COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Side

2020/CLE/gen/FP/00122

BETWEEN

DIANE DALE LOUISE MORGAN

Plaintiff

AND

KINGS BAY CONDOMINIUM ASSOCIATION

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Harvey O. Tynes KC with Mrs. Tanisha Tynes Cambridge for the Plaintiff

Miss Meryl O. Glinton for the Defendant

HEARING DATE: March 17, 2023

RULING

(On Preliminary Objection)

Hanna-Adderley, J

The Substantive **part heard** application before the Court is the Defendant's application to enter Summary Judgment. This present application by Notice of Application is an application by the Defendant to amend its Summons filed August 23, 2022 ("**the Summons**") seeking Summary Judgment and the Plaintiff's **Preliminary Objection** thereto.

Introduction

[1.] On March 1, 2023 the Civil Procedure Rules, 2022 ("**the New Rules**") came into effect.

[2.] On March 7, 2023 the Court commenced the hearing of the Defendant's Order 14 application. The Summons was supported by the Affidavit of Roger Rolle filed May 24, 2022 and the Affidavits of Yannick Rodgers filed August 23 and 24, 2022. Miss Meryl Glinton Counsel for the Defendant relying on her Submissions entitled "Defendant's Submissions In Support of Summary Judgment (for use at the hearing on 25th August 2022)" dated August 24, 2022 made her application. The Submissions repeat in paragraph 2 that the application is being brought pursuant to Order 14 r 1, but the relief sought was for "for judgment to be entered against the Plaintiff in respect of its **counterclaims…**". The matter was adjourned to March 17, 2023 for the Plaintiff's response. The substantive application for Summary Judgment is therefore part heard.

[3.] Miss Glinton, upon being served with the Plaintiff's Submissions entitled "Plaintiff's Submissions (Order 14 Application)" filed on March 6, 2023, states that, out of an abundance of caution, on March 16, 2023 she filed the Notice of Application with the return date of March 17, 2023. The heading of the Notice of Application states as follows: "(Intended Summons converted to Notice of Application under duress)."

[4.] The Notice of Application seeks an Order granting leave to amend the Summons, pursuant to R.S.C. Ord. 20 r.7, or alternatively pursuant to Part 11 of the Supreme Court Civil Procedure Rules 2022 ("**CPR**"), or the inherent jurisdiction of the Court, by replacing "R.S.C Ord. 14 r 1" as contained therein with "R.S.C Ord. 14 r 5." The grounds of the application are that, the proposed amendment is just and reasonable and would serve the purpose of determining the real question in controversy between the parties to the proceedings, and of correcting a defect or error in the proceedings.

[5.] Mr. Harvey O. Tynes KC attorney for the Plaintiff makes a Preliminary Objection to the application to amend pursuant to the Notice of Application.

Statement of Facts

Summons before the Court

[6.] The Summons commands the Parties to attend before this Honourable Court on August 25, 2022 to hear Counsel on an application on behalf of the Defendant "pursuant to R.S.C Ord. 14 r. 1 for Judgment to be entered against the Plaintiff …" for (1) damages in the amount of arrears of

maintenance and special assessment; (2) a Declaration that the Defendant is entitled to vacant possession of Unit 234, Building F, Kings Bay Condominium and (3) a Declaration that the Defendant is entitled to exercise a power of sale over Unit 234, on the grounds that the Plaintiff has no defence to any of the claims set out in its Amended Defence and Counterclaim filed herein on August 17, 2022.

[7.] Order 14 of the R.S.C ("the Old Rules") sets out the Rules as relate to Summary Judgment proceedings. Ord. 14 r 1 provides:

> "***1. (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***

[8.] Order 14 rule 5(1) provides:

> ***"5.(1) Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the court for judgment against the plaintiff on that claim or part."***

[9.] The Court will determine the Preliminary Objection to the Notice of Application to amend; and if the Defendant is successful, the Court will move on to hear the parties more fully as soon as possible on the application to amend, unless there is no objection to such amendment, and finally onto the application for Summary Judgment.

Submissions on Preliminary Point

Miss Meryl Glinton for the Defendant

[10.] Miss Glinton submits that the general proposition is that Order 14 Rule (1) refers to Summary Judgment of a Plaintiff, which in many respects, she submits, on a Counterclaim, the Defendant is regarded as the Plaintiff to the Counterclaim. However, to the extent that Order 14, Rule (5) specifically makes provisions for Counterclaim situations, to ensure that all of the issues before the Court are addressed, the Defendant is prepared to change the reference to Order 14 Rule (1) to Order 14 Rule (5).

[11.] That in this case, the Defendant, because time permitted, filed a Notice of Application to amend the Summons. That in this case the Old Rules are applicable.

Mr. Harvey O. Tynes KC for the Plaintiff

[12.] Mr. Harvey O. Tynes KC Counsel for the Plaintiff submits, in respect of the Notice of Application filed, that Order 32 Rule (1) of the Old Rules, requires that except as provided in Order 15 Rule (7), every application in Chambers not made ex parte must be made by Summons. That the exception acknowledged by Order 32 is an exception that relates to applications made on Summons for Direction, which is not applicable here. That presumably, if the application made pursuant to Order 32 Rule (1) was relevant, it was mandated to be made by Summons. This document, however, was not a Summons. That what he noticed, though in brackets, beneath "Notice of Application", was the words "Intended Summons Converted to Notice of Application under Duress." That what he thought was that it is the Applicant was saying, this Notice of Application was intended to be a Summons, but was converted to be a Notice of Application, and what is more, converted under duress.

[13.] Mr. Tynes KC submitted that Part 11 (6) of the New Rules, which came into effect on the 1st of March of this year, requires that written applications, pending proceedings must be commenced with Form G14 of the New Rules. That the Applicant had "slavishly" followed the requirements of Part 11 (6) and 11 (7) by employing Form G14, which is to be found on page 319 of the New Rules. That he was still left somewhat at a loss at the fact that the form being used is the form under the New Rules but that this Notice of Application was intended to be a Summons, but converted, according to the Applicant, under duress. That what he did notice was that 11(6) of the New Rules was slavishly followed and he came to the a conclusion that the answer to his questions and doubts was that what appears in paragraph 1 of the Notice of Application: "The Defendant makes application for an Order pursuant to Order 20 Rule (7)..." which appears clearly to be a reference to the Old Rules, "... or alternatively pursuant to Part 11 of the Supreme Court Procedure Rules 2022..." which is a reference to the New Rules, and it seems in the further alternative, "... under the inherent jurisdiction of the Court."

[14.] So, Mr. Tynes KC submitted, the application seeking to amend the Summons which was filed on the 23rd of August, 2022, appears to be made, according to the language, either under

Order 20 Rule (7) of the Old Rules, or alternatively Part 11 of the New Rules, or alternatively under the inherent jurisdiction of the Court. He submits that he came to the conclusion that the Applicant, by simply following slavishly the provisions of Part 11 and adopting the Form G14, obviously means to make application pursuant to the Part 11 of the New Rules. That as far as the inherent jurisdiction of the Court is concerned, no argument was advanced by Counsel when she made her Submissions for relief under Order 14 in the first place. She specifically refers to Order 14 Rule (1) and not Order 14 Rule (5). That the New Rules came into effect on the 1st of March of this year and that the 1978 Rules were revoked.

[15.] Mr. Tynes KC submitted that bearing in mind that no arguments were advanced based on the inherent jurisdiction of the Court; that there is expressed provision in the New Rules and that the Old Rules had been revoked; that the Applicant slavishly followed the requirements of Form G14, the application could only go forward if it was made pursuant to the provisions of the New Rules. That Part 11(1) deals with interlocutory applications for court orders, being application made before, during or after the course of the proceedings. That Part 11.3 deals with applications to be dealt with at a case management conference and states that (1) So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.

[16.] That the application for Summary Judgment made by the Summons, which is being heard by this Court, does not appear to comply with the provisions in Part 11.3. The matter was never listed for hearing at a case management conference or listed for hearing at a pretrial review. That the application to amend, which is made by slavishly following the requirements of G14 Form, was not listed for hearing at a case management conference or a pretrial review.

[17.] Further, there is no dispute that the application to amend was served on the 16th, yesterday, and returnable before the Court on today's date. That the provisions of Part 11.11 (1) of the New Rules deals with service of Notice of Application. The general rule is that a Notice of Application must be served as soon as practicable after the day it is issued. Part 6.2 of the New Rules deals with the "Deemed Date of Service" and provides that: "Any document served after 4:00 p.m. on a business date or any time on a day other than a business day is treated as having been served on

the next business day." So in effect, applying the New Rules, the document was served on Mr. Tynes KC today for hearing before the Court at 11 o'clock.

[18.] Additionally, Part 11.11(1)(b) provides that the application must be served at least 7 days before the Court is to deal with the application. From this morning to 11 o'clock today is not 7 hours. There is no discretion in the matter. The word "must" is mandatory. As far as this particular application is concerned, there has been noncompliance of mandatory provisions of the New Rules.

[19.] This takes us next to Part 11.3(2) which provides: "(2) Where an application is made which could have been dealt with at a case management conference or pre-trial review the Court must order the applicant to pay the costs of the application unless there are special circumstances." That there is certainly no evidence of any special circumstances. There is no evidence by affidavit or otherwise that outlines any circumstances that should apply to knock out the strict requirements of part 11.3(2) So, when an application is made what could have been dealt with at a case management conference or pretrial review, the Court must order the applicant to pay the cost of the application unless there is special circumstances.

[20.] Mr. Tynes KC asked that the application to amend the Summons be dismissed and for an order pursuant to the provision of 11.3(2), that the applicant pay to the Respondent the cost of the application to amend.

Defendant's Final Response

[21.] Miss Glinton in her response to the Preliminary Objection, submitted that she had "slavishly" followed the New Rules, and that she would say that Mr. Tynes's wording there is accurate. That the Defendant's position has always been the application having been made pursuant to the Old Rules, the Court's jurisdiction having been invoked during the time period when the Old Rules applied, that it is the Old Rules which should govern these proceedings. What she found, however, was that no amount of legal arguments made had any affect on the Supreme Court Registry, who has been instructed to only accept the forms under the New Rules. As such, she had no choice but to convert the application from the form she originally intended to file it under, which was a Summons, into a new form because otherwise, she would not be allowed to

file it. That is why she says that the word "slavishly" is quite appropriate because she was given no options in the circumstances. That for the avoidance of doubt, and because she knew that this question of New Rules and Old Rules will be dealt later, she drew the Court's attention to both sets of Rules, and, at the end of day, the Court could make its own determination on both sets of circumstances. Miss Glinton made further Submissions on the operation of the Old Rules and New Rules, which in my view essentially relate to the application for leave to amend and will be considered should I rule in the Defendant's favour on the Preliminary Objection.

Ruling on the Preliminary Objection

[22.] The Summons was filed under the Old Rules on August 23, 2022 and was set down on October 1, 2022 for hearing on March 7, 2023. The Application was part heard, under the Old Rules, on March 7, 2023 and the part heard Summons was adjourned to March 17, 2023 at 11:00 for the Plaintiff's Response.

[23.] Clearly, the Substantive application for Summary Judgment was commenced by the Summons filed long before the New Rules came into effect. As of March 1, 2023, with respect to an application to amend a Summons filed under the Old Rules, the filing of a Summons was no longer possible. No provision or form for the filing of a Summons is included in the New Rules. The filing of the Notice of Application in these circumstances, seeking a minor amendment to the Old Rule referred to in the Summons, does not change the nature of the substantive application. As submitted by Mr. Tynes KC, Part 11.3 (1) of the New Rules provides "**So far as is practicable** all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review." I emphasize the words, "So far as is practicable". It would not be practicable or it would be impracticable not to **continue** the substantive application under the Old Rules. It would be impracticable to hear part of the application under the Old Rules and the balance of it under the New Rules. To do so would be putting form over substance. The preliminary objection is essentially an objection to form.

[24.] The application to amend and the substantive application for summary judgment shall be heard under the Old Rules.

[25.] I will now consider Supplemental Submissions in respect of the application to amend from the Plaintiff on the Old Rules if the application to amend is still opposed, together with a final

Reply from the Defendant, and the Court shall come to a Decision on the papers. Should the application to amend be unopposed, the order will be granted together with the usual order for costs to the Plaintiff. Thereafter, the Plaintiff may file Supplemental Submission on the Summary Judgment application if necessary and the Defendant shall file a final Reply. Unless the parties object I will determine the application for Summary Judgment on the papers.

Dated this 2nd day of April, A.D. 2024

Petra M. Hanna-Adderley
Judge