

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2018/FP/CLE/gen/00306



BETWEEN

FREEPORT SHIP SERVICES

Plaintiff

AND

1) PAUL FRAZIER, JR
2) THEOLA BROOKS
3) JOANN LEWIS

Defendants

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Jacy Whittaker for the Plaintiff
Ms. Krysta Mason-Smith for the 1st Defendant

HEARING DATES: April 1, 2021; May 12, 2021

RULING

Introduction

1. The parties are before the Court for the hearing of two applications filed on behalf of the Plaintiff. The Plaintiff in its first Summons filed October 30, 2019 seeks summary judgment of its claim against the 1st Defendant and in its second Summons filed September 4, 2020 seeks leave to enter Judgement in Default of Defence.
2. The Plaintiff by way of its Writ of Summons filed November 22, 2018 and Statement of Claim filed October 4, 2019 allege against the Defendants inter alia:- fraud, unjust enrichment, monies had and received and conspiracy to commit the same as a result of

the 1st Defendant's breach of contract, defalcation, embezzlement, misappropriation, conversion, fraud, unjust enrichment, and monies had and received over a period of time.

3. A Memorandum and Notice of Appearance was entered on behalf of the 1st Defendant by Arthur D. Hanna & Co. on December 7, 2018. However, by a Notice of Change of Attorney filed on October 11, 2019 the law firm of Mario D. Ducille & Co was appointed to act on behalf of the 1st Defendant.

Background

4. A review of the Court's record reflects that the parties (the Plaintiff and 1st Defendant) appeared before the Court on April 1, 2021 for the hearing of several applications however the Plaintiff's applications were to be heard first. Counsel for the Plaintiff, Mr. Jacy Whittaker advised the Court of the nature of his applications and that he intended to rely on the Affidavits of Jeremy Cafferata filed in support of the applications on June 22, 2020 and January 13, 2021 respectively. However, Counsel for the 1st Defendant, Ms. Krysta Mason-Smith indicated that she was in receipt of the Plaintiff's Summonses and only one of the Affidavits in support which was filed on January 13, 2021. In response to Ms. Mason-Smith, Mr. Whittaker advised the Court that the previous attorneys for the 1st Defendant would have been served with the said Affidavit as they had not been served with the Notice of Change of Attorney. Further, that an attorney at the 1st Defendant's former firm indicated that she would forward those documents to his new Counsel. Ms. Mason-Smith in response to the Court noted that she would not have had an opportunity to address the information in the Affidavit. The Court indicated that they would proceed with the Plaintiff's applications and then adjourn for another date for the 1st Defendant's response. The Court also requested that Plaintiff Counsel electronically forward the missing document to Ms. Mason-Smith. Mr. Whittaker a few minutes later advised the Court and Ms. Mason-Smith that he sent the said Affidavit via her e-mail. Mr. Whittaker proceeded with his applications referring to his Written Submissions and certain portions of both Affidavits in support. The Court set down May 12, 2021 for the 1st Defendant's response and the Plaintiff's reply.
5. On the parties return on May 12, 2021 for the 1st Defendant's response, Mr. Whittaker indicated that he had been served on May 11, 2021 with a Summons seeking to strike several portions of the Affidavit of Jeremy Cafferata filed June 22, 2020 on the grounds

that it contains inadmissible hearsay evidence and inadmissible evidence that is speculative and/or scandalous and/or irrelevant and/or oppressive and/or an abuse of the process of the Court and the Affidavit of Avrom Thompson both filed on May 11, 2021. Ms. Mason-Smith advised the Court that she wished to be heard on that application in addition to her response to the Plaintiff's applications for summary judgment and default judgment. However, Mr. Whittaker objected on the basis that the 1st Defendant's application to strike attacked the fundamental nature of his applications and further raised a preliminary issue to be determined. As a result the Court indicated to the parties that it would provide its Ruling on the preliminary issue before the parties proceed with their response to the Plaintiff's applications.

Preliminary Issue

6. The preliminary issue before me is whether the Court should hear the 1st Defendant's application to strike portions of the Plaintiff's Affidavit (filed on June 22, 2020) after the Plaintiff presented its applications to the Court.
7. Both parties have provided very fulsome Written Submissions which for the most part outline the events that led up to the hearing and what transpired during the hearing on April 1, 2021 and what transpired prior to and during the hearing of May 12, 2021. I have attempted to summarize the relevant portions of their submissions which relate to the preliminary issue before me.
8. Mr. Whittaker has submitted that the 1st Defendant was present at the hearing and despite indicating to the Court they did not have an opportunity to review the Affidavit before the hearing no objection or reservations to the admissibility of the Affidavit was made. He relies on and refers the Court to the decision of Justice Rhonda Bain in **Cable Bahamas Limited v Rubis Bahamas Limited and Fiorente Management & Investments Limited** [2014/CLE/gen/00922] and submits that the case is similar to the instant case. Further, that Counsel during the hearing heard the references to the Affidavit and documentary evidence and chose not to make an objection during the hearing but instead chooses to object after the Plaintiff has made submissions and closed its case.
9. Mr. Whittaker also submits in part that the Plaintiff served the said Affidavit on the 1st Defendant's former Counsel which is evidenced by an Affidavit of Service dated July 2, 2020 and filed June 15, 2020 and also by an Affidavit of Service dated May 17, 2021

confirming the contents of the prior Affidavit of Service and exhibiting the service receipt. Additionally, that in the 1st Defendant's Affidavit filed May 11, 2021 at paragraph 4 they confirm that the said Affidavit was served on Counsel of record.

10. Ms. Mason-Smith submits in part that the 1st Defendant was not able to raise their objection to the said Affidavit prior to the filing of its Summons to strike as the Plaintiff failed to serve Counsel of record with a copy of the said Affidavit prior to the hearing. Further, that an adjournment was requested so that Counsel had an opportunity to review the said Affidavit but the Court proceeded with the hearing and sought to set the matter down for another date for the 1st Defendant to respond. She also submits that at no time during the said hearing was the said Affidavit admitted into evidence as contended by Plaintiff Counsel but instead oral submissions were made which the said Affidavit was heavily relied on. Moreover, that Counsel for the 1st Defendant was not in a position to raise any objections during the hearing as she did not have sight of the said Affidavit.

Discussion/Analysis

11. Ms. Mason-Smith has maintained that she had not been in receipt of the said Affidavit and its exhibits prior to the hearing on April 1, 2021 and was therefore not in a position to answer and/or object to the admissibility of the said Affidavit. Mr. Whittaker has submitted that prior to the hearing on April 1, 2021 he served Counsel of record with the documents and as such Ms. Mason-Smith should have been in receipt of the same. Further, that she was present during the hearing and had an opportunity to object to the admissibility of the Affidavit and failed to do so and that the Plaintiff's case is now closed and Ms. Mason-Smith cannot now attempt to object.
12. While Mr. Whittaker has submitted that the Plaintiff had closed its case on April 1, 2021 I am not of the view that his yielding for the 1st Defendant's reply amounted to his case being closed. The transcript reflects that in an effort not to waste judicial time the Court indicated its willingness to hear the Plaintiff's applications and return at a later date for the 1st Defendant's reply (which would involve a reply to the Affidavit evidence) and the Plaintiff's final reply for its applications. The parties agreed to the Court's response and the Court's instruction to Mr. Whittaker to forward the "missing Affidavit" via e-mail which he did. Ms. Mason-Smith has also submitted that she had only been in receipt of the Affidavit's exhibits a few days prior to the filing of the Summons to strike and therefore

the 1st Defendant's filing of the said Summons one day prior to the adjourned date was a result of the Plaintiff's delay.

13. It is evident that the 1st Defendant sought to "reply" to the applications by way of his own application to strike portions of the said Affidavit. The parties in their respective written submissions have gone back and forth regarding service on Counsel and the manner in which it was done. Although as stated above that both parties initially acquiesced to the Court's direction to hear the Plaintiff's applications and adjourn for the continuation of the applications so that Counsel for the 1st Defendant could respond to the applications, I believe that the issue of service is an important feature to this determination.
14. Ms. Mason-Smith had submitted that she was in receipt of all of the other documents relative to the Plaintiff's application except the said Affidavit and therefore had difficulty proceeding.
15. I have reviewed the Court file and note that Skeleton Arguments on behalf of the 1st Defendant was filed on July 8, 2020 by Murrio D. Ducille & Co., the firm now representing the 1st Defendant. Counsel for the 1st Defendant identified that there are four Summonses filed before the Court in the instant action with reference to the Plaintiff's applications for Summary Judgment and Default Judgment. At paragraphs 23 to 25 Counsel makes reference to those applications and in particular at paragraph 25 states "On a preliminary note, the 1st Defendant object to the affidavit in support as it contains inadmissible opinion evidence by Mr. Cafferata in relation to opinions that he is not qualified to give or issues that are for the determination of the Court."
16. These Skeleton Arguments on behalf of the 1st Defendant represented by Counsel on record now are dated and filed on July 8, 2020, less than a month after the filing of the said Affidavit of Mr. Cafferata. Having reviewed the submissions contained in the Skeleton Arguments and taking into consideration the filing date of the same I am of the view that Counsel of record had knowledge and sight of the said Affidavit from as early as July 8, 2020 and no application to strike the Affidavit or portions thereof was made. Further, that the filing of the 1st Defendant's Summons to strike almost an entire year later amounts to delay on the 1st Defendant's part. To permit that application to be advanced now would delay and therefore prejudice Plaintiff's case.

17. Therefore, I am of the view that the 1st Defendant cannot now attempt to challenge the said Affidavit by way of having portions of the Affidavit struck out. However, the 1st Defendant can still reply to the Plaintiff's applications on the adjourned date.

Dated this 31st day of October A. D. 2023

Petra M. Hanna-Adderley
Petra M. Hanna-Adderley
Justice

