

IN THE SUPREME COURT

Common Law Division

BETWEEN

PAUL SMITH

Plaintiff

AND

CALVIN JOHNSON

t/a Calvin Johnson's Trucking

First Defendant

AND

EULIEMAE HIGGS

Second Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

**Appearances: Mr. Leon Bethel for the Plaintiff
Mr. Bjorn Ferguson and Shannon Fernander for the
Second Defendant**

Trial Dates: 25th February, 2022 and 18th March, 2022

JUDGMENT

Darville Gomez, J

Facts

1. By an Amended Writ of Summons filed on the 27th May, 2020, the Plaintiff claimed the payment of all sums due and owing by the First Defendant, Calvin Johnson and guaranteed by his mother, Euliemae Higgs, the Second Defendant in the sum of \$21,333.07.
2. I set out below the facts as gleaned from the said Amended Writ of Summons:
 - (i) *The Plaintiff and the First Defendant were customers of Commonwealth Bank ("the Bank"). The Plaintiff maintained a certificate of deposit at the Bank in the sum of*

- \$110,000 which he agreed to allow the First Defendant to use as collateral to facilitate a loan at the Bank for \$110,000 to assist with the working capital requirements for his trucking business. After the First Defendant defaulted on his loan, the Bank exercised its lien over the Plaintiff's certificate of deposit of \$110,000.*
- (ii) After the default as referred to in paragraph 2, on or about 23rd December, 2016, the First Defendant entered an agreement with the Plaintiff to sign over ownership of his three trucks to the Plaintiff until he had repaid the Plaintiff the sum due and owing of \$110,000.00, and after which the Plaintiff would sign the said trucks back to him.*
 - (iii) Subsequently, the Plaintiff became aware that the trucks were no longer available as collateral because the First Defendant had sold them to a third Party. The Plaintiff made a complaint to the police.*
 - (iv) On or about 11th October, 2018, the First Defendant entered into an agreement with the Plaintiff to assign to the Plaintiff \$2,500.00 per month from the proceeds of a contract dated 13th, August, 2018 between him and North Eleuthera District Council for the collection of garbage.*
 - (v) Notwithstanding the First Defendant's commitment to repay the Plaintiff for his loss, and his promise to assign \$2,500.00 per month to the Plaintiff to satisfy his indebtedness to the Plaintiff, he failed to pay any sum to the Plaintiff.*
 - (vi) The Plaintiff and his Attorneys again notified the First Defendant of his indebtedness aforesaid and demanded that the First Defendant pay to the Plaintiff all the sums due and owing, but the First Defendant failed and/or refused to pay any sum and remain indebted to the Plaintiff.*
 - (vii) On or about 15th November, 2018, the Second Defendant communicated with the Plaintiff, and requested that he did not pursue criminal charges against her son the First Defendant as a result of him selling the said trucks which he had signed over to the Plaintiff. The Plaintiff agreed and acceded to the Defendant's request.*
 - (viii) On or about 15th November, 2018, the Second Defendant entered an agreement with the Plaintiff by way of a promissory Note, to assist the First Defendant Calvin Johnson and to act as Guarantor in the repayment of the said loan and thereby agreed to undertake to pay to the Plaintiff a portion of the debt of the First Defendant Calvin Johnson in the sum of Twenty One Thousand Three Hundred and Thirty Three dollars and seven cents (\$21,333.07) toward the satisfaction of the said debt.*
 - (ix) The Second Defendant on 15th November, 2018 signed the promissory note and agreed that in the event she failed to settle this indebtedness, the Plaintiff would pursue recovery of the debt along with reasonable Attorney fees.*
 - (x) Notwithstanding the Second Defendant's commitment to assist with the*

repayment of Twenty One Thousand Three Hundred and Thirty Three dollars and seven cents (\$21,333.07) to the Plaintiff for his loss, she failed to pay any sum to the Plaintiff and is in default of her agreement as guarantor of the said debt of the First Defendant.

AND THE PLAINTIFF CLAIMS:-

- a. Payment of all sums due and owing by the First Defendant Calvin Johnson and guaranteed by the Second Defendant to the Plaintiff being B\$21,333.07;
- b. Interests;
- c. Costs; and
- d. Such further or other relief as the court deems just.

Issues

3. The issues to be determined by this Court are as follows:
 - (i) Whether the promissory note is valid on its face;
 - (ii) Whether the promissory note is voidable by reason of duress.

Issue I: Whether the promissory note is valid on its face

4. The Plaintiff exhibited the Promissory Note in his Affidavit filed on the 29th May, 2020. I set it out below to support my analysis.

"THIS PROMISSORY NOTE is made the 15th day of November A.D., 2018 BETWEEN PAUL SMITH of the city of Nassau on the island of New Providence, one of the Islands of The Commonwealth of The Bahamas (hereinafter called "the Creditor") of the one part AND EULIEMAE HIGGS of Upper Bogue, Blouthera, The Bahamas (hereinafter called "the Debtor/Guarantor") of the other part.

WHEREAS:-

1. Calvin Johnson (son of EULIEMAE HIGGS) is indebted to PAUL SMITH in the amount of Forty-two Thousand Six Hundred and Sixty-six Dollars and Fourteen cents (\$42,666.14) which represents a portion of the total debt owed by virtue of a Promissory Note made between Paul Smith and Calvin Johnson dated 23rd day of December A.D. 2016 to which he has defaulted.

2. That EULIEMAE HIGGS hereby agrees to assist Calvin Johnson and act as Guarantor in the repayment of said loan and hereby agrees to undertake to pay to PAUL SMITH the equivalent of 50% of the said amount (\$21,333.07) as a "good will attempt" toward the satisfaction of said debt.

3. Upon the signing of this Promissory Note the first payment in the amount of One Thousand Dollars (\$1,000.00) shall be paid to the office of SANDOLLAR LEGAL & COMPLIANCE SERVICES (attorneys for the Creditor) on or before the 20th day of December, A.D. 2018. All subsequent payments shall be paid on or before the 25 day of each month being no less than the sum of One Thousand Dollars (\$1,000.00) but having to be equivalent to the undertaken amount before the completion of this Promissory Note. The method of each additional payment shall be by Hand Delivery to the office of Sand Dollar Legal and Compliance Service in care of Mrs. Dania Anderson.

4. In the event, that EULIEMAE HIGGS fails to settle this indebtedness, PAUL SMITH will pursue recovery of the debt along with reasonable attorney fees.

5. That until this indebtedness is settled on the 20 day of December A.D., 2019 this Note will act as a legally binding document.

6. That the said EULIEMAE HIGGS make(s) this undertaking of her own free will and is not under no compulsion to execute said Promissory Note.”

5. Counsel for the Defendant argued that the promissory note did not satisfy the requirements set out in section 84 because there was no commencement date or clear completion date. He sought to rely on the case of ***Petrona Russell and another v Anthony Thompson and another [2021] 1 BHS J. No.1*** where Charles J. essentially pointed out that a promissory note must have a commencement and/or completion date and installment amount to meet the requirements set out in the Bills of Exchange Act.
6. According to **section 84(1) and (2) of the Bills of Exchange Act, Chapter 335**,
- “(1)A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.*
- (2) An instrument in the form of a note payable to maker’s order is not a note within the meaning of this section unless and until it is endorsed by the maker.”*
7. Having assessed the document which the Plaintiff sought to rely upon as a promissory Note, I found the following: (i) it is signed by the maker and witnessed ; (ii) it is an agreement to pay to the Plaintiff the sum of \$21,333.07; (iii) it has a commencement date of on or before the 20th December, A. D., 2018; (iv) the installment amount was \$1,000.00 to be paid monthly on or before the 25th; (v) the completion date was on the 20th day of December, A. D., 2019.
8. Despite the fact that the promissory note included a section for the Plaintiff’s signature, it is not a requirement under the Act and therefore, if his signature was missing, it would not invalidate the note.

9. Therefore, I do not accept the argument by Counsel for the Defendant that the promissory note does not satisfy the requirements in the Bill of Exchange Act and accordingly, I find that the promissory note is valid.

Issue II: Whether the promissory note is voidable by reason of duress

Plaintiff's Evidence

10. The Plaintiff testified that sometime in 2018, he made a police complaint against Calvin Johnson, whom he alleged owed him monies stemming from an agreement made between them sometime in May 2016.
11. I refer to Paragraph 21 of the Plaintiff's Statement dated 9th August, 2021 where he stated as follows:
- "That on or about 15th November 2018, the Defendant communicated with the Plaintiff, and asked him not to pursue criminal charges against her son Calvin Johnson, as a result of him selling the said trucks which he has signed over to the Plaintiff. The Plaintiff agreed and acceded to the Defendant's request."*
12. During cross-examination, the Plaintiff admitted that he made a complaint to the Police against Calvin Johnson which resulted in Mr. Johnson being arrested.
13. He also admitted in cross-examination that he had retained the services of an attorney, Dania Anderson located on the island of Eleuthera. However, he denied giving her instructions to prepare a promissory note.
14. His evidence was that whatever documents had been prepared was as a result of an agreement between Ms Anderson and the Second Defendant's attorney, Mr. Langton Hilton. He denied speaking with the Second Defendant before or during the arrest of her son and further, that they had only spoken a month or three months after her son had been released from custody.
15. On re-examination the Plaintiff admitted to communicating with Ms Anderson after she would have spoken with Mr. Hilton and that he gave her permission to accept the arrangement that the Second Defendant would try to compensate him on behalf of her son "some \$20,000".

Evidence of the Second Defendant

16. The Second Defendant called two witnesses in support of her defence; her daughter, Kes Higgs and her sister, Sheria Higgs.

Kes Higgs

17. She testified that she was living in Nassau at the time when her mother called and told her that her brother had been arrested and brought to Nassau.

18. She said that she attended at the Cable Beach Police Station where she left a pillow, blankets and food. However, she was not permitted to speak with him while he was in custody and she was not aware of the reason for her brother's arrest. She recalled that he would have been released some two or three days later.

Sheria Higgs

19. Miss Higgs testified that she accompanied her sister to the office of Ms Anderson and witnessed her signature on a document but she was unaware of the contents of the document.

Second Defendant

20. The Second Defendant averred in her statement filed on 3rd November, 2021 that Calvin Johnson was arrested on or about 14th November, 2018. She testified that or about 16th November, 2018, she received a call from a lawyer named Dania Anderson who invited her to her office in Lower Bogue, Eleuthera. She was accompanied by her sister Sheriae Higgs and cousin Louise Cartwright.

21. Her evidence was that upon arrival she was presented with a document and told by Ms. Anderson that Calvin Johnson's release from police custody was contingent on her signing the promissory note to pay the Plaintiff the sum of \$21, 333.07.

22. In her evidence-in-chief she said as follows:

"Q. And Ms. Higgs, on or about the 16th of November, 2018 did you have any reason to visit the office of Ms. Anderson?

A. Yes, Ma'am.

Q. And upon your arrival there, what, if anything, took place?

A. She said that Mr. Paul was on the phone while she was speaking with me and she said that he had her to draw up this promissory note and she asked me to read it carefully and while he was talking to her, they said that once I had signed this note, that my son, Calvin Johnson would have been released because he was already locked up here in Nassau.

Q. And after that information was provided to you, what, if anything, did you do?

A. Well, I overlooked the note and I signed it and after I signed it, one or two phone calls were made here into Nassau and probably an hour or less than that my son was released from the Cable Beach Police Station.

Q. And how were you made aware that your son was released shortly after you signed those documents?

A. He called me.

Q. "He" being who?

A. Sorry, my son.

Analysis

23. The Plaintiff admitted that he retained Dania Anderson to act on his behalf and gave authorization for arrangements to be made with Mr. Langton Hilton who was then Counsel for the Second Defendant as it related to the matter. He also testified that he eventually signed the promissory note. It is clear from the evidence that the Plaintiff was knowledgeable of the agreement made by his Counsel who was acting on his behalf.
24. Counsel for the Plaintiff relied on the following cases to establish the argument that the burden of proving undue influence rests on the Defendant: **Daniel v Drew [2005] EWCA Civ 507**; **Davies v AIB Group (UK) plc [2012] WSHC (ch) 2178**; and **Thompson v Thompson 2009/CLE/gen/007816**.
25. Duress can be defined as some form of threat towards or pressure on an individual to do a particular thing; for example to enter into a contract involuntarily. In the case of **Times Travel (UK) Limited and Pakistan International Airlines Corporation [2021] UKSC 40**, Lord Burrows explained that: "Duress in the law of contract focuses on an illegitimate threat (or illegitimate pressure) which induces a party to enter into a contract."
26. Two essential elements of duress were highlighted by Lord Burrows at paragraph 78 of **Times Travel (UK) Limited and Pakistan International Airlines Corporation [2021] supra**:
- "Where it is alleged that one contracting party (the defendant) has induced the other contracting party (the claimant) to enter into the contract between them by duress, the case law has laid down that there are two essential elements that a claimant needs to establish in order to succeed in a claim for rescission of the contract. The first is a threat (or pressure exerted) by the defendant that is illegitimate. The second is that that illegitimate threat (or pressure) caused the claimant to enter into the contract."*
27. In the case of **Kaufman v Gerson [1904] 1 K.B 591** and **Henry Williams and James Bayley (1866) L.R. 1 H.L. 200** there were threats of criminal prosecution. Both courts found that the agreements were deemed unenforceable based on the circumstances in which they were obtained. It was found that they were obtained by undue pressure and/or duress.
28. It is the duty of this Court to determine whether the essential elements of duress were present in the instance case, that is, (i) whether the threat or pressure was illegitimate; and (ii) whether the illegitimate threat or pressure caused the Defendant to enter the contract.
29. Having heard the evidence proffered regarding this issue, I prefer the evidence of the Second Defendant. I found her to be truthful. It appears to this Court that it is not coincidental that after the arrest of Calvin Johnson and the subsequent signing of the promissory note, that he was released from custody shortly thereafter.

30. According to the Second Defendant's evidence her son was released an hour or less after the execution of the promissory note.
31. This leads the Court to the inescapable conclusion that the Plaintiff through his Attorney extorted a contract from the Second Defendant to recover funds that Calvin Johnson owed him by means of a threat of further detention or imprisonment (because had already been arrested at the time of the threat).
32. Therefore, I am of the view that both elements of duress have been proven.
33. It was inappropriate and unethical for the Plaintiff's then Counsel, Dania Anderson to make direct contact with the Second Defendant in and under those circumstances. The Second Defendant was represented by Cecil Hilton and there was no reason why she could not reach out to her attorney.
34. The Court cannot enforce a contract which was obtained by undue pressure. In all the circumstances of this case, I find that the promissory note was obtained by reason of duress and is unenforceable in law.
35. Having found that the promissory note is unenforceable, the Plaintiff is not entitled to the sum claimed or costs.

Conclusion

36. I make the following orders:

- (i) The Plaintiff's claim for the payment of \$21,333.07 representing the sum guaranteed for the First Defendant's debt by the Second Defendant is hereby dismissed; and
- (ii) Costs to the Second Defendant to be fixed by the Court.

Dated this 12th day of April, A. D., 2023


Camille Darville Gomez
Justice