

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

No. 2016/CLE/gen/01366

BETWEEN

BRADLEY MCKENZIE

AND

JOSEPH MORRIS

Plaintiffs

AND

MICHAEL BAKER

First Defendant

AND

HENFIELD AND FLOWERS ESTATES
HOMEOWNERS ASSOCIATION LIMITED

Second Defendant

AND

HOMEOWNERS ASSOCIATION LIMITED

Third Defendant

AND

SIDNEY ALEXANDER HENFIELD

Fourth Defendant

AND

SHARON HENFIELD

Fifth Defendant

Before: Deputy Registrar Carol Misiewicz

Appearances: Mr. Alex Dorsett for the Plaintiffs
Mr. Nicholas Mitchell for the Defendants

Hearing Dates: 22 November 2017, 1 February 2018, 13 March 2018, 7 June 2018 and 4 July 2018

RULING

1. This is my decision regarding the application by the First Defendant for a wasted costs order against the Plaintiff.
2. This matter came before me as a strike out application by a summons that was apparently originally dated 2nd August 2017, later amended and re-filed on 2 February 2018. Both sides filed affidavits in support of their respective positions on that application.
3. On 13 March 2018 I made an order granting the application made in the Amended Summons and striking out the action. The perfected Order filed on 9 May 2018 recites that the application was granted with costs to the First Defendant. It was further ordered that the wasted costs application by the First Defendant be adjourned to a date to be fixed. By seeking a 'wasted costs' order counsel for the First Defendant was aiming to have counsel for the Plaintiff made personally liable for a portion or all of the costs in the proceedings. Counsel for the Plaintiffs made a submission regarding the effect of the perfected Order, which I shall return to at the end of this Ruling.
4. A formal application for a wasted costs order was then made by a Summons filed on 23 April 2018 ("wasted costs summons"). It sets out three grounds for the application, namely, that Counsel for the Plaintiffs: (i) acted improperly and in breach of their duty to the Court; (ii) acted without reasonable cause and in breach of their duty to the Court and (iii) engaged in misconduct in breach of their duty to the Court with respect to whole or part of the Plaintiffs' case.
5. Beginning at paragraph 15 of the First Defendant's undated Skeleton Argument addresses the fact or facts alleged to support the above mentioned grounds. The ground of "acting improperly" is correlated with the failure of Plaintiff's Counsel to appear and prosecute a summons for an interlocutory injunction. However, aside from a mere recitation of complaint of 'failure to appear' on injunction application, counsel for the Applicant has not pointed this Court to any facts or circumstances

surrounding the alleged failure, although it seems that event happened some time ago, and would necessarily have been before a Judge. Furthermore, no information is given about the outcome of the injunction application, such as whether any order was made, and the result.

6. Mr. Mitchell relied on Medcalf v Mardell [2002] UKHL 27. I note that the ground of 'failure to appear' is mentioned almost in passing in a quote from that case at paragraph 24. As was further explained by the Court in that same paragraph: the factual basis for the exercise of the jurisdiction in such circumstances are within the knowledge of the judge that was seized of the matter at the relevant time, and could then have been easily identified. The quotation recited in the Medcalf case from Harley v McDonald [2001] UKPC 18 para.50, bears repeating here:

“Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed.”

7. It is not possible at this stage to undertake a 'brief' inquiry. A costly and time-consuming exercise would be required to review and recount the history via affidavits, of what transpired on the injunction application. The House of Lords in Medcalf found this to be an undesirable course to follow. I accept this guidance from the House of Lords and decline to pursue the line of inquiry. As such, no wasted costs order will be made on this ground.
8. Paragraph 16 of the Skeleton Argument makes reference to withdrawal from a case and inadequate notice. This is apparently connected to ground (ii) of the Summons, which asserts breach of duty to the Court. No facts supporting these grounds were articulated either in the wasted costs summons or in the First Defendant's Skeleton Arguments. If by withdrawal is meant counsel's failure to appear on 13 March 2018 this was not expressed, and in any event I am not

persuaded that the failure to appear on that occasion should attract such a draconian sanction.

9. The next ground alleged in support of the wasted costs application is that the Plaintiffs through their counsel pleaded an unsubstantiated allegation of fraud. To demonstrate this Skeleton Argument condescends to an examination of facts and evidence as pleaded in the statement of claim or in affidavits filed by the Plaintiffs in the action. The complaint on this score of counsel for the Plaintiffs having done slipshod work in poorly drafting pleadings or affidavits, are met with the response that it is the Plaintiffs who suffer the consequences, if indeed it is the case, and that the striking out of the action is an appropriate and sufficient remedy. I do not consider the issue of bad drafting to rise to the level of breach of duty to the Court.
10. The opportunity for counsel to address me on the issue of wasted costs was not meant as an invitation to re-litigate the action. An exercise to examine the multiple affidavits that were filed in these proceedings to determine whether they were appropriate or suitable for the purposes which they were filed is an exercise in re-litigating matters that have already been disposed of. It falls foul of the test in **Medcalf v Mardell**, namely, that the question is clearly not apt to summary disposal by the Court.
11. Suffice it to say that having considered the arguments for and against, the application for a wasted costs order is refused.
12. There are two final points to mention. Firstly, there may be some merit in the argument made by counsel for the Plaintiffs at paragraph 10, that the Court having already awarded costs to the Defendants, and said order having been perfected and filed, that this court may be *functus* on the question of costs and could not make any further order. But I have given consideration to the arguments presented, in the event I may be wrong on this issue.

13. Secondly, it seems as though there was some in-fighting or disagreement on the Plaintiffs' side between counsel of record, Donna Dorsett Major & Co and counsel appearing on their behalf, Alexander Dorsett. With the conclusion I have reached on the application there is no need to address or determine the issue of which of them ought to have been liable.

Dated the 29th day of January, A.D., 2019

A handwritten signature in black ink, appearing to read "Carol D. Misiewicz". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping tail.

Carol D. Misiewicz
Deputy Registrar