



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2005: No. 29

BETWEEN:

BRENT JEROME FURBERT

Plaintiff

AND

ROBIN SWAN

Defendant

and

**MICHAEL SMITH
(trading as Smith & Co.)**

Third Party

and

KEVIN BEAN

Fourth Party

Lynda Milligan-Whyte & Associates, for the Plaintiff
Trott & Duncan, for the Respondent

JUDGMENT

1. In this action the Defendant in his counterclaim seeks summary judgment under Order 14 of the Rules of Supreme Court 1952 against the Plaintiff for the amount claimed (\$132,000) with interest and the cost of the counterclaim.

2. The Plaintiff opposes the application on the basis that he has a bona fide Defence and/or issue in dispute which ought to be tried.

3. The evidence shows that on 1st June 2004 the Plaintiff and the Defendant entered a lease agreement for a portion of the building at 81 Northshore Road Devonshire [the premises].

4. Subsequently a dispute arose over the letting of the premises and allegedly the overpayment of \$184,500 which the Plaintiff had made to the Defendant. Because of the dispute the Plaintiff ceased paying rent to the Defendant who then entered the premises and started to change the locks in order to deny the Plaintiff access to the premises. Where upon on 27th January 2005 the Plaintiff sought:

i. An injunction to restrain the Defendant whether by his servants or agents or otherwise from entering any portion of the premises;

ii. A declaration that the Plaintiff is entitled to have returned to him the sum of \$184,500 with interest paid to the Defendant by way of the manager's cheque in the total amount of \$300,000 dated the 21st May 2004 and drawn at the Bank of Bermuda Ltd;

iii. Damages for fraudulent misrepresentation;

iv. Costs;

v. Such further or other relief as may be deemed just; and

vi. Interest pursuant to statute.

5. On 27th January 2005, an injunction was granted to the Plaintiff restraining the Defendant or his agent from entering the premises.

6. By consent Order dated 8th July 2005; the injunction granted on 27th January was discharged and the Defendant was granted leave to assess the damages he allegedly sustained as a consequence of the injunction granted in favour of the Plaintiff on 27th January 2005.

One year later on 27th February 2006 Bell J. heard the application for assessment of damages and ruled that the claim for damages falls to be determined in the main action.

7. On 23rd June 2006 the Plaintiff filed a statement of claim seeking damages and restitution and reimbursement of all sums paid and damages for deceit by virtue of the Defendant's alleged false representation and/or breach of contract.

8. On 1st February 2007, the Defendant filed a Defence and counterclaimed for inter alia damages in breach of contract.

9. On 27th April 2007 the “Plaintiff admitted the amount claimed in the counterclaim and relies on the amount claimed as ‘over payment’ to set off so much of the sums counterclaimed as may extinguish the Plaintiff’s liability to the Defendant.”

10. Mr. Duncan, Counsel for the Defendant, submitted that he is entitled to summary judgment on the admission in paragraph 2 of the Defence to the counterclaim dated 27th April 2007. He added that a Defendant to a claim or counterclaim for summary judgment must show a good arguable Defence in his pleaded claim or establish some other basis or reason why he should be given conditional leave to defend the claim or counterclaim.

11. On the other hand, Mr. Harshaw, Counsel for the Plaintiff, whilst not resiling from the admission that the Plaintiff owes the Defendant rent estimated at \$132,000, contended that there are issues of fact which should not be determined in a summary manner.

12. Mr. Harshaw submitted that the Defendant’s counterclaim must fail because the Plaintiff has a bona fide Defence or there is an issue in dispute which ought to be tried. He relies on three grounds:

(a). First, that the Defendant has not adduced sufficient evidence for the Court to determine the counterclaim at this stage;

(b). Second, the issue of the counterclaim has already been considered and is therefore res judicata, the subject of estoppel or an abuse of process to raise again; and

(c). Third, the Plaintiff has a valid cross-claim to the counterclaim in the form of a misrepresentation claim which operates as an equitable set-off and a substantive Defence to the counterclaim such that summary judgments should not be entered.

13. Counsel for the parties has referred me to a number of authorities in support of their submissions. One authority is the Imperial Hotel Company Limited -v- Bermuda Business Club Limited and Anton Duzovic— Supreme Court of Bermuda Civil Jurisdiction [1996]: No. 299 p. 3 which Mr. Duncan relies on in submitting that the Court is only entitled to entertain a claim for an equitable set-off in landlord and tenant actions if the claim for set-off arises under or is connected with the landlord and tenant agreement. In *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* (1979) 2 All ER p 1063 at p 1076 the court said:

“it does not seem possible to conclude that it is in all case necessary that a claim and cross-claim must arise out of the same contract. Whereas in this case they do not it is still therefore remains for consideration whether in any particular case the two matters are so

closely connected that the principles affecting equitable set-off can be said to apply. It is very necessary when seeking to reach a conclusion on this question in a case such as this to drive from one's mind the insidious prompting of generations of common lawyers that there is something special about rent. As I have already indicated I can find no trace of such a principle in equity and there is no reason why there should have been or should be now."

In this difficulty as with others concerned with set-off, the best guide is, I think, to be found in Hanak v Greene (1958) 2 All ER 141. In explaining and approving Banks v Jarvis (1903) 1 KB 549, Morris LJ had this to say:

"The Plaintiff, suing as agent or trustee for her son, claimed £50 from the defendant. The defendant had a perfectly good claim for £51 damages against the Plaintiff's son. It was held that the defendant could set up as a Defence to the claim against him that the plaintiff's son (the cestui que trust of the plaintiff) was indebted to the defendant in the sum for unliquidated damages exceeding the amount of the claim. The conclusion seems to me to be clearly correct and obviously fair. It would have been manifestly unjust if the defendant had had to pay £50 to the plaintiff (who was agent or trustee for her son) at a time when the defendant had an unquestioned claim of £51 against the plaintiff's son who had left the country. There was a close relationship between the dealings and transactions which gave rise to the respective claims. If the case had been brought before Judicature Acts, it would appear that the defendant would have strong equitable grounds for asking a Court of Chancery to restrain the plaintiff from proceeding with her case. But since the Judicature Acts the position is that matters of equity on which such injunctions might formerly have been obtained may now be relied on by way of Defence."

In other words, in considering questions of this kind it is what is obviously fair or manifestly unjust that will determine the solution. This is because today, while it is necessary to look back before the Judicature Act to discover the broad principles on which equity would grant relief, it may not be helpful to seek to find out from the cases what court of equity would have done in a similar case. The principles may be derived from the older cases. The application of that principle should be reached by consideration of what today would be regarded as fair or just.

14. The Court has no affidavit evidence before it which is necessary from a claimant who is seeking to resist summary judgment. A set off will not be granted in every case and it is also necessary for the Court to have evidence before it which will assist the Court in making a determination as to whether the resistance is in good faith. There is a long history of delay. Two and half years have elapsed since the filing of this action. Having regard to the history of this matter I entertain some doubts as to the bona fides of the Plaintiffs' resistance to the application for summary judgment.

15. Nevertheless, having regard to all the circumstances, I order leave to the Plaintiff to defend the proceedings, conditional upon the Plaintiff paying into court the total rent due of \$132,000. The payment should be made by way of three installments of \$44,300, to be paid bi-monthly, commencing on or before 30th January 2008. In any event if the Plaintiff does not expeditiously prosecute this matter to the point of applying for a trial date on or before 1st June 2008 the Defendant is hereby granted leave to sign a final judgment on the counterclaim

in terms of his summons dated June 4th 2007; and leave is granted to apply to the Registrar for payment out of the funds paid into Court.

16. The Defendant is to have his cost of these proceedings.

Dated this 27th day of December 2007.

The Hon. Mrs. Norma Wade-Miller
Puisne Judge