

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2014/CLE/gen/00062
BETWEEN**

**BANK OF THE BAHAMAS LIMITED
Plaintiff
AND
CURTIS WENDELL PINDER
Defendant
AND
JOHN SANDS
Third Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Paul Wallace Whitfield for the Defendant
Ms. Shantelle Munroe for the Third Party

WRITTEN SUBMISSIONS: For Third Party dated March 17, 2020
For the Defendant dated April 20, 2020

RULING

Hanna-Adderley, J

Introduction

1. There is one Summons in this action filed on February 11, 2020 by the Third Party which formed the subject matter of the hearing. The Summons is supported by the Affidavit of the Third party filed on March 10, 2020. The Third Party is seeking pursuant to Order 16 Rule 6 of the Rules of The Supreme Court ("**RSC**") an Order setting aside the proceedings on a Third Party Notice on the ground that the Defendant's claim against the Third Party is unmeritorious and as a result the Third Party is not a proper party to this action, and alternatively, an Order pursuant to Order 16 Rule 4 of the RSC that the Defendant serve a Statement of Claim on the Third Defendant within 14 days of the Court's Order. The Defendant meets this

application with an Affidavit filed on April 16, 2020. The Third Party relies on Submissions dated March 17, 2020 and the Defendant relies on Submissions dated April 20, 2020.

2. The Plaintiff, in an action commenced by Writ of Summons filed herein on February 24, 2014, pursuant to Order 73 of the RSC, seeks the recovery of monies loaned to the Defendant by way of a mortgage. The Third Party was the Plaintiff's Branch Manager at the time of the transaction.

Statement of Facts

3. The Third Party Notice filed on April 23, 2014 and served on the Third Defendant on February 21, 2018, provides in part as follows:

"TAKE NOTICE THAT this action has been brought against the Defendant. In it, the Plaintiff claims the sum of B\$289,551.03 interest and costs, as appears from the Writ of Summons, a copy of which is served herewith.

The Defendant claims against you to be indemnified against the Plaintiff's claim and the Costs of this action or a contribution to such extent as the Court deems just, on the grounds that:-

1. The matters complained of in the Writ of Summons were caused entirely or alternatively contributed to by your bad faith and/or negligence and/or inducement whilst at all material times acting as the Manager of the Freeport Branch of the Plaintiff..."
4. The Defendant's claim as alleged against the Third Party in the Counterclaim of the Defence is that:

"1. The Plaintiff has been entirely negligent in the management operation and control of its Freeport Branch whilst at all material times under the management and control of Mr. John Sands, (hereinafter referred to as "the Third Party"), which negligence has caused the Defendant inconvenience loss and damage.

2. By an agreement made orally on or about the 16th day of December A.D., 2009, between the Defendant and the Third Party (who at all material times acted as Branch Manager and agent and behalf of the Plaintiff), it was agreed

that the Defendant would purchase the fee simple in Lot numbers 51B and 53, Lucayan Beach Subdivision, Freeport, Grand Bahama, Bahamas (hereinafter referred to as "Meridian") for a consideration of B\$230,000.00, by means of a B\$250,000.00 Legal Demand Mortgage which would be provided by the Plaintiff via the Third Party.

3. The Defendant was induced to enter the said agreement and execute the said Legal Demand Mortgage by the Third Party (at all material times acting as aforesaid) who represented *inter alia* that Meridian would be responsible for and would faithfully make the monthly instalment payments to the Plaintiff, thereby obviating the need for the Defendant to make the said monthly instalment payments.
4. By virtue of matters aforesaid, as a direct consequence of the negligence and/or bad faith of the Plaintiff, its servants or agents, the Defendant has suffered inconvenience, loss and damage.
5. FURTHER OR ALTERNATIVELY the Third Party has been entirely negligent or has acted in bad faith in the management operation and control of the Plaintiff's Freeport Branch, which negligence and/or bad faith has caused the Defendant inconvenience loss and damage.

The Defendant claims damages, interest, costs and further or other relief the Court deems just."

5. The Third Party stated in his Affidavit, in part, that, on February 21, 2018 he was served with a Third Party Notice filed April 23, 2014 by the Defendant. That as a result he filed a Third Party Response and Memorandum of Appearance. That the Defendant has not filed a Third-Party Statement of Claim and that as a result as far as he is aware the allegations made against him are contained in the Defendant's Defence and Counterclaim. He referred to the Witness Statement filed by the Defendant and denied approaching the Defendant or having any discussions with him about assisting another client. That the Defendant or a representative phoned and made an appointment to meet with the Third Party to discuss the loan. That the Defendant was seeking funds to carry out renovations to certain investment

properties that he owned. That the first time he met the Defendant was on December 15, 2009 the same date that the Commitment Letter was prepared. That the Defendant's request was reasonable and the application was expedited after various bank clearing procedures were completed and the mortgage approved.

6. That when the Defendant approached him, he believed that the Defendant had already acquired the subject property from Meridian because he had seen a Conveyance dated November 27, 2009 between the Defendant and Meridian and that when he met the Defendant on December 15, 2009 he told the Defendant that he was short of funds needed to borrow the money to complete his renovation. The mortgage payout was made to his company Craftsman Constriction rather than in his personal name and per the Plaintiff's policy and it was understood that the funds were to be used on the renovations. The Commitment letter indicated the reason for the loan and the Defendant's offer of the subject property as collateral for the loan. That in the circumstances he could not have and did not induce the Defendant into any agreement to obtain a mortgage for the purpose of purchasing the subject property as the subject property had been purchased one month before he met with the Defendant.
7. That he made no promise or gave no assurance to the Defendant that Meridian or Mr. Jenette or any other person would repay the loan and that it was explained to the Defendant that the monthly payments would be deducted from his personal account. He believed that the Defendant knew Mr. Jenette before he met with him because of the date of the Conveyance. That it was the Plaintiff's practice to provide an attorney with instructions requiring good and marketable property which would have involved stamping and recording the documentation and that funds were given to the attorney for this purpose. As Branch Manager of the Plaintiff he ensured that the Plaintiff's policies were followed. He never had a conversation with the Defendant that would have induced him to unfairly expose him to any action or by negligence or by bad faith.
8. The Defendant stated in his Affidavit in response, in part, that all material times the Third Party was "the Manager of the Freeport Branch of the Plaintiff, with ostensible

authority derived from his position of Manger aforesaid to execute and perform the responsibilities and duties of a branch manager of a commercial bank, including but not limited to the approval of loans and mortgages according to standard banking procedures, the Plaintiff's management policies and the law." The Defendant includes in his affidavit advice given to him by his attorney and also states that the Conveyance and Mortgage remained unstamped and unrecorded. He disputes the Third Party's assertion that they met on December 15, 2009 and he refers to the following documents and the dates of the same: Personal Loan application dated December 15, 2009, Commitment Letter dated December 15, 2009, unstamped mortgage dated December 15, 2009, the Plaintiff's certified cheque in the sum of \$249,000.00 made payable to Craftsman Construction dated December 16, 2009 and the Plaintiff's Disbursement Form dated December 16, 2009.

9. The Defendant disputes that he told the Third Party that he owned the subject property and states that the Personal Loan Application Form is silent as to whether he owned property. He denied that he was a customer of the Plaintiff and that he ever was, and that he never operated a bank account with the Plaintiff. That the Third Party never made certain that he complied with the terms of the Commitment Letter. That no title searches or opinion of title was conducted on the subject property and none could have been conducted within the 24 hours of the date of the Application Form and the Commitment Letter. That the Commitment Letter required the Mortgage to be stamped and recorded. There was no express provision that the loan funds were being used to stamp the mortgage deed. He asks that the status quo of the action be maintained and that the Third Party's application to strike out be dismissed.

Issue

10. The issue before the Court is whether the pleadings disclose a reasonable cause of action against the Third Party which would justify the continuation of Third Party Proceedings.

Analysis and Conclusions

The Law

11. Order 16, Rule 1 of the RSC states:-

“1. (1) Where in any action a defendant who has entered an appearance —

(a) claims against a person not already a party to the action any contribution or indemnity; or,

(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action, then, subject to paragraph (2), the defendant may issue a notice in Form No. 20 or 21 in Appendix A, whichever is appropriate (in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

(2) A defendant to an action may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff.

(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.

12. Order 16, Rule 6 of the RSC. Proceedings on a third party notice may, at any stage of the proceedings, be set aside by the Court.

13. Order 18 Rule 19 of the RSC. (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; or**

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

(Emphasis Mine).

14. The Defendant by his own admission at paragraph 4 of his Defence states that he entered into an agreement on December 16, 2009 with the beneficial owners of Lot numbers 51B and 53, Lucayan Beach Subdivision, Freeport, Grand Bahama, Bahamas (“**the subject property**”) whereby the owners would satisfy the mortgage he took out with the Plaintiff by paying the monthly instalments and in return he would provide a Satisfaction of Mortgage at the end and reconvey the property to the owners.
15. The Defendant makes an allegation of negligence firstly as against the Plaintiff, for the management, operation and control of its Freeport Branch whilst at all material times under the management and control of Mr. Sands and as such caused the Defendant inconvenience and loss.
16. The Defendant also alleges that he was induced by the Third Party on December 16, 2009 to purchase the subject property by way of obtaining a mortgage with the Plaintiff.
17. The Defendant alleges that the Defendant suffered inconvenience, loss and damage as a result of the negligence and/or bad faith of the Plaintiff, its servant or agents

and that the Third Party has also been negligent, acted in bad faith in the management operation and control of the Plaintiff's Freeport branch.

18. In any claim for negligence as against a party, the person who alleges such negligence must ensure that by way of their pleadings they establish that there was a duty owed to the offended party by the offending party, that there was a breach of that duty and as such the offended party has suffered loss and damages as a result of the offending party's action or inaction. The Defendant alleges that the Plaintiff has been negligent in the management, operation and control of its Freeport branch whilst under the management of the Third party. However, his pleadings fail to state the way in which the Plaintiff has been negligent in its management, operation and control of its Freeport branch. Further, the Defendant also fails to show if and when such duty was breached by the Plaintiff and in what manner the alleged breach occurred.
19. The Defendant alleges against the Third Party that he was induced to enter an agreement by the Third Party to obtain a mortgage to purchase the subject property and that another party (Meridian) would be responsible for the monthly instalments towards the mortgage debt. He also alleges that the Third Party has been entirely negligent or has acted in bad faith in the management, operation and control of the Plaintiff's Freeport branch. Moreover, he alleges that it was the Third Party who represented that another party would be responsible for the monthly payments. The Defendant's allegation as against the Third Party is grounded in negligence however, the Counterclaim fails to particularize the negligent actions or inactions of the Third Party in his management, operation and control of the Plaintiff's Freeport branch which led to the Defendant's loss and damage.
20. While recognizing that the parties are bound by their pleadings, the Defendant throughout his Defence and Counterclaim maintains that the Third Party always acted as "Branch Manager and agent for and on behalf of the Plaintiff" and that as a result of the matters previously complained of, such matters were a direct consequence of the negligence and/or bad faith of the Plaintiff, its servants or agents. Moreover, Mr. Pinder in his Affidavit states that at all material times the

Third Party was the manager of the Freeport Branch of the Plaintiff, with ostensible authority as manager of a commercial bank. After a review of the Defendant's pleadings, it is evident that the Defendant has pleaded a case as against the Plaintiff bank and not the Third Party in his **personal capacity**. The Defendant cannot in the same breath sustain a claim against the Third Party in his personal capacity in Third Party Proceedings. To my mind, the Defence and Counterclaim may have potentially raised the issue of vicarious liability between the Plaintiff bank and "one of its servants and/or agents" which resulted in loss and damages.

Disposition

21. Having read the Summons and the Affidavits filed in this application and considered the submissions made by Counsel for the parties, for the reasons stated Third Party Proceedings ought not to have been brought against Mr. John Sands in his personal capacity as the pleadings disclose no reasonable cause of action and if permitted to proceed would be an abuse of the process of the Court and I hereby set the Third Party Proceedings aside. As costs usually follow the event, costs in respect of the Third Party Proceedings are awarded in favour of the Third Party, Mr. John Sands, to be taxed if not agreed.
22. Leave is granted to the Defendant to appeal this Ruling to the Court of Appeal. The Defendant is also given leave to amend, file and serve his Defence and Counterclaim within 14 days and the Plaintiff is given leave to amend, file and serve its Reply and Defence to Counterclaim within 14 days of such service.
23. In as much as the written Ruling was not issued on October 9, 2020 when it was delivered, and considering the intervening holiday weekend, pursuant to the Court's powers under Order 42 Rule 3(2) of the Rules of the Supreme Court this written Ruling has been dated and is handed out on October 13, 2020 so as to allow the Plaintiff the full 14 days in which to appeal this Ruling.

This 13th day of October, 2020

Petra M. Hanna-Adderley
Justice