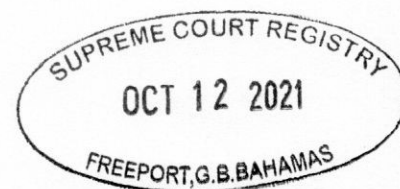


**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2018/CLE/gen/FP/00043**



B E T W E E N

**COLINA MORTGAGE CORPORATION LTD.
Plaintiff**

AND

**AXCEL INVESTMENTS LIMITED
First Defendant**

AND

**JAMES BAIN
Second Defendant**

AND

**JOHN BAIN
Third Defendant**

AND

**DAVID BAIN
Fourth Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Miss Wynsome D. Carey for the Plaintiff
Mr. Harvey Tynes, QC and Mrs. Tanisha Tynes-Cambridge for the
Defendants

HEARING DATE: September 8, 2021

RULING

Application for the Determination of a Preliminary Objection

Introduction

1. The Plaintiff filed its Specially Indorsed Writ of Summons on February 1, 2018 whereby it seeks the payment of all sums due to the Plaintiff under a mortgage loan facility; possession of Lots 1, 1A, 2, 2A, 3 and 3A in Block Number 5, Unit 2 in the Bell Channel Bay Subdivision, Freeport, Grand Bahama; further or other relief the Court may deem appropriate and costs. The Defendants entered their Appearances on February 23, 2018

and subsequently filed their Defence on March 9, 2018. A Case Management Order ("the Directions Order") was made by the Court on November 28, 2019 and filed on July 7, 2020.

2. The Plaintiff filed an application by way of Summons on May 6, 2021 seeking to strike out the Defendants Defence pursuant to Order 18, Rule 19 (1)(a)(b) and (d) of the Rules of the Supreme Court ("the RSC") on the grounds that the Defence does not disclose a reasonable Defence, that it is frivolous and vexatious or otherwise an abuse of the process of the Court. In support of its application, the Plaintiff relies on the Affidavit of Beverley Ferguson filed on May 6, 2021 and its Skeleton Arguments dated June 22, 2021.
3. The Plaintiff's strike out application was not heard on the hearing date as Counsel for the Defendants, Mr. Harvey Tynes, QC raised a preliminary objection to which the Court must now determine. Mr. Tynes, QC's objection in summary is that the Plaintiff's application to strike the Defendants Defence is inconsistent with the Directions Order made that the trial was to proceed on November 10, 2020 and that the said Order was never varied nor an application was made to vary it. Further, that by the Plaintiff seeking to attack the Defendants Defence it disobeys the Directions Order that the trial proceed on the Defence as it stood when the matter was heard during the Case Management Conference.

Submissions

4. Mr. Tynes, QC submits in part that by virtue of the Case Management Conference that was conducted on November 28, 2019 an Order was made by the Court giving directions for the future conduct of the matter and fixed a trial date. He further submits that those directions imposed an obligation on both the Plaintiff and the Defendants relating to discovery, filing of bundle of pleadings, filing of witness statements, filing and exchanging of submissions and the fixing of the trial of this action for November 10, 2020. It is his submission that there is a question of compliance of that Order by the parties but as the current application is an application by the Plaintiff to strike out the Defence (a Defence filed three and a half years ago), whether the Plaintiff should be permitted to proceed on the same. He also submits that the Directions Order was made in respect of the state of the record and specifically the state of the pleadings as they stood on that date. Mr. Tynes, QC submits that the Directions Order has not been complied with, it has not been appealed and it has not been set aside and as such still stands as a valid and subsisting Order which ought to have been complied with by November 10, 2020.

5. Mr. Tynes, QC submits that the question that now arises is can the Plaintiff now seek to act in a manner contrary to the Directions Order having failed or refused to obey the same. He further submits that the Plaintiff wishes to act inconsistently with the Directions Order made by the Court by attacking the Defence while it is in disobedience to the said Order and that the trial ought to proceed on the Defence as it stood when the matter was before the Court for case management. He also submits that the Plaintiff is not only seeking to act contrary to the Directions Order but is also asking the Court to engage in conduct which is inconsistent with the said Order by attacking the Defendants' pleadings. He relies on the case of **Hadkinson v Hadkinson [1952]** 2 All ER at page 567 and refers the Court to page 569, paragraphs C to F. He states that he is not suggesting that the Plaintiff is in contempt but submits that the case demonstrates the attitude of the court towards a party who is in disobedience of an order of the court, even if he considers the order to be void, a nullity, or irregular, as long as the order exists he is to comply with the order. He also submits that as long as there is no compliance by the Plaintiff, they ought not to be making an application to the Court which would be inconsistent with the Order made and they should not be entertained where the Court is being invited to deviate from its own order. Mr. Tynes, QC also referred the Court to the case of **Issacs v Robertson [1984]** 3 All ER in support of his submissions.
6. Ms. Carey in response submits, in part, that given the history of the matter the trial was delayed because the parties were attempting to settle and not incur further litigation costs. She further submits that due to the pandemic where most of their offices were closed, they could not meet the trial directions and be prepared for the trial in November 2020. Ms. Carey also submits that the Directions Order also gave the parties liberty to apply and that during the hearings then Counsel for the Defendants also advised the Court of the parties' attempts to resolve the matter. It is also her submission that during another hearing date she advised then Counsel for the Defendants of her intention to make an application to strike the Defendants Defence and that no further directions were given after the Directions Order with respect to the case management of the action. It is her position that it is disingenuous for Counsel for the Defendants to now state that the Plaintiff has not complied with the Directions Order as the Defendants previous Counsel had requested the delay the matter in an effort to settle.

7. Ms. Carey also submits that the Plaintiff's application pursuant to Order 18, Rule 19 of the RSC can be made at any time and referred the Court to the said provisions. Ms. Carey submits that the Plaintiff is allowed to make such an application at any time even if they had complied with the Directions Order and the rules expressly state that. It is her submission as both parties have not complied, the proper application should be an application asking for relief from sanctions.
8. Mr. Tynes, QC in response to Ms. Carey's submissions, submits in part that there is a directive from the Court that the matter proceed to trial and while Ms. Carey has indicated the possible reasons and excuses as to why neither side complied, it is not the Defendants who are now asking the Court to make any order inconsistent with the Directions Order made in November 2019 but it is the Plaintiff.
9. Ms. Carey in response, referred the Court to Order 31A, Rule 26 of the RSC in support of her submissions and further submits that due to COVID 19 and the parties attempting to resolve this matter, the trial did not take place.
10. Ms. Carey was given the opportunity to provide written submissions in response to Mr. Tynes, QC's preliminary objection. She submits, in part, that a Hadkinson Order (as determined in **Hadkinson v Hadkinson** (supra)) is an order preventing any application to the court by a person who is in contempt of court until that person has purged himself of his contempt and referred the Court to Halsbury's Volume 9(1) Fourth Edition Reissue which provides the general principle founded in **Hadkinson v Hadkinson** (supra) in support of the same. Ms. Carey also referred the Court to the final paragraphs of LJ Denning's ruling in **Hadkinson v Hadkinson** (supra).
11. Additionally, she referred the Court to the case of **The Confederation of North, Central America and Caribbean Association Football v Lisle B Austin** SCCiv App & CAIS No. 90 of 2011 (CONCACAF) whereby the Court of Appeal of The Bahamas considered the position of a contemnor who was a party to proceedings before the Court and drew the Court's attention to paragraphs 74 and 75 of the ruling. Ms. Carey submits that the facts of the instant case cannot satisfy the Court that the Plaintiff's non-compliance with the Directions Order impedes the course of justice (as highlighted by LJ Denning in **Hadkinson v Hadkinson** (supra)).
12. Ms. Carey further outlines that the Plaintiff opposes the Defendants preliminary objection on the basis that both parties have failed to comply with the Directions Order; the non-

compliance has not prejudiced any parties as efforts were made to resolve the matter and save litigation costs; the Order 18, Rule 19 application, if successful will allow the Court to terminate the proceedings at an early stage thereby saving the expense and delay of a trial and if unsuccessful, it would narrow any defects identified by the court that can be cured by amendment to effectively define the issues in dispute and allow the Plaintiff to know the case it has to meet; the Court has a discretion to extend time pursuant to Order 3, Rule 4(1) of the RSC; Order 31A, Rule 18 (2)(b) of the RSC also gives the Court power to extend time for compliance; Order 45 Rule 6(1) of the RSC enables the Court to make an order requiring an act to be done within another time as may be specified.

13. She also submits that Order 31A, Rule 18 of the RSC gives the Court the authority to exercise its powers on its own initiative and the Court, in its power to control its process, both by way of its inherent powers and the wide powers afforded it by the Supreme Court Rules 1978, is entitled to assess at any stage, whether a pleading should be struck out. It is her submission that the Court does not need the issue to be raised by any party to the claim, and certainly no party should be precluded from raising an issue which may affect the preparation of the claim for trial. Therefore, as previously submitted an Order 18 Rule 19 application can be made at any stage of the proceedings.

Analysis and Discussion

The Law

14. Order 18, Rule 19 of the RSC states:-

“(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.”

Chronology of Matter

15. The Court has had an opportunity to consider the submissions provided by Counsel and the relevant case law. However, given the history of this matter I find that the preliminary objection raised by Mr. Harvey Tynes, QC to be a moot point at this juncture for the following reasons.
16. Following the Case Management Conference on November 28, 2019, the parties appeared before this Court via zoom on June 11, 2020. It was noted by Ms. Wynsome Carey, Counsel for the Plaintiff that the Directions Order prepared by her was sent via email to Mr. Miles Parker (then Counsel for the Defendants) who advised the Court that he had sent the initialed copy to Ms. Carey via email on February 13, 2020. However, the initialed Order was not filed following this email exchange and considering the state of affairs during the COVID-19 pandemic the Plaintiff requested further directions relating to the filing and exchanging of documents. The Court advised the parties to perfect the initialed Order (i.e. the Directions Order). The parties also advised the Court of their potential readiness for the trial scheduled for November 10, 2020, however, due to scheduling issues with the Court's calendar the Court vacated the November 10, 2020 trial date and scheduled that date as a final Pre-Trial Review and fixed November 27, 2020 as the new trial date. The Court also gave further directions that all outstanding documents be filed and exchanged on or before November 10, 2020.
17. During the final Pre-Trial Review on November 10, 2020 Counsel for the parties advised the Court that they were still attempting to resolve the matter in hopes of settling and were not ready to proceed with the trial scheduled for November 27, 2020. The Court subsequently vacated the November 27, 2020 trial date and set a for mention date for the parties to return on December 3, 2020.
18. On the mention date scheduled for December 3, 2020 the parties once again advised the Court that they were still attempting to settle the matter but Ms. Carey advised the Court and Counsel for the Defendants of her intention to make an application pursuant to Order 14 of the RSC and requested a date to be set by the Court for the same. The matter was adjourned to March 22, 2021.
19. During the hearing on March 22, 2021, Mr. Tynes, QC appeared on behalf of the Defendants although at that time a Notice of Change of Attorney had not been filed nor served on the Plaintiff. Mr. Tynes, QC inquired of the Court if the matter was set down for trial to begin on that day but the Court advised that the trial was not scheduled for that

- day. Ms. Carey advised that she had not filed her Summons and Affidavit in Support of her Order 14 application as yet and Mr. Tynes, QC advised that he was aware of her intended application. The matter was adjourned to April 7, 2021 as a "for mention" date.
20. The parties appeared before the Court on April 7, 2021 where Mr. Tynes, QC advised that he had filed his Notice of Change of Attorney on the same date. Ms. Carey also advised the Court that the matter was still not resolved between the parties and requested directions relating to the Plaintiff's application pursuant to Order 14 of the RSC, in particular dates for the filing and serving of the Plaintiff's Summons and Affidavit in Support, the Defendants Affidavit in response (if they wished to rely on any evidence) and the exchange of submissions. The matter was adjourned to June 29, 2021 however the matter was not heard on the date due to the Judge being on sick leave and was subsequently given a new date, July 30, 2021.
21. The parties appeared before the Court on July 30, 2021 however, Ms. Carey advised the Court that she was unable to confirm whether Counsel for the Defendants had received/been served with the Affidavit in Support of the Plaintiff's application. Therefore, Ms. Carey wrote to the Court requesting an adjournment to ensure that the Defendants were served with the said Affidavit before proceeding on her application. Mr. Tynes, QC also indicated that upon his review of the file he noted that this was a matter that ought to have been tried a year prior. The matter was adjourned to September 8, 2021 and it was during that hearing Mr. Tynes, QC made his preliminary objections, which the Court now considers.

Discussion

22. The Court derives its case management powers under Order 31A of the RSC. Considering these provisions, in particular Order 31A, Rule 15 of the RSC, the case management timetable can be varied (i.e. dates previously fixed by a judge) once a party applies to the judge to vary the dates fixed for:- a case management conference; a party to do something where the order specifies the consequences of failure to comply; a pre-trial review; the return of a listing questionnaire; **or the trial date or trial period (emphasis mine)**. Therefore, as I understand the provision, the Court has in its discretion the power to vary dates previously fixed by itself on the application by a party.
23. As stated above, during the June 11, 2020 hearing, the Plaintiff requested further directions relating to the dates previously fixed by the Court as a result of the late filing

of the initialed Directions Order and the COVID-19 pandemic, which prevented the parties from filing, serving and exchanging documents during a certain period. Moreover, the parties also indicated their readiness to proceed to trial on the November 10, 2020 date however due to the Court's calendar, the Court vacated the original date and fixed a new date for trial as November 27, 2020.

24. Moreover, paragraph 14 of the Directions Order makes provisions for the parties to apply to the Court for further directions which given the history of this action, they have done.

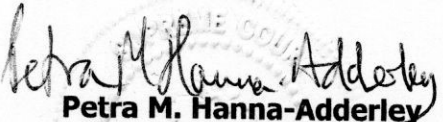
25. Further, as I understand it, Mr. Tynes, QC's preliminary objection is that the Plaintiff in this action "agreed", "acquiesced" or "accepted" the Defendants Defence as it stood when the trial date was set during the Case Management Conference and was prepared to proceed to trial "accepting" the Defence as is and cannot now come and make an application seeking to strike the same. While Mr. Tynes, QC has provided two authorities (**Hadkinson v Hadkinson** and **Isaacs v Robertson**) on the basis that perhaps the Plaintiff's actions amounts to disobedience of the Directions Order (he concedes that he is not suggesting that the Plaintiff is in contempt of the Order), I do not find those authorities helpful with respect to the objections raised. I find that based on the chronology of events that this is not a matter in which the issue of contempt or disobedience of an Order is applicable or arises or should be considered. It is patently clear that from the first Case Management Conference that the parties have been exerting all efforts to resolve this matter and to save judicial time which the Court facilitated by adjourning the matter "for mention" several times. The initial trial date of November 10, 2020 had to be vacated due to an error of scheduling by the Court and no trial date was set after November 10, 2020 as the parties continued to try to settle the matter.

26. As early as December 3, 2020 Ms. Carey indicated to the Court her intention to make a similar application (Order 14 of the RSC) and as such the Defendants were put on notice of the same and as a consequence no new directions for trial were given. Furthermore, the Plaintiff's application pursuant to Order 18, Rule 19 of the RSC is an application that can be made at any stage of the proceedings. Therefore, I am of the view that the Court's fixing of a trial date does not prevent a party from making an application pursuant to Order 18, Rule 19 of the RSC. I accept Ms. Carey's submissions on this point.

Conclusion

27. Having read the pleadings, having heard Counsel and having accepted in part the submissions of Counsel for the Plaintiff and for the reasons stated above I hereby dismiss the Defendants' preliminary objections. I will go on to hear the Plaintiff's application pursuant to Order 18, Rule 19 of the RSC and the Defendants' response thereto.

This 21st day of September, A. D. 2021


Petra M. Hanna-Adderley
Justice

