

COMMONWEALTH OF THE BAHAMAS

2022/CLE/GE/00618

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN:

PATRICE R. MOXEY

Plaintiff

AND

BAHAMAS FIRST GENERAL INSURANCE COMPANY LIMITED

Defendant

**Before:** Registrar Constance A. Delancy

**Appearances:** Ms. Paula Adderley for the Plaintiff

Mrs. Nadia Wright for Defendant

**Date of Hearing:** 19 July 2022

### **RULING**

1. I rendered my decision to the parties in this matter on 16 August, 2022 and promised to provide reasons in writing.

2. The Plaintiff commenced an action against the Defendant by a Writ of Summons filed 22 April, 2022 seeking, *inter alia*:

- (1) A Declaration that an Agreement between the Defendant and the Plaintiff for the Defendant to pay the Plaintiff's damages in respect of personal injuries and loss of expenses suffered by her as a result of the said April 29, 2002 accident is binding upon the Defendant;**

**(2) An Order for specific performance by the Defendant of the said agreement;**

**(3) Damages in addition to or in lieu of specific performance.....**

3. By Summons filed 9 May, 2022 the Defendant seeks an order to have the Writ of Summons filed herein set aside pursuant to Order 12 Rule 7(1) of the Rules of the Supreme Court (“RSC”) on the ground that the Plaintiff’s action is “*woefully statute-barred*”.

4. The Defendant rely on the Affidavit of Eugeina T. Butler (“the Butler Affidavit”) filed 9 May 2022. The Defendant also filed a Conditional Memorandum of Appearance and Conditional Notice of Appearance on the aforementioned date.

5. The Plaintiff opposed the application on the ground that the Defendant’s application to set aside the Writ filed herein on the basis that the Plaintiff’s claim is statute-barred is misconceived and cannot be sustained under O.12 r.7 RSC.

6. The Court has the power to set aside a Writ or the service of a Writ under O.12 r.7(1) RSC:

**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. *[Emphasis mine]***

7. A prerequisite of an application under RSC O.12 r.7(1) is that it must be made before entering an appearance or within fourteen of entering a Conditional Appearance.

8. The Defendant filed a Conditional Appearance, without leave, on the same date as the present application. O.12 r.6 RSC allows for a party to file a Conditional Appearance. It provides:

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

**(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, 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.**

9. The Defendant submitted that the Plaintiff's claim is statute-barred as the Plaintiff failed to file action against the Defendant for an accident which occurred on the 29 April, 2002 as outlined in paragraphs 3 to 5 of the Butler Affidavit filed herein. The Defendant relied upon the provisions of Sections 9(1), 9(2) and 10(1) the Limitation Act:

**9. (1) Subject to subsection (6), this section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by any written law or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.**

**(2) Subject to subsection (3), an action to which this section applies shall not be brought after the expiry of three years from —**

**(a) the date on which the cause of action accrued; or**

**(b) the date (if later) of the plaintiff's knowledge.**

**10(2) For the purposes of this section, an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify the institution of proceedings against a defendant who did not dispute liability and was able to satisfy a judgment.**

10. The Plaintiff submitted that the Court cannot rely upon the O.12 r.7 RSC to grant the Order sought by the Defendant as the Rule pertains to the setting aside the issuance of a Writ or service thereof on the basis of some procedural anomaly or irregularity with reference to the issuance or service of the said Writ.

11. The issue which the Court must consider is whether the ground relied upon by the Defendant falls within the ambit of O.12 r.7 RSC. The Court found the side notes in The Supreme Court Practice 1976, O.12 r.8 thereof instructive as it closely mirrors the provisions of O.12 r.7 RSC to provide context as to the effect of the said Rule:

**12/8/1 - Its effect is to require the Defendant, who has an objection to the issue and service of the writ or notice of the writ or to the jurisdiction of the Court, to apply to the Court to set aside the writ or the notice of the writ or the service on him; the burden is on the Defendant to make his objection in due time, otherwise his appearance if conditional will become unconditional, or if he is not entered an appearance, he will be in default of appearance.**

**Applications under this rule include an application on the ground of irregularity in the issue or service of the writ or irregularity or want of jurisdiction on any order to amend or renew the writ or for substituted**

**service, or for service out of jurisdiction. In the Q.B.D. the application is made by summons before a Master; and in the Ch. D. it is made by summons or motion.**

**The motion or summons must state the grounds of the irregularity ..... and must be supported by affidavit stating the relevant facts relied upon. [Emphasis mine]**

12. An application to set aside a Writ of Summons under O.12 RSC is a summary procedure and does not require the Court to hear evidence or cross-examination. The issue of the expiration of the limitation period and whether there was an agreement between the parties are factual questions which should be determined at trial.

13. The Court finds the Butler Affidavit does not disclose any facts in relation to irregularity of issuance or service of the Writ filed herein. Having regard to the Defendant's submissions that the Plaintiff's claim is "*woefully statute-barred*" requires the production of evidence which this Court cannot determine at this interlocutory stage.

14. The Defendant's application by Summons dated 9 May 2022 to set aside the Writ of Summons filed herein is dismissed. The Defendant's Conditional Memorandum of Appearance and Conditional Notice of Appearance filed herein shall stand as unconditional. The Defendant shall file and serve its Defence within fourteen days hereof. The costs of this application shall be paid by the Defendant to the Plaintiff be taxed if not agreed.

Dated this 3 day of October A.D., 2022

  
Constance A. Delancy  
Registrar