

COMMONWEALTH OF THE BAHAMAS

2019

THE SUPREME COURT

CLE/GEN/00608

Common Law Equity Division

B E T W E E N

LAKEISHA PINDER

Plaintiff

AND

MINISTRY OF FOREIGN AFFAIRS

First Defendant

AND

THE ATTORNEY GENERAL

Second Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Anthony McKinney, KC for the Plaintiff

Kristan Stubbs, Vashti Bridgewater for the Defendant

Date of Hearings: 5th April, 2023

DECISION

1. By Generally Endorsed Writ of Summons filed 7th April 2019, the Plaintiff initiated an action against the Defendants for personal injuries, loss, and damage. A Statement of Claim was filed on 6th December 2019, in which the Plaintiff alleges that she visited the Passport Office on 6th July 2018, and sat in a chair which subsequently collapsed. The Plaintiff alleges that she was injured as a result of that fall. That Statement of Claim seeks Special Damages in the amount of \$21,959.57, as well as general damages, interests and costs.
2. A Defence was filed in this matter on 20th November 2020. In that Defence, the Defendants plead that the chair which collapsed had been checked for safe functionality, that no detectable or patent defects were found, that the chair had been safely utilized earlier that

day without incident, and that any fault in the chair was remote and not reasonably foreseeable. The Defendants therefore deny liability, and further plead at paragraph 8 that **“the Defendant cannot speak to any peculiarities about the plaintiff herself, nor the manner in which she used the said chair that may have contributed to or caused the accident claimed by the Plaintiff.”**

3. By Summons filed 6th December 2019, the Plaintiff seeks an interim payment in the amount of \$21,959.57 or a reasonable sum. In support of the application, the Plaintiff relies on the affidavits of Lakeisha Pinder filed on 6th December 2019 and 3rd April 2023, to which are exhibited medical reports and receipts.

Plaintiffs’ Submissions

5. The Plaintiff cites Order 29 Rule 12(1), which provides as follows: (1) If, on the hearing of an application under rule 10, the Court is satisfied —
 - (a) **that the defendant against whom the order is sought (in this paragraph referred to as “the respondent”) has admitted liability for the plaintiff’s claim; or**
 - (b) **that the plaintiff has obtained judgment against the respondent for damages to be assessed; or**
 - (c) **that, if the action proceeded to trial, the plaintiff would succeed in the action on the question of liability without any substantial reduction of the damages for fault on his part or on the part of any person in respect of whose injury or death the plaintiff’s claim arises and would obtain judgment for damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff.**
6. The Plaintiff simply submits that she is likely to be successful at trial, as there is no dispute that the fall occurred on premises for which the Defendants were responsible, and while using equipment provided by the Defendants for the use of the public. She claims that she has suffered significant injury, as verified by the receipts exhibited to her affidavit, and that a substantial award is likely at trial. It is further submitted that the Plaintiff has suffered

hardship as a result of this incident, and should be reimbursed for monies advanced by her in seeking treatment for her injuries.

Defence Submissions

7. In response, the Defendants rely on the Affidavits of Siobhan Dean and Andreae Francis filed on 20th January 2023. Both affiants speak to the information provided to them about the incident, as neither was an actual eyewitness. Each avers that the chair in question was regularly checked that day, and exhibited no defects.
8. In particular, Andreae Francis avers at paragraph 4 that:
 4. **Although personally I was not a witness to the actual incident, Ms. Russell (Information Desk Clerk) and Defence Force Officer Munnings, both informed me that Ms. Pinder sat in one of the chairs for the usage of the general public who visits the Passport Office (so that one can be comfortable) while waiting for service. Upon sitting in the chair, one of the legs separated causing Ms. Pinder to end up on the floor.**
9. The Defendant's submissions on the question of an interim payment were quite brief. They note that liability is denied, and submit that the Defendants discharged their duty of care by ensuring that the chair was safe prior to the accident. As such, they claim that the accident was mere happenstance, and that there was no evidence that the chair was faulty. They further raise the issue of contributory negligence, and intimate that the Plaintiff may have in some way contributed to the accident.
10. The Defendants cite the case of *British Commonwealth Holdings plc v Quadrex Holdings & 1989) 3 AER 492*, in which the court said the following:

"But Order 29 (as construed by this court in the Shearson Lehman case [1987] 1 W.L.R. 480) [1989] Q.B. 842 at 866 requires the court, at the first stage, to be satisfied that the plaintiff will succeed and the burden is a high one: it is not enough that the court thinks it likely that the plaintiff will succeed at trial. For myself, I find it an impossible concept that the same court can be simultaneously "satisfied" that the plaintiff will succeed at trial and at the same time consider that the defendant has an arguable defence sufficient to warrant unconditional leave to defend. If there is a distinction between the two concepts which I have failed to detect, such distinction

must in my judgment be the result of "an uncommon nicety of approach" which the requirements of certainty in the law would make it undesirable to recognise. In my judgment, therefore, it is impossible to make an order for interim payment where unconditional leave to defend has been given."

11. The Defendants note that the test is whether the Plaintiff "would" succeed, and not whether the Plaintiff was "likely" to succeed, and submit that the court could not be satisfied at this stage to that very high standard, and an interim payment should therefore be refused.

Discussion

12. RSC Order 29, Rule 12(1) sets out the criteria which must be satisfied before an application for an interim payment can be granted. The court must be satisfied either that the defendant admitted liability; or judgment has been obtained for damages to be assessed; or the Plaintiff would succeed in the action on the question of liability without any substantial reduction in damages for fault on his part. In this case, the issue of liability has not been settled, which is required for the case to fall within one of the first two parameters. The court must therefore be satisfied that the Plaintiff would be successful at trial without any substantial reduction in damages for fault on her part, in order to award an interim payment.
13. In considering that prospect of success, I note the contention by the defence that the issue of contributory negligence may arise. At paragraph 9 of the Defence, the Defendants plead that they are "unable to speak to any particularities of the Plaintiff, nor the manner in which she used the said chair that may have contributed to or caused the accident." In saying that they are unable to speak to it, my view is that the Defendants are in essence admitting that they have no knowledge of any evidence that might support a finding of contributory negligence. It is therefore difficult at this stage to see how any award of damages would be significantly reduced on the basis of contributory negligence.
14. I further note the pleadings which indicate the checks that were done earlier that day, and the fact that the chair had been utilized by others without incident. The issue raised by the Defence is therefore whether the incident was reasonably foreseeable, and whether the Defendants had upheld their duty of care by carrying out those checks.
15. In *Paulette Major v Xtra Valu Food Stores Ltd 2020/CLE/gen/00667* the learned Chief Justice Sir Ian Winder notes the following:

[10.] Occupier's liability is not a strict or absolute duty to prevent any and all damage to an invitee or licensee, such as the plaintiff. The state of the law was ably put by Sawyer J. (as she then was) in the case of Cox v. Chan [1991] BHS. J. No. 110. At paragraph 21, of the decision, Sawyer J states: “[I]t is clear from the decided cases, including Indermaur v. Dames, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful businesses.”

16. In my view, given the intimations of the defence that they did everything reasonably practicable to ensure the safe functionality, and that the chair had been used safely earlier that day, and given that the duty of care is not absolute, it is possible that a court at trial may find in favor of the Defence on these issues. Given the high standard required to be met on an application for an interim payment where liability is still in issue, and bearing in mind that this application is not a trial of the matter with full consideration of tested evidence that a trial entails, I am unable to conclude that the Plaintiff “would” be successful at trial. I am therefore constrained to refuse the interim payment.
17. Given that costs are within the discretion of the court, and having regard to the facts of this case, including particularly the circumstances of the Plaintiff, I order that each side bear their own costs.

Dated this 24th day of November, A.D. 2023



Neil Brathwaite
Justice