

COMMONWEALTH OF THE BAHAMAS

2015/CLE/gen/00746

IN THE SUPREME COURT

Common Law and Equity Division

SIDNEY DURAN CUNNINGHAM

Plaintiff

AND

**SCOTIABANK (BAHAMAS) LIMITED
THEIR AGENTS, OFFICIALS, EMPLOYEES AND SERVANTS**

First Defendant

AND

**CIBC FIRST CARIBBEAN INTERNATIONAL BANK
THEIR AGENTS, OFFICIALS, EMPLOYEES AND SERVANTS**

Second Defendant

AND

COMMONWEALTH BANK LIMITED

Third Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr. Sidney Duran Cunningham appearing pro se

**Mr. Branville McCartney along with Ms. Siann Thompson for
the Second Defendant**

Hearing Date: 15th March, 2022

RULING

Darville Gomez, J.

1. I gave my oral decision in this action on May 6, 2022 and promised to give my reasons later. I do so now.

2. The Plaintiff's claim is for special damages, general damages and exemplary damages for defamation and/or libel per se against the Second Defendant.
3. This Court gave Case Management Directions in November, 2021 and the action has been set down for trial for two (2) days in July, 2022.
4. Both parties made interlocutory applications by Summons seeking the following relief:
 - a. The Plaintiff made an application for Specific Production pursuant to Order 24, Rule 10 of the Rules of the Supreme Court, 1978 ("**RSC**") by Summons supported by an Affidavit; and
 - b. The Second Defendant made an application pursuant to Order 23 Rule 2 of the RSC that the Plaintiff give Security for the Second Defendant's cost in this action and for a stay of the proceedings by two Summonses and supported by Affidavits.
5. The Court has for the reasons hereinafter set out refused the relief sought by both parties and has made no order for costs.

Plaintiff's Application for specific discovery

6. The Plaintiff in his filed Notice made a request for the inspection of documents referenced in the letter of the Second Defendant, CIBC First Caribbean International Bank dated April 24, 2015 as follows:

" JUDGEMENTS" – Please produce copies of Judgements of \$855,560.85 under seal, made by the Supreme Court and filed.
In the process of enforcing against him" – Please provide copy of Affidavit of Service wherein filed copy of Judgements of \$844,560.86 was served on the plaintiff
is indebted to CIBC" – Please provide a detailed statement of account of said indebtedness. "
7. Order 24, Rule 10 (2) provides that after the service of the Notice, the receiving party has 3 days after such service to serve the party within 7 days with a time and place to inspect documents. The Plaintiff argued that the Second Defendant did not comply with this Rule.
8. The Second Defendant in response submitted that the Affidavit of Garth McDonald addressed the request of the Plaintiff. Exhibited to the Affidavit was a letter and closing statement from the Second Defendant to the Plaintiff setting out the amount due and owing on Mortgage #1030192 by the Plaintiff. The balance shown was \$591,414.61. The Plaintiff has challenged the authenticity of this.
9. The issue to be decided is whether or not this Court should make an Order for production of documents and inspection.

10. The Second Defendant readily admitted that the court has the discretion to grant the order sought by the Plaintiff. However, the court was referred to Order 24, rule 13(1) which provides that production shall only be made where the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
11. The Second Defendant submitted that the Plaintiff's claim is for defamation and questioned the relevance of the statement of accounts. Further, it was noted that copies of the judgments could be obtained from the court's records.
12. The Plaintiff in his Statement of Claim averred amongst other things, that he has no accounts with CIBC and that he has in fact, never had any banking relationship with CIBC. His claim is that despite being aware of that, the Second Defendant instructed their attorneys to write the false and defamatory statements which were contained in a letter.
13. The Plaintiff claimed that the letter had falsely stated that the Plaintiff was indebted to them in the sum of \$844,560.86 amongst other things.
14. Therefore, the Plaintiff has denied any debt, he goes further to suggest a lack of any relationship at all with the Second Defendant, hence the claim for defamation.
15. In those circumstances, it is unclear what the relevance or necessity for the specific discovery. If the Plaintiff has claimed that there is no relationship, then whether the amount alleged to be owed by the Second Defendant is \$591,414.61 or \$844,560.86 is irrelevant.
16. For these reasons, the Plaintiff's application for Specific Production pursuant to Order 24, Rule 10 of the RSC is hereby dismissed.
17. I make no Order as to costs for reasons that will become clearer later in the decision.

Second Defendant's Application for Security for Costs

18. The Second Defendant sought an Order for security for costs against the Plaintiff. The application is supported by an Affidavit of Garth McDonald in which he exhibited a Certificate of Taxation for \$21,525.00 in relation to action No. 2012/CLE/gen/00541. This is another action in which the Plaintiff and the Second Defendant were parties and where Second Defendant had its costs taxed. The taxed costs remain unpaid by the Plaintiff.
19. Therefore, the Second Defendant is of the view that if the Plaintiff's claim in the instant action is defeated, he will be unable to pay costs if ordered to do so. The Second Defendant set out the reasons why there is no clear cause of action in law by the Plaintiff.

20. The Plaintiff submitted that the grounds for the grant of security for costs does not fit the conditions required per Rule 23 (1) and further that the failure to satisfy an order for costs is insufficient a ground to order security for costs.
21. Both parties have helpfully set out authorities in relation to this issue. I have summarized some of them below.
22. The Court of Appeal case of **Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd [1973] Q.B. 609** is currently considered the leading authority in relation to the factors to be considered when exercising discretion whether to grant an Order for security. Some of the factors noted in the judgment of Lord Denning at pages 285 and 286 are as follows:

“...If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively—so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.”

23. The case of **Porzelack K. G. v Porzelack (uk) Ltd. [1987] 1 All ER 1074** was referred to in support of the Second Defendant's submission that there is a high probability of success in defending the case put forth by the Plaintiff. A quote from Sir Nicolas Browne- Wilkinson V- C at page 1077 was relied on in support of their submissions:

“Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a weighed.”

24. The Plaintiff opposed the Second Defendant's application for security for costs and relied upon the case of **Allan Crawford Sharon Crawford Applicants/ Respondents and Christopher Stubbs Shanna's Cove Estate Company Limited Respondents /Appellants SCCivApp. No. 59 of 2020** where the Honourable Sir Michael Barnett, P in delivering the Judgment stated at paragraph 16 that :

“...It is also settled law that the failure to pay costs ordered against an appellant by a trial judge is not of itself a special circumstance that warrants the making of an order for security for the costs of an appeal. In *Hills v London Passenger Transport Board* [1937] 4 All E.R. 230 Greer, LJ said: “It has for a long time been the practice in this court that, where a respondent desires to obtain security for the costs of an appeal, he must state in his affidavit facts which show the appellant's inability to pay such costs. It is not sufficient in a case of this sort merely to state that an application has been made to the appellant to pay the costs of the action in the court below, and that such costs have not been paid. It is quite possible that an appellant may be unwilling to pay such costs although he be well able to pay them. I think it ought generally to be known that the mere failure by an appellant to pay the costs of an action is not, in the absence of facts showing his inability to pay them, sufficient grounds for making an order for security...”

25. In addition, the Plaintiff cited **Knox v Deane and another (2012) 80 WIR 71** where the Caribbean Court of Justice alluded to the point that impecuniosity is no longer an automatic ground per se for ordering security for costs.

26. Without a doubt the factors to be taken into account must be weighed and balanced on both sides to ensure that no injustice will occur by the grant of an Order. This point was noted by Charles J in the case of **Maris Iglesias Rouco et.al. v Surf ‘N’ Turf Ltd 2017/CLE/00937** at paragraph 12 of the Ruling that:

“...the Court must be cognizant of the effect of the order and balance the competing interests of securing a defendant’s costs and not driving a plaintiff from the judgment seat.”

27. Authorities have established the principle that impecuniosity is not a standalone ground that warrants the grant of security for costs. Cases such as **Thune v London Properties Ltd [1990] 1 All ER 972** affirmed this principle when Bingham LJ at page 979 stated that :

“...the impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security.”

28. The Court of Appeal in **Alexandra Henderson and Yamaha Motor Manufacturing Corporation of America and Yamaha Motor Co. Ltd. SCCivApp No. 153 of 2021** referred to the case of **Frances Farmer and others v Security & General Insurance Company Limited (The Court appointed representative of the estate of the late GEMASON SMITH, deceased) SCCivApp & C AIS No. 93 of 2011** where John JA, as a then single judge noted at paragraph 7 of the case that:

“ the financial position of the appellants is a matter to be taken into consideration and is not a decisive or conclusive factor.”

