

COMMONWEALTH OF THE BAHAMAS

2021/CLE/GEN/00319

IN THE SUPREME COURT

Common Law & Equity Division

B E T W E E N

HERMAN ELISHA FRANCIS

Plaintiff

AND

THE NATIONAL INSURANCE BOARD

Defendant

Before the Hon. Mr. Justice Neil Brathwaite

Appearances: Leslie Stuart by Power of Attorney

Cordell Frazier, Fern Bowleg, Heather Maynard,

Date of Hearing: 21st July, 2021

DECISION

1. The Plaintiff is represented in this matter by Leslie Stuart, who is not an attorney, but who is relying upon a power of attorney. By Summons filed on 19th May 2021, the Plaintiff moves to strike out the Defendant's defence, as well as for leave to serve interrogatories on the Defendant. In the Summons, which is not a model of clarity, the Plaintiff claims that the Defendant has engaged in fraudulent conduct, as a result of which there is no possibility that judgment will be entered for the Defendant. Alternatively, the Plaintiff also seeks leave to serve interrogatories on the Defendant, seeking answers to the following questions:
 1. Are there two computer systems of record keeping at the National Insurance Board that show different results for Mr. Herman Elisha Francis' National Insurance contributions payments.
 2. Is there any record of Mr. Herman Elisha Francis' employment with Asa H. Pritchard on record at the National Insurance Board.
 3. Can you provide the Plaintiff with all the National Insurance Board's records for Mr. Herman Elisha Francis on your old computer system.
 4. Is there any record at the National Insurance Board to indicate that Mr. Herman Elisha Francis ever applied for any National Insurance contributions refund.
 5. What is the employer number for Asa H. Pritchard.
2. In support of the Summons, Mr. Stuart swore an affidavit on 24th June 2021, to which he exhibits a letter to counsel for the defence, Ms. Cordell Frazier. In that letter, Mr. Stuart seeks to alert Ms. Frazier to the provisions of the Bahamas Bar Association Code of Professional Conduct, rules I and VIII. Rule VIII (d) is in the following terms: *"The attorney must not, for example, ... (d) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, mis-state facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or assisting in any fraud, crime or illegal conduct;*

3. On behalf of the plaintiff, Mr. Stuart referred to a number of examples of what he described as fraudulent conduct. He complained that counsel for the Defendant had withheld answers to interrogatories for two weeks, despite undertaking to forward them as soon as they were received. He complains that a statement in a letter from Ms. Frazier that the Plaintiff had made no contributions for the period 2013-2014, and attempts to clarify the same, is demonstrative of fraudulent conduct.
4. Mr. Stuart complains that a statement in the affidavit of Lawrence Knowles that “the April 2013 to April 2015 contributions were not paid by the Plaintiff when they were due” also amounts to fraud, as he states that the National Insurance Act Chapter 350 provides that late payments are considered as paid on time for the calculation of a right to any benefits on behalf of a claimant.
5. He further complains that a statement in the affidavit of Lawrence Knowles that there were “contribution records for the Plaintiff’s employment with Asa H. Pritchard for the 1978/1979 contribution year, but there were no payments to the National Insurance Board on behalf of the Plaintiff” amounts to fraud, as section 19 provides that regulations may be made for treating contributions payable on behalf of an employed person but not paid as paid. Mr. Stuart also complains that the Defendant has shifted their reliance from National Insurance (Benefit and Assistance) (Amendment) Regulations of 2012 to the similarly titled regulations of 2010 to support their contention that the Plaintiff cannot receive credit for late contributions.
6. Mr. Stuart therefore submits that, because of this allegedly fraudulent conduct, the Defence cannot possibly succeed, and he cites the Privy Council case of **Hip Foong Hong v H. Neotia and Company (PC Appeal No. 98 of 1917 at paragraph 5** where the Court says “...*a judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail....*”
7. In opposition to the application of the Plaintiff, counsel for the Defendant preliminarily objects to the affidavits of the Plaintiff, which were sworn by Leslie Stuart, on the basis that Stuart should not be a witness and advocate in the same proceedings. Counsel relies on the case of **Emmott**

and others v The Treasurer of the Commonwealth of The Bahamas and another (2001) BHS. J. No 144, where the court is critical of the practice of an attorney swearing an affidavit in a matter, and then appearing as counsel in the same matter, as it places the court in the embarrassing position of having to decide the acceptability of an affidavit sworn by counsel who then appears before the court. I also note that, at paragraph 12 of the decision, the court sets out **Practice Note No. 1 of 1995**, which itself adverts to paragraph 3 of the Commentary to Rule VIII of the Bahamas Bar Code of Professional Conduct, which states that *“If the attorney is a necessary witness he should testify and the conduct of the case should be entrusted to another attorney.”* Ms. Frazer therefore submits that Stuart should not be a witness and advocate at the same time.

8. In response to this preliminary point, Mr. Stuart submits that this rule cannot apply to him, as he is not an attorney. In my view, that is beside the point, as the spirit of the rule is directed at preventing an advocate from being advocate and witness at the same time, to avoid placing the court in an embarrassing situation. The point therefore applies to Mr. Stuart. However, I note also that the authority, and the rule quoted, does not indicate that the affidavit will be disallowed or of no effect, but merely expresses that the practice should be discontinued. It is therefore hoped that Mr. Stuart will desist from swearing affidavits, if he wishes to continue as advocate in this matter.
9. Substantively, it is the contention of the Defendant that, having regard to the divergences between the positions of the Plaintiff and the Defendant, the Plaintiff is in essence seeking to have the Court determine factual matters, in order for the Court to find that the conduct of the Defendant is fraudulent, with the result that the defence could not succeed and should be struck out.
10. The Defendant cites the case of **The Ontario Securities Commission v Pushka and another (2018) 1 BHS J. 94**, a decision of Winder J., where the Learned Judge identifies ten factors to be considered in determining whether to try a preliminary issue. Among those factors are: (iv) *“Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either unsafe or useless.....”*

11. The Defendant contends that this is not an appropriate case for the Court to exercise its discretion to order the trial of a preliminary issue, as the point of contention has been clarified. In my view, this is an oversimplification, as the point of contention could only be considered clarified if the court accepts the facts as submitted by the Defendant. Furthermore, while the Defendant has provided clarifications of some of the points contested by the Plaintiff, those clarifications, and their import, are disputed by the Plaintiff, and have themselves lead to allegations of fraudulent conduct.
12. The Defendant further submits that the power of the Court to strike out pursuant to Order 18 of the Rules of the Supreme Court should only be exercised in plain and obvious cases. This submission is supported by the authority of **Asa H. Pritchard Ltd. V Bahamas Supermarkets Limited (2015) BHS J No. 32**. In that decision, Bain J. held that *“The principle is well settled that the jurisdiction to strike out must be used sparingly. In the exercise of such powers it must be mindful that it deprives a party of the normal trial procedure through discovery and oral evidence tested through cross examination. To entertain an application the Court must decide whether the case is so plainly inarguable that there is no point in having a trial. In essence it should only be used in plain and obvious cases.”*
13. In considering the application to strike out, I note that the Plaintiff’s main contention is that the Defendant has engaged in fraudulent conduct, and that the defence therefore cannot succeed, and should be struck out. Mr. Stuart bolsters this submission with the authority of **Hip Foong Hoong**. However, a further reading of that case reveals the following statement by the Court: *“They have only to add that where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved...”* Having considered the issue, I am unable to agree with the Plaintiff, on the evidence that has been placed before the Court, that the Defendant or counsel has engaged in fraudulent conduct. The allegations of fraud are based on factual disputes, which cannot be resolved without an actual trial, and on legal submissions, on which it is clear that the parties disagree. Such disagreement, without more, could not amount to fraud. Indeed, Mr. Stuart is admonished to consider carefully the nature of the personal attacks and allegations in which he engages, which, in my view, are baseless.

14. What is also clear is that this is far from a “plain and obvious” case. The Plaintiff contends that he has wrongly been denied a pension. The Defendant says that the Plaintiff is not entitled to the pension, as he has not made the necessary number of contributions. There are clearly a number of issues which can only be resolved at trial, not least of which is the question of how many contributions the Plaintiff in fact made, and is he therefore clearly entitled to the pension which is being denied? These matters, in my view, cannot be resolved in summary fashion.
15. On the remaining issue of interrogatories, the Defendant submits that they have been answered, and have exhibited to the affidavit of Lawrencine Knowles of 9th July, 2021, a letter dated 30th June 2021, which refers to the interrogatories referenced in the Summons. The Defendant does not dispute this, and indeed, one of the complaints of fraudulent conduct relates to answers provided by the Defendant, and to the alleged withholding of those responses from the Defendant by not forwarding the same for two weeks.
16. I therefore decline to strike out the Defence, or to give leave to serve Interrogatories on the Defendant in the terms sought in the Summons of 19th May 2021. The application is therefore dismissed, with costs to the Defendant.

Dated this 15th day of October, A.D. 2021



Neil Brathwaite
Justice