EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

GRENADA

GDAHCV2012/0296

BETWEEN:

BEVERLEY MODDER

Claimant

and

BRIAN WORME
(trading as B.M.W. Designs and Building Construction)

Defendant

Before:
Kimberly Cenac-Phulgence Master [Ag]

Appearances:
Ms. Karina Johnson for the Claimant
Mr. Ian Sandy for the Defendant
Claimant and Defendant present

2013: December 17;
2014: June 12.

JUDGMENT

[1] CENAC-PHULGENCE, M [AG.]: This decision concerns an application by the claimant for summary judgment to be entered against the defendant. On the 22nd October 2013, when the matter came up for hearing, the Court made an order that the matter be adjourned to 17th December 2013 and the defendant was to retain counsel to represent him and if counsel or the defendant failed to appear on the adjourned date, the application for summary judgment would be determined. When the matter came on for hearing on 17th December 2013, the defendant had

retained counsel and filed an affidavit in response to the application for summary judgment on 16th December 2014. The claimant objected to the filing of the affidavit; however the Court felt that since the defendant had retained counsel as ordered, that it would allow the affidavit and permit the claimant time to reply to the affidavit. The court ordered that the claimant file its reply by 31st December 2013 and the parties file and exchange submissions by 10th January 2014.

The Background

The Claim

[2] On 18th July 2012, the claimant filed a claim form in which she claimed special damages and general damages for breach of contract. The claimant's case is that she entered into a written contract with the defendant for the construction of a house ("the work") for an agreed sum of EC$603,436.65 and that there was a subsequent agreement for extra works for the agreed price of EC$9,388.00. The claimant states that the defendant commenced work in October 2007 and that she paid certain sums of money to the defendant. It is the claimant's case that the defendant was to have completed the house by the end of June 2008.

[3] The claimant says that there were implied terms and conditions of performance of the work and the defendant warranted that (a) he possessed and would exercise all reasonable skill, diligence and competence as contractor in regard to the work; (b) he would exercise all reasonable skill, diligence as a contractor in regards to ascertaining the scope of the work to be carried out; (c) he would exercise all reasonable skill, diligence and competence as contractor in regards to specifications and bills of quantities of materials for the work; (d) for the purpose of such preparations, he would make and carry out all the usual and necessary surveys, examinations and inquiries; (e) he would adequately supervise the carrying out of the work by its employees; (f) he would indicate design defects which would impact upon the contract and (g) he would execute the work with skill and competence in accordance with the Organization of Eastern Caribbean States- Grenada Building Guidelines.

[4] The claimant further avers that the defendant at the completion date, wrongfully, and in breach of the written contract for the work and the said terms, conditions and warranties negligently performed the work and the claimant has particularized all the defects (a) to (p) of paragraph 8 of the statement of claim. Two reports on the work done by the defendant are exhibited to the statement of claim. The claimant says that the house was far from complete when she returned to Grenada in October 2008 and was not habitable. She claims that despite repeated requests both verbal and in writing, the defendant failed to complete and has refused to complete the work. The claimant further avers that she paid the defendant $12,000.00 being part of the retention monies to assist the defendant to complete the work.

[5] The claimant further claims that the defendant reduced the number of workers and failed to supervise the workers who did appear at the work site as he rarely appeared to view the work. The claimant says she terminated the work in December 2008. The claimant says that the work done by the defendant is worth far less than the amount which the claimant paid to the defendant and the claimant has had to employ and pay other contractors to finish the work as well as remedy some of the defects created by the defendant. In addition, the claimant had to incur costs to prepare a report detailing the defects of the work and the work remaining to be completed.

The Defence

[6] The defendant filed a defence on 19th November 2013 in which he avers that the works described in the contract were significantly altered as a consequence of changes to the drawings and structure of the building requested by the claimant. The changes requested resulted in the building having to be set back from the cliff or sea edge which placed the structure on a different slope other than that envisaged in the contract, resulting in deeper excavations for foundation purposes.

[7] The defendant states that the price quoted for the work was borderline for a project of this nature and was so settled upon based on the claims by the claimant that she was not able to pay more than the sum stipulated in the contract.

[8] The defendant denies any negligence in the performance of the contract and replied to each of the particulars in (a) to (p) in the statement of claim. The defendant's defence consists in the main of admissions of some of the things complained of but says that failure to complete or do some of the work was due either to the claimant not making up her mind as to what she wanted or that the funds had been exhausted by then. In relation to the plastering of the front exterior of the house being incomplete, the defendant says that this was so because the claimant continuously deferred her decision as to what finish she wanted on that part of the building and that the funds had been exhausted by then. As to the tiling, the defendant says the contract provided for tiles on both floors and the claimant requested a different finish to the top floor which he says was done. The defendant denied that there was anything wrong with the main entrance door as alleged by the claimant. The failure to complete closets the defendant says was due to exhaustion of all funds for the project by that time.

[9] The defendant denies the allegations of defective works reported in the report of the engineer which supports the claimant's claim. The defendant says that all structural works had been completed at the time of his departure from the project. The defendant says further that the total contract sum was not sufficient to complete the project and he admits to receiving part of the retention monies from the claimant. The defendant admits to reducing the workforce on project and avers that such a step was necessary when the funds for the project were no longer available and the claimant declined to advance further monies. He says however that his supervisory role on the project continued until the claimant declined to further communicate him.

[10] The defendant admits that the kitchen was not complete at the time of his departure from the project. The defendant denies the loss and expenses pleaded

by the claimant and says that the claimant will have to prove these losses. The defendant avers that the claimant is not entitled to the sums claimed nor is she entitled to a quantum meruit reimbursement on the performance of a contract.

The Reply

[11] The claimant filed a reply to the defence on 25th January 2013. The reply refers to two different designs; one which the claimant says was for a contract price of $499,827.73 dated 12th October 2006 which is not the subject of this action and which was discarded and the other the contract signed on 11th October 2007 for the contract sum of $603,426.65. The claimant says that the house was to have been built according to the October 2007 contract and that there was no re-design. Any alteration was subject to a separate costing and was signed for prior to commencement of the extras. The claimant says that the excavation required was provided for by a signed supplemental agreement. The columns for the deck are at least 18' away from the sea edge and there was therefore no necessity for the building to be setback or for deeper excavation for foundation purposes especially since the house was already built when the deck was added.

[12] The claimant relies on the report of the engineer that the contract price was reasonable for the construction of such a project in 2007 and that at no time did the defendant either verbally or in writing even request further funds of the claimant.

[13] The claimant in her reply responds to each of the answers of the defendant to the defects raised in the statement of claim and denies the averments of the defendant. The claimant says in response to the defendant's averment that the railings were finishing items and that there was no money to complete same, that this was not a finishing item but a safety requirement. In response to the defendant that the fencing was not a contract item and was not provided for, the claimant says it was a contract item and $7000.00 was provided for it.

The Application for Summary Judgment

[14] The claimant filed an application for summary judgment on 16th May 2013. The application was supported by an affidavit of Beverley Modder, the claimant. The sole ground of the application is that the defendant has no real prospect of successfully defending the claim, having regard to the defence filed on 19th November 2012.

[15] The claimant avers in her affidavit that she filed a claim for special and general damages for breach of contract arising out of the defendant's failure to fulfill the terms of a building contract between herself and the defendant. Specifically, the claim alleges that the defendant failed to carry out the terms of the contract and that the work that was done was so negligently done that she had to pay to have the works remedied incurring additional cost.

[16] The claimant says that in response to the claim, the defendant filed a defence denying the claim and alleging instead that the contract price that he had agreed to was insufficient to complete the works and that he had done what he could with the funds that were available. This defence, the claimant says discloses no real prospect of success, in that it is not open to the defendant to say that the agreement he entered into was essentially a bad or ineffective agreement.

The Defendant's Response

[17] The defendant filed an affidavit in opposition to the application on 16th December 2014. The defendant avers that he does not think that this is an appropriate case for the grant of summary judgment as it cannot be said that he does not have a real prospect of successfully defending the claim or any issue in the claim. The defendant says that his defence goes much further than simply alleging that the contract was insufficient to complete the works or that the he had done what he could with the funds that he had available.

[18] The defendant avers that the pleadings put in issue the following: (1) whether he incurred additional costs as result of having to set back the building differently from that provided in the site plan which formed part of the approved plan; (2) whether in fact the items which the claimant has stated in her statement of claim were actually in the condition which she says since in most of the cases he is contending otherwise; (3) the degree of completion of the electrical and plumbing works and the external works as there is dispute between the parties as to the percentage completion of these items.

[19] The defendant says that he has denied the items of defective work pleaded by the claimant and therefore the costs associated with remedying those defective works as outlined in both reports of Leslie Barry and Timothy Bubb are being disputed. The defendant submits that 'the interest of justice requires a trial of the issues raised on the pleadings and those issues cannot be justly and fairly determined on an application for summary judgment. Then application ought therefore to be dismissed.

The Claimant's Reply

[20] The claimant filed its affidavit in reply to the defendant's affidavit on 20th December 2013. In that affidavit, the claimant reiterates the position that the matters raised by the defendant do not constitute a defence and therefore he has no realistic prospect of succeeding on his defence. The claimant says that the issues raised by the defendant as to the differences in the percentage completion of various aspects of the work and the disputes as to the reports of Leslie Barry and Timothy Bubb go to quantum and cannot raise a realistic defence to the claim for breach of contract.

The Principles relating to Summary Judgment

[21] Rule 15.2 of the Civil Procedure Rules 2000 ('CPR 2000") provides:

> "The court may give summary judgment on the claim or on a particular issue if it considers that the-
> (a) … or

(b) defendant has no real prospect of successfully defending the claim or the issue."

Rule 15.4 states:

"(1) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.
"(2) The notice under paragraph (1) must identify the issues which it is proposed that the court should deal with at the hearing." (my emphasis)

[22] An application for summary judgment is decided applying the test of whether the defendant has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly. In Swain v Hillman[1], Lord Woolf Mr said that the words 'no real prospect of succeeding' did not need any explanation as they spoke for themselves. The word 'real' directed the court to the need to see whether there was a realistic, as opposed to be a fanciful, prospect of success. The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is 'bound to be dismissed at trial'[2]. This was echoed in the case of Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste[3].

[23] Lord Woolf in Swain v Hillman said that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Summary judgment hearings should not be mini-trials. They are simply to be summary hearings to dispose of issues where there is no real prospect of success.

[24] The court should be slow to entertain an application for summary judgment on certain issues where there is going to be a full trial in any event, particularly

[1] [2001] 1 All ER 91.
[2] Para. 34.10 Blackstone's Civil Practice 2004.
[3] Saint Lucia HCVAP2009/008 (delivered 11th January 2010).

where dealing with such an application may delay (because of possible appeals) the final disposal of the claim[4].

[25] In the case of Munn v North West Water Ltd.[5], it was held that where there are issues of fact, which if decided in the respondent's favour, would result in judgment for the respondent, it is inappropriate to enter summary judgment, even if there is substantial evidence to support the applicant's case. Primarily, the court will consider the written evidence adduced by the parties, and if it discloses a dispute with a real prospect of success, the summary judgment application will be dismissed.

[26] In Bank of Bermuda Ltd. v Pentium[6], Saunders CJ [Ag.] stated that:

> "[15] A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim"

[27] In the Trinidadian case of Western Credit Union Co-operative Society Ltd. v Corrine Ammon[7], Kangaloo JA said that in reaching its conclusion the court must not conduct a mini-trial. This he said does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial.

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[4] Partco Group Ltd. v Wrag [2002] ECWA Civ. 594.
[5] [2000] LTL 18/07/2000.
[6] BVI Civil Appeal No. 14 of 2003 (delivered 20th September 2004.
[7] Trinidad and Tobago Civil Appeal 103/2006.

Submissions

[28] The claimant and defendant filed submissions in support of their respective positions on 10th January 2014. The claimant submits that the question for the court is whether the defence has a realistic prospect of success as opposed to a fanciful prospect of success in relation to the claim for breach of contract. The claimant further submits relying on Emden and Gill's Building Contracts and Practice,[8] that the law is that where a contractor or builder has entered into a contract to erect a building and the contract is absolute and unrestricted by any condition express or implied, if it is impossible to complete the work, he will not be excused from the consequences of not fulfilling his contract, or from a liability to pay damages. The claimant says that the defendant cannot rely on his assertion that the contract price was borderline to relieve him from liability for his failure to complete the contracted works.

[29] The claimant further submits that the defence does not address at which point the defendant knew that the funds were insufficient, at which phase of the project the funds ran out and what efforts were made by him to alert the claimant to the insufficiency of funds. The dispute as to the value of the unfinished works does not preclude the court from addressing the breach of contract summarily and the court can enter summary judgment on the claim for breach of contract and proceed to trial on the issue of quantum of damages submits the claimant. The claimant further submits that the defence raises no genuinely triable issue for which a full trial is warranted.

[30] The defendant submits that the notice of application for summary judgment filed by the claimant is materially defective and as a consequence should be dismissed because the notice of application does not identify the issues which it proposed that the court should deal with at the hearing. He submits that all that is stated in the notice is the grounds of the application, namely that the defendant has no real prospect of successfully defending the claim. No issues are identified as required

[8] 7th ed. at pages 162-163.

by CPR 15.4(2). The defendant relies on the case of Geddes v Mc Donald Milligen[9] in support of this submission. The defendant submits that without prejudice to his submissions as to why the application ought to be dismissed, the pleadings in this matter do not lend itself to the grant of summary judgment in favour of the claimant. The defendant further submits that there are a multitude of factual issues to be tried. The defendant submits that the claimant has misrepresented the extent of the defendant's defence by simply stating the defence to be that the contract price agreed to by the defendant was insufficient to complete the works and that he had done what he could with the funds available. The defendant says that his defence goes much further than that in that inter alia he has denied any allegation of negligence or defective works on his part as pleaded by the claimant.

Analysis and Conclusion

Whether non-compliance with CRP 15.4(2) is fatal to the application for summary judgment

[31] In the case of Geddes v Mc Donald Milligen, the Court of Appeal of Jamaica had to consider whether the failure to comply with CPR 15.4(4) (same as our CPR 15.4(2)) was fatal to an application for summary judgment which had been granted in the court below. Harrison and Dukharan JJA delivering the court's judgment, held that the purpose of CPR was to allow the court and the party meeting the application to have adequate notice of the issues raised by the application. They further stated that the affidavit evidence relied upon by the applicant had not stated with the clarity demanded by the rules any of the issues which arose for consideration by the court. The application was therefore defective and the appeal was allowed. The court also in its judgment considered whether CPR 26.9 could be used to rectify matters and it concluded that this would not be a proper case for the court to have exercised its powers under CPR 26.9 which pertains to the general powers of the court to rectify matters where there has been a procedural error.

[9] (2010) 79 WIR 376.

[32] Based on the Geddes case, the application of the claimant has to fail and would be dismissed, it having failed to comply with CPR 15.4(2). Neither the notice of application nor the affidavit in support addresses the issues which the court is to consider. If I am incorrect in my conclusion on this issue, then I consider the other point which is whether this is a suitable case for summary judgment.

Whether this is a suitable case for summary judgment

[33] This is a case which is heavily fact based and will rely to a great extent on the assessment of the evidence presented to the court and the court being called upon to assess the credibility of the evidence. The claimant's statement in its reply that the contract to which the defendant seems to refer is not the contract which is the subject of the claim itself suggests that this is not a suitable case for summary judgment as this is an issue which would have to be determined after evidence is presented to the court. The question as to what is the applicable contract in relation to this claim is a matter which is not clear on the pleadings.

[34] The claimant's main ground for the application for summary judgment is that the defence of the defendant is that he underestimated the work. Respectfully, I understand the defendant's defence to be that the amount of the contract was not sufficient to complete the works due to significant changes which were made to the designs at the claimant's request which resulted in the building having to be set back from the cliff or sea edge which meant that the building was placed on a different slope than contemplated in the contract. This the defendant said resulted in deeper excavations for foundation purposes. The claimant says that this is not the case as seen from the Barry Engineering report. This is clearly a matter which is in dispute.

[35] The nature of this case requires that the pleadings be tested on evidence. To embark on such an exercise would be undertaking a mini-trial which is what Lord Woolf in Swain v Hillman cautioned against. The essential point is not whether the defence as filed is a substantial defence but whether is a real rather than a

fanciful one. The defence may not be a strong one but it must be a viable one. I consider that for summary judgment to be granted, the claim or defence must be one that cannot succeed on its face and without there being the need for any further evidence

[36] The defendant admits that some of the works were not completed as averred by the claimant but provides reasons why this is so. The defects averred by the claimant in the statement of claim are substantially contained in the reports of Barry Engineering and SAFED. The defendant has in his defence challenged the findings of the Barry Engineering report. The report has to be tested at trial and the opportunity given to the defendant to cross-examine the writer of the report. The report cannot be simply accepted at this stage of the matter without the court having an opportunity to make a finding as to the weight to be attached to the report.

[37] The defence as filed by the defendant raises issues of fact which have to be decided at a trial and this makes this matter not suitable for summary judgment because a summary hearing at this point will result in a mini-trial.

[38] In all the circumstances, I dismiss the application for summary judgment. The parties may wish to consider the option of mediation at this stage.

Order

[39] The application for summary judgment is dismissed with costs to the defendant in the sum of $1000.00. The matter is remitted to the Master for case management.

Kimberly Cenac-Phulgence
Master [Ag.]