

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2007/CLE/GEN/FP00213

BETWEEN

GERTRUDE PETER

and

GERHARD PETER

Plaintiffs

AND

AHMED MAHEER ABOUELENIN

Defendant

BEFORE: The Honourable Mrs Justice Estelle Evans, Acting

APPEARANCES: Mr Christopher Gouthro for the plaintiffs

Mrs Tiffany Dennison for the defendants

HEARING DATES: 2008: 3 March and 8 May

RULING

Gray Evans, J. (Ag)

1. This action commenced by a specifically endorsed writ of summons filed 31 October 2007 in which the plaintiff claimed:
 - (1) Specific performance of the contract (between the defendant and the plaintiffs dated 29 August 1996) such that the defendant be ordered to convey one half of Lot 14 Block 4 Fortune Beach Subdivision to the plaintiffs.
 - (2) Damages.
 - (3) Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992.
 - (4) Injunction preventing the defendant from interfering with the plaintiffs' use of their one-half of Lot 14.
 - (5) Costs.
 - (6) Such further or other relief as this Honourable court may deem just
2. According to the Statement of Claim, the defendant has an agreement with The Grand Bahama Development Company Limited (DEVCO) to purchase Lot 14 Block 4 Fortune Beach Subdivision, Freeport, Grand Bahama, which agreement contains a "building commitment" clause that required the defendant to build one or more residences on the property within a certain time, after which the legal title would be conveyed to the defendant.
3. The plaintiffs also allege in the statement of claim that the defendant agreed to sell one-half of the said property to them for the sum of \$135,000.00, which sum included pre-paid service charges on the said property, with the result that each of the parties is to own one-half of the property and share a common swimming pool.
4. The plaintiffs apparently paid the sum of \$135,000.00 to the defendant in 1996 but to date the defendant has not conveyed the one-half interest to them.
5. On 15 November 2007 the writ was served on counsel for the defendant, who apparently accepted service on his behalf, as an unconditional Memorandum of Appearance was entered on behalf of the defendant on 12 December 2007.
6. On 3 January 2008, the defendant filed a summons, returnable before a judge, seeking the following relief:
 - (1) An Order for security for costs pursuant to Order 23 rule 1(1)(a) and (c) of the Rules of the Supreme Court;
 - (2) An Order striking out the action for lack of jurisdiction pursuant to Order 18 rule 19 of the Rules of the Supreme Court; and

(3) An Order for third party proceedings to be issued against Landstar Investments Limited pursuant to Order 16(1) rule 15(3) of the Rules of the Supreme Court

7. On 14 January 2008 the plaintiffs filed a summons, returnable before the Deputy Registrar, for leave to enter judgment in default of defence pursuant to Order 19 rule 7 of the Rules of the Supreme Court, and costs.

8. The parties apparently appeared before the Deputy Registrar on 7 February 2008 and the Deputy Registrar granted an order which was perfected and filed on or about 19 February 2008. There are no notes of the hearing before the Deputy Registrar, but the said Order was signed by her. The terms of the Order are as follows:

“It is ordered that unless the defendant issue a 3rd party notice and or a defence within thirty (30) days from the date of this order the plaintiffs shall be at liberty to enter judgment in default of defence.

And it is ordered that costs of and occasioned by this application be paid by the defendant to the plaintiffs to be taxed if not agreed.”

9. On 4 March 2008 counsel filed a Notice of Adjourned Hearing with regard to the other relief sought in the defendant’s said summons filed on 3 January 2008, that is that the action be struck out and, in the alternative, for security for costs.

10. On 19 March 2008, an order in the following terms dated 10 March 2008 and signed by the Deputy Registrar was filed:

“Pursuant to an unless order granted herein by the Deputy Registrar Stephana J Saunders on the 7th day of February 2009 wherein it was ordered that leave be granted to the plaintiffs to enter judgment against the defendant unless the defendant files a defence within thirty (30) days of the 7th February 2008:

And no defence having been filed by the defendant;

It is ordered that:

The written contract of sale made on the 29th August 1996 between the parties whereby it was agreed that the defendant would convey ½ of Lot 14 Block 4 Fortune Bay Subdivision and ½ of the improvements to the said property to the plaintiffs ought to be specifically performed and carried into execution provided that a good title can be made to the said property in the said contract of sale;

And upon the plaintiffs accepting the title, the defendant be at liberty to prepare and execute a proper conveyance of ½ of the said property and improvements, a draft of such proper conveyance to be approved by the plaintiffs’ attorney or to be settled by the judge in case the parties differ;

The defendant do execute a proper conveyance within thirty (30) days of the plaintiffs' attorney approving title and approving the draft conveyance failing which the Deputy Registrar of the Supreme Court shall execute such conveyance."

11. Notwithstanding the above-mentioned order, on 8 April 2008, counsel for the plaintiffs filed another summons, this time returnable before a judge, seeking the following relief:

- (1) The plaintiffs be granted leave to enter judgment in default of defence pursuant to order 19 rule 7;
- (2) Alternatively, that the plaintiffs be granted summary judgment;
- (3) Alternatively, that unless the defendant files his defence within 14 days that the plaintiffs be at liberty to file judgment in default;
- (4) Costs of and occasioned by this application to be paid by the defendant to the plaintiffs to be taxed if not agreed.

12. On 1 May 2008 the defendant, notwithstanding its Summons of 3 January 2008 and its Notice of Adjourned Hearing filed 4 March 2008, without leave, filed an amended summons seeking the following:

- (1) The writ of summons filed herein to be struck out for lack of jurisdiction within the Commonwealth of The Bahamas.
- (2) In the alternative, the writ of summons filed herein be dismissed for claim of anticipatory breach pursuant to order 18 rule 19(1)(a).
- (3) In the alternative, an order pursuant to order 2 rule 1 or rule 2 of the Rules of the Supreme Court for non-compliance.
- (4) An order for security of the defendant's costs pursuant to Order 23 rule 1.
- (5) And any other relief that the court may see as fit.

13. None of the mentioned summonses was supported by affidavit.

14. In any event, at the hearing before me, the parties agreed that on the state of the record, the order filed herein on 19 March 2008 should be set aside, which is what I did, and I proceeded to hear the summonses filed by the defendant and the plaintiffs respectively.

15. Counsel for the plaintiffs had two (2) preliminary objections to the defendant's application.

16. Firstly, he submitted, in order for the defendant to challenge this court's jurisdiction in these proceedings, the application ought to have been made pursuant to Order 12 rule 6 (English rule 7) and not Order 18 rule 19 and that such application ought to have been filed within the time limited for the defendant to file and serve its defence.

17. Order 12 rule 6 provides:

"6. (1) A defendant to an action may with the leave of the Court enter a conditional appearance to an action.

(2) A conditional appearance...is to be treated for all purposes as an unconditional appearance unless the court otherwise orders or the defendant applies to the court within the time limited for the purpose for an order under rule 7 and the court makes an order thereunder.

18. Order 12 rule 7 (English rule 8) provides:

"7. (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction."

19. In the 1979 English Rules at paragraph 12/8/2, the learned authors state:

"The application must be made before entering an unconditional appearance. After unconditional appearances it is too late to object to any irregularity in the issue or service of the writ or notice of the writ, of which the defendant had knowledge, for appearance is a "fresh step" within Order 2 rule 2(1).

20. Further, the learned authors at 1979 Rules of the Supreme Court 1979 (12/7/4) state:

A conditional appearance or appearance under protest is a complete appearance to the action for all purposes, subject only to the right reserved by the defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. A conditional appearance is, although expressed to be "conditional," nevertheless a complete appearance to the action for all purposes subject only to the right reserved by the defendant to apply to set aside the writ or service, and moreover it is a voluntary appearance and may thus amount to a submission to the jurisdiction. If a party, therefore, desires to avoid submitting to the jurisdiction, the safer

course for him is not to enter a conditional appearance, but without entering any appearance to apply to set aside the service or the writ on the ground that the court has no jurisdiction to claim or exercise jurisdiction over him.” (Underline added).

21. It seems clear from the rules that a defendant wishing to raise an objection to the jurisdiction of the court should do so before entering an appearance or after having obtained leave to enter an unconditional appearance and then within the time limited for making such application, usually fourteen (14) days, failing which he is deemed to have submitted to the jurisdiction.

22. I therefore accept the plaintiffs’ submission that the defendant, having by its counsel accepted service of the writ and having entered an unconditional appearance, is precluded from raising the issue of the jurisdiction of the court in these proceedings, since an unconditional appearance is considered a “fresh step” in proceedings. (12/8/2 above).

23. In any event, although the parties’ country of origin may be a more convenient forum, there appears to be nothing excluding The Bahamas as a forum for bringing the action since the property, the subject of the agreement, is situated in The Bahamas.

24. I therefore find that The Bahamas Supreme Court has jurisdiction in this matter.

25. Secondly, counsel for the plaintiffs objected to the defendant proceeding with the amended summons filed 1 May 2008 as no leave was obtained to file the said summons pursuant to Order 20 of the Rules of the Supreme Court.

26. Order 20 provides that the court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just.

27. As pointed out by counsel for the plaintiffs, an application to amend should be made by summons. No such application was made in this case. Nor was an application made at the hearing for leave to use the amended summons.

28. Notwithstanding the procedural defect in the defendant’s amended summons, in exercise of my discretion, I proceeded to hear the “offending” application.

29. The only “new” prayer in the amended summons was the defendant’s prayer that the writ be dismissed for claim of anticipatory breach pursuant to Order 18 rule 19(1) (a).

30. Order 18 rule 19(1)(a) provides as follows:

“19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be.

31. Order 18 rule 19(2) provides that no evidence shall be admissible on an application under paragraph 1(a), so one should be able to determine merely by looking

at the pleading, in this case, the specially indorsed writ, whether a reasonable cause of action has been disclosed.

32. A “reasonable cause of action” is defined as “a cause of action with some chance of success when only the allegations in the pleading are considered” (per Lord Pearson in **Drummond-Jackson v. British Medical Association [1970] 1 WLR 688**) and so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a judge the mere fact that the case is weak and not likely to succeed, is no ground for striking it out. (**Moore v. Lawson 31 TLR 418 C.A.**) (*1979 English Rules, paragraph 18/19/5*).

33. In the statement of claim, the plaintiffs allege that they have a contract, in writing, with the defendant for the sale and purchase of property; that they have paid all moneys due under the contract and that the defendant has failed to convey his interest in the property to them. As a result, the plaintiffs are seeking an order for specific performance against the defendant.

34. In my view, the plaintiffs’ statement of claim discloses a reasonable cause of action. Consequently the defendant’s application to strike out the writ under Order 18 rule 19 is also refused.

35. The defendant also makes a claim for security for costs pursuant to Order 23 of the Rules of the Supreme Court which provides:

“23. (1) Where on the application of a defendant to an action or other proceeding in the Supreme Court it appears to the court:

- (a) That the plaintiff is ordinarily resident out of the jurisdiction, or
- (b) ..., or
- (c) That the plaintiff’s address is not stated in the writ or other originating process or is incorrectly stated therein

Then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceedings as it thinks just.”

36. Under Order 23, an application for security for costs is to be made by summons and an affidavit in support is generally necessary, though not where the ground for requiring security is that the plaintiff is resident out of the jurisdiction and that fact appears on the writ.

37. The fact that the plaintiffs are resident outside of the jurisdiction does not appear on the writ. In fact, the plaintiffs’ address for service is stated as c/o Gouthro & Co., Suite B, Second Floor, Regent Centre, Freeport, Grand Bahama.

38. The defendant’s counsel has asked that \$30,000.00 be paid into court as security for its costs. However, no evidence was provided as to how counsel arrived at that sum.

39. I note here that it is a great convenience to the court to be informed as to what are the estimated costs, and for this purpose a skeleton bill of costs, exhibited to an affidavit, usually affords a ready guide.

40. No such guide having been provided it is therefore left to this court to speculate.
41. It is not disputed that the plaintiffs reside outside the jurisdiction. However, counsel for the plaintiffs has asked that the court not exercise its discretion in favour of the defendant to order security for costs because the plaintiffs are of substantial means and they are entitled to an interest in the property owned by the defendant. In his view, the defendant has no valid defence to the plaintiffs' claim and in these circumstances to order the plaintiffs to provide security for costs would in effect be a denial of justice to them.
42. Although the plaintiffs are ordinarily resident outside of the jurisdiction, and their address for service is stated as c/o Gouthro & Co., Suite B, Second Floor, Regent Centre, Freeport, Grand Bahama (their local attorneys' address) rather than their address outside of the jurisdiction, there was no allegation that this was intended to deceive since it appears that the parties are, or were before the commencement of these proceedings, friends and the defendant well knows the plaintiffs' address abroad. Further, it would appear that the plaintiffs have at least an equitable interest in the land, the subject of this action, having made a substantial financial investment therein.
43. So, having regard to all the circumstances of the case, I do not think this is a proper case for the court, at least not at this time, to exercise its discretion and order the plaintiffs to provide security for the defendant's costs.
44. The defendant's application for security for costs is therefore refused.
45. As regards the plaintiffs' summons filed 8 April 2008 for leave to enter judgment or summary judgment, the parties' attention is drawn to Order 75 of the Rules of the Supreme Court, and specifically rule 2 thereof, which governs the procedure for applications for specific performance.
46. The plaintiffs' applications for judgment in default pursuant to Order 19 of the Rules of the Supreme Court and for summary judgment, presumably pursuant to Order 14 of the Rules of the Supreme Court, are therefore denied.
47. In summary, the orders of this court are as follows:
- (1) The order of the Deputy Registrar filed herein on 19 March 2008 is set aside.
 - (2) The defendant's summonses of 3 January 2008 and 1 May 2008 are dismissed.
 - (3) The plaintiffs' summons of 8 April 2008 is dismissed.
 - (4) The defendant is given fourteen (14) days within which to file and serve its defence.
 - (5) Costs will be in the cause.

DELIVERED on the 5th day of June 2008

Estelle G. Gray Evans
Justice (Acting)