COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/01229

BETWEEN

FREDERICK E. ARNETT

Plaintiff

-AND-

NAOMI FARRINGTON

First Defendant

BARRINGTON HAWKINS

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Kharin Sears of Lennox Paton for the Plaintiff
Non-appearance of Mr. Carlton Martin for the Defendants

Hearing Date: 6 November 2017

Practice – Summary Judgment - Application for Judgment under Order 14 Rules 1 and 3 of the R.S.C. 1978 - Plaintiff asserts defendants have no defence to claim –Final Judgment

The Plaintiff seeks summary judgment against the Defendants pursuant to RSC Order 14. He asserts that the Defendants have no plausible defence to his claim. Except for a Defence and Counterclaim, the Defendants failed/refused to put in any affidavit evidence to deal specifically with the Plaintiff's claim.

HELD: entering final judgment in favour of the Plaintiff against the Defendants;

1. **The purpose of Order 14 of the Rules of the Supreme Court is to enable a Plaintiff to obtain summary judgment without the necessity for a trial if he can prove his claim clearly and if the Defendant is unable to set up a bona fide defence or raise an issue or question which ought to be tried, or there exists some other reason for the matter proceeding to trial. Barclays Bank Plc v Clarke *[1998] BHS J. No. 111* applied.**

2. **To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step but the interests of justice overall will sometimes so require. Thus, the Court has a discretion to do so.**

3. **An analysis of the Defence and Counterclaim filed by the Defendants shows that there is no triable issue. The only issue in this action is whether the Defendants wrongfully erected a wall on the Plaintiff's property. The Defendants have failed and/or refused to file any affidavit evidence in this application to answer this question.**

4. **The Defendants have failed to raise any bona fide Defence to the claim or to refute any evidence produced by the Plaintiff. As such, there is no plausible reason which justifies the matter going to trial.**

JUDGMENT

Charles J:

Introduction

[1] By Summons filed on 12 April 2017, the Plaintiff seeks:

(i) Final judgment in this action to be entered against the First and Second Defendants for the relief claimed in the Writ of Summons filed on 17 August 2016,

(ii) the Defence and Counterclaim filed on 3 January 2017 be set aside and;

(iii) the costs of and occasioned by this action and application be the Plaintiff's, such costs to be taxed if not agreed.

[2] The Summons is made pursuant to Order 14 of the Rules of the Supreme Court 1978 ("RSC") and under the inherent jurisdiction of the Court.

[3] The Plaintiff's application is supported by the Affidavits of Frederick Emerson Arnett filed on 12 April 2017 ("the Arnett Affidavit") and the Affidavit of Donald Thompson filed on 26 October 2017 ("the Thompson Affidavit"). The Plaintiff also refers to the pleadings in this action, namely:

i. The Statement of Claim filed on 17 August 2016;

ii. The Defence and Counterclaim filed on 3 January 2017 and;

iii. The Reply and Defence to Counterclaim filed on 17 January 2017.

Background facts

[4] The background facts of this case can be gleaned from the Arnett Affidavit and the Thompson Affidavit together with their supporting documents. Stripped to its bare essentials, they are the following:

[5] The Plaintiff is and was at all material times the owner of two vacant lots, Lots 3 and 4 of Block 14 in the Englerston Subdivision in the Island of New Providence. ("Lots 3 and 4"): see Conveyance dated 26 May 1964 and recorded in the Registry of Records at Volume 790 at pages 114 - 117. The First Defendant is the owner of Lot 23 in Block 13 in the said Subdivision along with a 10 ft. wide road reservation: see Conveyance dated 8 June 1990 and recorded in the Registry of Records at Volume 9990 at pages 220 -223. The property contains a residential home, No. 61 Palm Beach Street where the First Defendant resides ("the Palm Beach Street Property"). The Second Defendant denies that he resides there. The Palm Beach Street Property is located to the north of Lots 3 and 4.

[6] The Plaintiff alleged that sometime between June 2008 and May 2016, unknown to him and without his consent, the First and/or Second Defendants constructed a cement wall which extends roughly three feet onto the northern portion of Lots 3 and 4 and runs along nearly the entire portion of the northern boundary of the said lots. The cement wall is roughly fifty feet long.

[7] Prior to the construction of the cement wall, a chain-link fence divided the property line between Lots 3 and 4 and Lot 23. It was not until May 2016 when the Plaintiff retained the surveying firm of Donald E. Thompson & Associates ("the Surveyor") to survey Lots 3 and 4, with the intention to have the lots enclosed with a chain-link fence, that he discovered that the cement wall encumbered Lots 3 and 4.

[8] On 12 June 2016, Counsel for the Plaintiff wrote to the Defendants seeking an amicable settlement of this dispute. Having received no response, the Plaintiff instituted these proceedings claiming, among other things, (i) possession of Lots 3 and 4; (ii) damages for trespass or alternatively, that the Defendants demolish the cement wall.

[9] The Defendants filed a Notice of Appearance on 21 December 2016. On 3 January 2017, the Defendants filed a Defence and Counterclaim wherein they denied that the cement wall was wrongfully constructed onto the Plaintiff's property.

[10] The First Defendant further alleged at paragraph 10 of the Defence and Counterclaim that she "*has been in open, exclusive, continuous and undisturbed possession of the land the subject-matter of this action for more than twelve years prior to the commencement of this action and she relies on the provisions of the Limitation Acts".*

[11] By a Reply and Defence to the Counterclaim filed on 17 January 2017, the Plaintiff referred to two survey plans commissioned by the Surveyor, one dated June 2008 and the second dated May 2016. It is the Plaintiff's evidence, as stated in both the Arnett Affidavit and the Thompson Affidavit that the June 2008 survey plan clearly demonstrates that the cement wall had not yet been constructed in 2008. On the other hand, the May 2016 survey plan illustrates that a cement wall is present and encumbers the northern boundary of Lots 3 and 4.

[12] By letter dated 9 March 2017, Counsel for the Plaintiff again sought to engage the parties in settlement discussions; however as no response was received, the Plaintiff filed the aforementioned application for summary judgment. To date, the Defendants have not filed an Affidavit.

[13] It is on this basis that the Plaintiff requests that the Court grants the relief sought in the Writ of Summons filed on 16 August 2017.

The Law on summary judgment

[14] Order 14 Rule 1(1) provides as follows:

> **"(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."** [Emphasis added]

[15] O14 r 3 states:

> **"(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.**
>
> **(2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counter claim made or raised by the defendant in the action."**

[16] Thus, summary judgment may be ordered unless there is an issue which ought to be tried or there is some other reason for there to be a trial of the claim or part thereof.

[17] Case law has expounded and crystallized the test for summary judgment as follows:

a. The purpose of O 14 is to enable a plaintiff whose application is properly constituted to obtain summary judgment without trial, if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried: **Order 14, Note 14/3-4-5 to the Supreme Court Practice 1979** and **Roberts v Plant** [1895] 1 QB 597, CA.

b. The onus is on the defendant to show that there is a triable issue; per Osadebay J (as he then was) in **Bank of Nova Scotia v Brown** [1994] BHS J. No. 20. The Defendant must show cause against an application for summary judgment either by "affidavit evidence or otherwise": **Order 14 Rule, Note 14/4/3 of the Supreme Court Practice 1999.**

c. It is not enough for a defendant to simply deny a claim. Rather, the defendant must either dispute the validity of the claim in law or set up some affirmative case of his own to answer it. Indeed, the defendant must either, in his defence or affidavit opposing the summary judgment application, '**condescend on the particulars': Barclays Bank Plc v Clarke** [1998] BHS J. No. 111 at para 8: per Dunkley J (Ag). **Generally, the Courts will require affidavit evidence of the defendant which sets out sufficient facts and particulars to establish that there is in fact a triable issue.** [Emphasis added]

d. The question that the Court must ask in considering the pleaded defence and affidavit in response of the application for summary judgment is whether there is a fair or reasonable probability of the defendant having a reasonable or bona fide defence: **Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray** [1983] CA Bound Transcript 376; [1983] Lexis Citation 68.

e. If the only defence is a point of law, and the Court can see that it is misconceived (or, if arguable, can be shown shortly to be unsustainable) the Plaintiff is entitled to Judgment: **Supreme Court Practice at 14/1/2.**

[18] That said, the common law aids in highlighting the importance of a full trial to achieve the interests of justice and therefore, the power of summary judgment should be approached as a serious step which should be used cautiously and sparingly.

[19] The Court also recognizes that to give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step but the interests of justice overall will sometimes so require. Hence, the discretion to the Court to give summary judgment.

[20] As already reiterated, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence or raise an issue against the claim which ought to be tried. This is also in keeping with the overriding objective of Order 31 A of our Rules which mandates judges to actively manage cases so as to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

[21] It is on these principles that I will consider the merits of the present application bearing in mind that the Plaintiff's Summons for summary judgment can only succeed if he can demonstrate on the evidence that he can prove his claim clearly, and the Defendants are unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

The Defence of the First and Second Defendants

[22] The Defendants filed a Defence and Counterclaim on 3 January 2017. They did not file any affidavit evidence and/or supporting documents to the application for summary judgment.

[23] Paragraph 1 of the Defence expressly states that the First Defendant is and has been at all material times the legal and beneficial owner in fee simple in possession of the land, the subject matter of this action. There is not supporting documents to support this bold assertion.

[24] At paragraph 2, the Second Defendant denies that he is or ever was an occupier of Lot 23. The Plaintiff disputes that allegation and alleges that Counsel for the Plaintiff personally attended Lot 23 and personally served the letter dated 12 June 2016 on the Second Defendant at the Palm Beach Street Property. The

Plaintiff also relies on the affidavit evidence of Cpl. 515 Stephen Alexander Russell filed on 14 December 2016 that he served the Second Defendant with the Writ of Summons at the Palm Beach Street Property.

[25] At paragraph 5 and subsequent paragraphs, the First Defendant denies that she erected a cement wall which encumbers Lots 3 and 4. Notwithstanding this denial, the First Defendant concurrently seeks to rely on the provisions of the Limitation Act, as a means of defending the Plaintiff's claim. The First Defendant asserts that "she has *been in open, exclusive, continuous and undisturbed possession of the land the subject- matter of this action for more than twelve years prior to the commencement of this action and she relies on the provisions of the Limitation Acts."* In short, the First Defendant says that the wall is on her land.

[26] Section 16(3) of the Limitation Act provides that:

> **"No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person…."**

[27] Learned Counsel Ms. Sears submitted that the Plaintiff's claim to recover possession of the portion of Lots 3 and 4 is not statute-barred due to the nature of the wrongdoing. Firstly, the Plaintiff did not discover that the First and/or Second Defendants wrongfully constructed a cement wall onto Lots 3 and 4 until May 2016. Although the cement wall was erected some years ago, the wrong is continuing. The cement wall which encumbers the Plaintiff's property remains in the control of the Defendants. As such, the trespass accrues from day to day, so long as the encumbrance remains. Ms. Sears has correctly expounded the law and in support, relied on the case of **Stephen Paul Grant v Timothy Francis Hayes [**2014] EWHC 2646 (Ch). At para 16, Nugee J stated:

> **"Nevertheless it is well established in other areas of the law that some torts are one-off torts - if I step on to your land and then step off again I have committed a trespass and that takes place on one occasion - but some**

torts are continuing torts - if I build a buttress on your land and leave it there that is a continuing tort. The traditional analysis is that such a trespass accrues from day to day. Clerk and Lindsell at para. 31-19 puts it this way:

> **'If the act complained of creates a continuing source of damage and is of such as to render the Defendant responsible for the continuance, then in cases in which damage is not of the essence of the action, such as trespass, a fresh cause of action arises de die in diem, and in cases where damage is the essence of the action, such as nuisance, a fresh cause of action arises on each occasion when fresh damage accrues.'**
>
> **On that analysis the question would be whether a course of conduct is one act which gives rise to harm or whether it is a continuing act in which case a fresh cause of action arises *de die in diem* or, if the essence of the tort is damage in which case a fresh cause of action would arise each time the fresh damage was suffered…."**

[28] Secondly, says Ms. Sears, the Plaintiff's evidence is that the survey plans exhibited to the Arnett Affidavit at pages 19 and 20, demonstrate that the cement wall was erected sometime after June 2008 and therefore the First Defendant could not have been in "*open, exclusive, continuous and undisturbed possession"* of the portions of Lots 3 and 4 for a period of more than 12 years, so as to entitle her to rely on the Limitation defence. The chain-link fence which previously bordered the properties, unlike its successor, the cement wall, did not encumber the Plaintiff's property. The First Defendant cannot rely on such a defence and the onus is on her to produce evidence to support her claim- which she has failed to do.

[29] Ms. Sears next submitted that as soon as the Plaintiff became aware of the trespass, he immediately sought to enforce his exclusive right to Lots 3 and 4 without delay. The First and/or Second Defendants continue to trespass onto the Plaintiff's property, and have therefore prejudiced the Plaintiff who is restricted from using his property in the manner in which he sees fit and has therefore suffered damage.

[30] An analysis of the Defence and Counterclaim filed by the Defendants demonstrates that there is indeed no triable issue. The only issue in this action is whether the Defendants wrongfully erected a wall on the Plaintiff's property. The

Defendants have failed and/or refused to file any affidavit evidence in this application to answer this question.

[31] In my considered opinion, the Defendants have failed to raise any bona fide Defence to the claim or to refute any evidence produced by the Plaintiff. They have no plausible ground of defence to the claims which justifies that matter going to trial.

[32] In the circumstances and in the exercise of my discretionary powers, I will enter final judgment in favour of the Plaintiff as against the Defendants with Costs to the Plaintiff to be taxed if not agreed.

Dated this 6th day of November, A.D. 2017

Indra H. Charles
JUSTICE