olesen filed 22 May 2013 and 31 May 2013 as well as its defence filed herein on 19 September 2012. The defendant either denies or does not admit the allegations set out in the plaintiff's claim and avers at paragraph 4 of its defence as follows:

The defendant denies paragraph 5 of the Statement of Claim and says that it is not and was not at any time in the course of the action in which the plaintiff obtained the Judgment sued on a subject of and owed no allegiance to the United States of America or the State of Florida and was not resident or present or domiciled in the United States of America or the said State of Florida or subject to the jurisdiction of the said Florida Court or otherwise submitted to the jurisdiction of the said Court.

6. At paragraph 5 of the statement of claim, the plaintiff pleads as follows:

The plaintiff is entitled to the Judgment sum of US\$628,946.00 together with the accrued interest of US\$265,187.00 for a total Judgment amount of US\$894,133.00 pursuant to the Judgment of the Circuit Court of the Ninth Judicial Circuit in and for Orange Country, Florida.

7. The purpose of RSC Order 14 is to enable a plaintiff to obtain summary judgment, without trial, provided he can prove his claim clearly and provided the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried. (See RSC Order 14 rule 3; *Roberts v Plant* [1895] 1 QB 597 at 603, 604 CA). The policy of RSC Order 14 is to avoid delay in cases where there is no defence (per Robert Goff LJ in *European Asian Bank AG v Punjab and Sind Bank (No. 2)* [1983] 1 WRL 642 at 654 and the power to give summary judgment under RSC Order 14 is intended to apply only to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay (*Jones v Stone* [1989] AC 122 at 124).

8. As a general rule, an application under RSC Order 14 is made after the defendant has entered an appearance and before he has filed a defence. In this case, the defendant filed its defence on 19 September 2012. The plaintiff's summons for summary judgment was filed on 4 January 2013.

9. Although there is nothing to prevent a plaintiff from applying for summary judgment under RSC Order 14, notwithstanding a defence has been filed, the onus is on the plaintiff to show that his delay is justifiable under the special circumstances of the case. Special circumstances may be where a defendant delivers his defence before the expiration of the usual time, for the very purpose of defeating such an application. *McLardy v Slateum* (1890) 24 Q.B.D. 504.

10. Counsel for the plaintiff says such special circumstances exist in this case as not only did the defendant file its defence before the expiration of the usual time therefor, but the defendant also filed its defence without having first filed an appearance, which counsel for the plaintiff suggests was done for the purpose of defeating the plaintiff's application.

11. Counsel for the defendant admits that the defence was filed immediately the defendant was served with the writ of summons, and, therefore, before the expiration of the time limited therefor, but denies that it was done to defeat the plaintiff's application. Mr Tynes pointed out that judgment in default had previously been entered against the defendant, which judgment had been set aside for irregularity, the writ not having been served on the defendant, so the defendant filed its defence immediately it was properly served with the writ of summons to avoid a regular judgment in default being entered against it.

12. The plaintiff's claim is for a liquidated sum, based on a foreign judgment.

13. The law in The Bahamas is that a foreign judgment may be enforceable in The Bahamas, inter alia, by action or counterclaim at common law. See *Cablevision Systems Development Co. v Shoupe* 1984 No. 1093. However, such foreign judgment will only be enforceable if the foreign court had jurisdiction in the matter in which such judgment was rendered. See *Re Dulles' Settlement (No. 2)* [1951] Ch 842 at 851. As a general rule, a foreign court will be deemed to have had such jurisdiction if the defendant is resident there, or has submitted to that court's jurisdiction by participating in the proceedings. *Jet Holdings Inc v Patel* [1988] 3 WLR 295; *Vogel v R and A Kohnstamm Ltd* [1990] 2 WLR 657.

14. The defendant's position is that it was not resident in the State of Florida nor did it participate in the Florida proceedings, except to challenge the Florida Court's jurisdiction in the matter.

15. At paragraph 4 of its defence, the defendant avers, inter alia, that "it is not and was not at any time in the course of the action in which the plaintiff obtained the judgment....subject to the jurisdiction of the said Florida Court or otherwise submitted to the jurisdiction of the said Court."

16. Then at paragraph 5 of his affidavit file 22 May 2013, Mr Olesen avers that “the defendant never submitted to the jurisdiction of the Florida Court and only appeared at the Case Management Conference to contest the jurisdiction of that Court.” Furthermore, Mr Olesen in his 31 May 2013 affidavit averred, inter alia, that “at no time was the defendant present in or carried on business from any place within the State of Florida or any other State within the United States of America and the contract upon which the foreign action was brought was executed by the parties hereto within the Commonwealth of The Bahamas”.

17. The plaintiff’s position is that the Florida Court had jurisdiction in the matter and that the defendant submitted to such jurisdiction by participating in the proceedings. In that regard, Mr Callender pointed out that the plaintiff’s evidence is that Mr Olesen, the defendant’s principal, appeared, with leave, telephonically, while the defendant’s counsel, Mr Toscano, appeared in person at a Case Management Conference before Judge Frederick J. Lauten on 12 November 2008, and participated in the Florida action. Moreover, counsel pointed out, the defendant via its Florida counsel, along with counsel for the plaintiff, signed the Case Management Report. Therefore, in counsel’s submission, having submitted to the Florida Court’s jurisdiction and having failed to successfully defend the plaintiff’s claim, thus allowing a default judgment to be entered against it, the defendant ought not to be allowed to raise in this Court the same issues that it could and ought to have raised in the Florida action. Furthermore, Mr Callender pointed out, even after the default judgment was obtained by the plaintiff, there were several other avenues, as pointed out in Mr Demetriades’ affidavit, that the defendant could have taken in the Florida action to deal with the judgment, including applying to have it set aside or appealing it, and failed to do so.

18. In his submission, therefore, to allow the defendant to now raise as a defence in this case the lack of jurisdiction by the Florida Court would be an abuse of the process of the Court as it would in effect be allowing the defendant two bites at the cherry and denying the plaintiff the fruits of its judgment.

19. I note from the Case Management Report to which Mr Demetriades referred, at section 2 thereof, that one of the items listed under the heading: “Pleading issues, including service of process, venue, joinder of additional parties, theories of liability, damages claimed and applicable defences” is the following:

“New Hope Holding Company Ltd [the defendant] has moved to dismiss the complaint, arguing that the court does not have jurisdiction over it.”

20. I note further at section 12 of that report that “Jurisdiction” is one of the “Preliminary listing of the principal legal and factual issues which counsel believe will need to be decided in the case.”

21. In the case of *Re Dulles*, Denning, L.J. opined:

“I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction: see *Tallack v. Tallack* (12), per Lord Merrivale, P.” [underline added for emphasis]

22. Mr Callender argued that the Florida Court found that the defendant was “subject to personal jurisdiction in the State of Florida and that Orange County [was] the proper venue for [the] action” and that, I understood him to say, was evidence that that court had jurisdiction. However, I note the dicta of Staughton, L.J. in the case of *Jet Holdings Inc. and others v Patels* *supra* which I respectfully adopt, that “the foreign court’s decision on its own jurisdiction is neither conclusive nor relevant. If the foreign court had no jurisdiction in the eyes of [Bahamian Law], any conclusion it may have reached as to its own jurisdiction is of no value.”

23. So, for the purpose of this application, the Court must take the facts to be as deposed, and in this case, as stated in the defence, unless what the defendant says is plainly untrue.

24. On what is before me, I am unable to say that what the defendant says is plainly untrue.

25. It seems that whether or not the Florida Court had jurisdiction to grant the order for judgment in default against the defendant in the Florida action, is an issue that ought to be tried.

26. Counsel for the defendant indicated that in June 2012, at the hearing before the Registrar of the defendant’s application to have the default judgment entered herein set aside, for irregularity he advised the Court and the plaintiff of the defendant’s intention to contest the jurisdiction of the Florida Court, which intention was later confirmed in the defence filed on 19 September 2012. Counsel pointed out that notwithstanding such knowledge the plaintiff nevertheless in January 2013 issued its summons for summary judgment. Counsel, in reliance on the provisions of RSC Order 14 rule 7, therefore, submits that not only should the plaintiff’s application be dismissed, but that the plaintiff ought also be ordered to pay the defendant’s costs herein.

27. RSC Order 14 rule 7 provides that “if it appears to the court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice, to Order 59, and in particular rule 4 thereof, the court may dismiss the application with costs and may require the costs to be paid forthwith.”

28. Lord Lindley in the House of Lords case of *Codd v Delap supra* opined that: “When an application is made under Order XIV for judgment on a foreign judgment, and an affidavit is put in to the effect that the foreign judgment is impeachable for fraud [lack of jurisdiction], the greatest possible caution is required in proceeding further; and unless it is obvious that the allegation of [lack of jurisdiction] is frivolous and practically moonshine, Order XIV ought not to be applied.

29. I am unable on what is before me to say that it is obvious that the allegation of lack of jurisdiction is frivolous and practically moonshine.

30. It is, however, clear that at the date the plaintiff filed its summons herein, the defendant had already, more than three months before, filed its defence in which it was made clear that the defendant intended to rely on the alleged lack of jurisdiction of the Florida Court to defend the plaintiff’s claim. Mr Tynes pointed out, and Mr Callender confirmed, that the plaintiff did not apply to have the defence struck out as not disclosing a reasonable defence or as being frivolous or vexatious. There is, therefore, an arguable defence on record. Counsel for the plaintiff accepts/concedes that a challenge to the jurisdiction of the Florida Court is a serious issue.

31. In the circumstances, the plaintiff’s application for summary judgment is refused and the summons dismissed with costs to be taxed if not agreed.

32. The defence having been filed since 19 September 2012, pleadings have long since closed. The parties should now seek to have this matter set down for a case management conference as soon as possible.

DELIVERED this 28th day of June A.D. 2013

Estelle G. Gray Evans, J.