



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 114

CHRISTOPHER TROTT

PLAINTIFF

-v-

HEATHER VIGILANTE

1ST DEFENDANT

-and-

CLAUDIO VIGILANTE

2ND DEFENDANT

EX TEMPORE RULING

(In Chambers)

Date of Hearing: May 28, 2012

Mr. Kamal Worrell, Charter Chambers for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Defendants

Introductory

1. The Plaintiff in this case applies for judgment under Order 14 by Summons issued on the 17 April 2012 and seeks, in particular, two heads of substantive relief.
2. The first head is delivery up of premises referred to in paragraph 1 the Statement of Claim to the Plaintiff forthwith. The second is Judgment in the amount of \$78,000.00 together with unspecified amounts of interest and costs.
3. The Statement of Claim in this matter refers to a lease entered into on or about the 1st September 2003 and alleges that on the 14 November 2011 the Plaintiff gave formal notice to the Defendant pursuant to the lease to vacate the premises on or before 31

December 2011. It is common ground that the lease has expired and that the Plaintiff is entitled to an Order for Possession as against the 2nd Defendant. It is said without any or any serious contradiction that the 1st Defendant occupies the premises as the Licensee of her husband the 2nd Defendant and therefore has no formal legal relationship with the Plaintiff.

The issues in controversy-Defence and Counterclaim

4. The application for summary judgment was opposed and supported by the Affidavit of Gianni Vigilante, which was sworn on May 9, 2012. This Affidavit exhibited a draft Defence and Counterclaim, which raised the following issues. By way of Counterclaim, it was firstly alleged that the landlord was in breach of obligations to repair the premises. Secondly it was alleged that the Plaintiff owes the 2nd Defendant \$200,000 plus interest at the rate of 7% under a promissory note which forms the subject of the 2nd Defendant's action against the Plaintiff in Civil Jurisdiction 2011 No. 414.
5. The defences raised have different characteristics. The Counterclaim in respect of repairs clearly arise out of the lease upon which the Plaintiff claims and it is unarguably clear that, if arguable, these claims do give rise to a right of legal and/or equitable set-off. The promissory note on the face of the Writ filed by the 2nd Defendant against the Plaintiff in the present action is unconnected with the lease in any formal or other obvious sense.
6. As far as the evidence relating to the arguability of the set-off claims is concerned, the Plaintiff argues that these claims are not bona fide. Mr. Worrell placed considerable emphasis on the fact that there was no evidence of any prior demands being made for the repairs to be done, nor was there any contemporaneous request for reimbursement of the expenses the 2nd Defendant claims to have expended in this regard.
7. However, the 2nd Defendant did produce a receipt in respect of repairs to the cesspit which suggested that the total amount due in respect of those repairs was the sum of \$13,196.00. The document produced by the 2nd Defendant does not clearly demonstrate that he actually paid that amount because the statement with certain amounts typed and certain other amounts handwritten indicate that some \$4,396.00 was still due at the time when this document was produced.
8. Mr. Worrell also invited the court to take into account the overriding objective in considering whether or not leave to defend should be given.
9. And taking those matters into account the approach that I have decided to adopt is as follows.

Findings

Set-off claims

10. I find that the arrears of rent claimed should be reduced by the amount of \$13,196.00 claimed in respect in the cesspit repairs, I give the 2nd Defendant the benefit of the doubt and accept on the balance of probability his evidence that that amount was in fact paid. On the other hand having regard to the fact that not an iota of support has been provided in respect of the other amounts claimed by way of set-off. Mainly the painting of \$4420.00 and the repairs of \$5000.00, I find that no triable issue is raised as far as those items of set-off are concerned.
11. In reaching these conclusions I was assisted by the *Imperial Hotel Co. Ltd –v- Bermuda Business Club Ltd. [1996] Bda. LR69* case, which Mr. Worrell relied upon to illustrate the quality of evidence that the Court in a broadly similar case relied upon in deciding to grant leave to defend.

Promissory Note

12. As far as the promissory note is concerned there were considerable arguments addressed to the Court in terms of the appropriate approach to be taken. The provisional view that I expressed was that the promissory note claim was an independent cross-claim and that no question that it impacted on the present proceedings arose.
13. Mr. Rothwell referred the court to the White Book 1999 (the pre-CPR White Book), which set out at page 179 under paragraph 14/4/14 the principles applicable to set-off and counterclaim the context of Order 14 applications. He drew the Court's attention to *the following passage at page 179:*

“an analysis of the authorities as to what order should be where the defendant raises a set-off counterclaim shows that there are four different classes or groups of such orders, namely

(a) where the defendant can show an arguable set-off, whether equitable or otherwise, he is entitled to leave to defend the extent of the set-off and the court has no discretion;

(b) where the defendant sets up a bona fide counterclaim arising out of the same subject matter as the action and connected with the grounds of defence, the order should not be for judgment on the claim, subject to a stay pending trial of the counterclaim, but should be for

unconditional leave to defend, even if the defendant admits the whole or part of the claim;

(c) where there is no defence to the claim but plausible counterclaim of not less than the claim is set up, judgment should be for the plaintiff on the claim with costs, stayed until the trial of the counterclaim,

(d) Where the counterclaim arises out of a separate and distinct transaction or is wholly foreign to the claim, judgment should be for the plaintiff with costs without a stay; the lack of clarity between classes (b), (c) and (d), gives the court freedom to respond to the perceived justice of the individual case (United Overseas Ltd v. Peter Robinson Ltd, March 26, 1991, CA Transcript 91/0297, per Bingham L. J.)”.

14. This is a case where it is difficult to assess precisely where justice lies. The Court clearly does not have all the material before it as to any tenuous connection between the disputed promissory note and the present lease. What is clear, it seems to me, is that it would potentially be unjust for the Plaintiff to be able to enforce a money judgment against the 2nd Defendant in circumstances where a substantially greater sum perhaps was due to the 2nd Defendant from the Plaintiff.

15. In these circumstances I find that the justice of the case requires that the Court should grant judgment to the Plaintiff in the amount of the sum of the arrears of rent claimed less the set-off which I have allowed, but that judgment should be stayed until further order.

16. The purpose of this stay is to allow the Court to review the position as the true strength or weakness of the promissory note action becomes clear, and to allow the Plaintiff in the event that the action is not pursued to seek to lift the stay. But on the other hand if that action is pursued, the stay will give the 2nd Defendant the protection that the justice of the case appears to me at this stage to require.

Possession

17. The evidence before the court clearly supports an immediate order for possession. Mr. Rothwell attempted, with considerable eloquence in the face of the evidence pointing strongly in the other direction, to suggest that the 1st Defendant's interest should be accommodated in some way by giving her until the end of July, but there is nothing in the material presently before the Court which would justify such generosity being extended.

18. I did accept Mr. Rothwell's submission that the judgment for arrears of rent should be entered only against the 2nd Defendant on the grounds that he is the sole tenant. As far as the Possession Order is concerned, I see no reason why that Order should

not be made as against both Defendants in that it conceded that the 1st Defendant is in possession.

Summary

19. Judgment to the Plaintiff for arrears of rent less the cesspit set-off, plus pre-judgment interest (to be determined by the Court if not agreed) and statutory interest on the judgment debt until payment. Execution stayed until further order. Costs to the Plaintiff to be taxed if not agreed.

Dated this 28th day of May, 2012

IAN R.C. KAWALEY CJ