

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

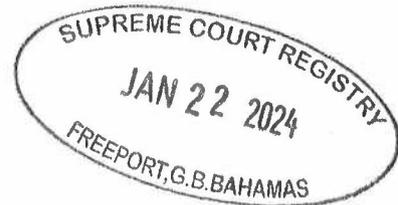
Magisterial Appeal
2016/MAG/APP/FP/3/703

BETWEEN

GARY GRANDE
Appellant

AND

SCALPRO LTD.
Respondent



BEFORE: The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES: Mr. Osman Johnson for the Appellant
Mr. J. Kwasi Thompson for the Respondent
HEARING DATES: September 27, November 8, 2023

RULING

Hanna-Adderley, J

This is an application for leave to appeal a decision of a Stipendiary and Circuit Magistrate out of time.

Introduction

1. By Summons filed herein on October 10, 2023, Mr. Gary Grande (“**the Intendant Appellant**”) pursuant to Section 56 of the Magistrate’s Court Act, Chapter 54 seeks an Order that he be granted an extension of time in which to file a Notice of Appeal against the Order of Stipendiary and Circuit Magistrate Laquey Laing made on September 15, 2022. The application is supported by the Affidavit of Ms. Gianna Major filed herein on October 13, 2023. The Intended Appellant’s application for leave is opposed by Scalpro Ltd. (“**the Intendant Respondent**”). The Intended Respondent relies on the Affidavit in Response by Mr. Sean Callender filed herein on October 31, 2023.

2. The Intended Appellant relies on his oral Submissions made at the substantive hearing and the Intended Respondent relies on Submissions filed on September 21, 2023 and oral Submissions made at the hearing.

Statement of Facts

3. Ms. Major, an employee of Counsel Johnson's Law Firm, states in her Affidavit, in part, that the facts and matters set out in the Affidavit are from her own information and from the documents and other sources referred to herein, and are therefore true or are known to her from the sources stated, which she believes to be true and correct. That she is advised by the Intended Appellant's Attorney that at the time the parties appeared before the Magistrate the Intended Appellant had paid 2 months rent in advance to the Intended Respondent, as per the original terms of a lease for No. 51 Fortune Bay Inlet, Freeport, Grand Bahama ("**the Property**") and, on that basis, the Intended Appellant's Attorneys requested not less than 60 days notice for the Intended Appellant to vacate from the Magistrate. That she was advised by the said Attorney that the Intended Appellant had spent \$11,000.00 on various repairs to the Property, which the Intended Respondent had refused to address. That the record reflects that notwithstanding the request for 60 days notice the Magistrate ordered that he vacate the Property in 30 days, by October 13, 2022.
4. That she was advised by Counsel Johnson that on or about October 18, 2022 the Intended Respondent instructed Officers of the Royal Bahamas Police Force to attend the Property and to physically remove the Intended Appellant. That the Intended Respondent has been unjustly enriched by the Magistrate's Court by way of the Intended Respondent withholding 2 months rent in addition to the Intended Appellant's security deposit, or in excess of \$10,000.00. That she verily believes that the Intended Appellant is entitled to a return of this money in lieu of having been evicted.
5. Mr. Callender, the beneficial owner of the Intended Respondent states, in part, in his Affidavit that Ms. Major's evidence would not be the best evidence and would be hearsay. That he did not know her nor had he had any communication with her. That Ms. Major adduced no exhibits and she had no personal knowledge of what had transpired. That no rent had been received for May, June or July 2022. That he received a payment on or about July 26, 2022 for the rents for August and September. That the Intended Appellant was provided with a Notice To Quit in April of 2022. That this was not

disputed. That the Intended Appellant had received 3 month's Notice to vacate. Rent was owing for June and July. By the date of the hearing 5 ½ months had elapsed since the Notice was served. the Intended Defendant who did not vacate until October, 2022. That the Intended Appellant did not vacate until October 20. That he owed the Intended Respondent \$10,000.00 for August and September and \$3,225.00 for October for a total of \$13,225.00 when he was evicted. That the Intended Appellant provided no receipts in respect of the alleged repairs, gave him no notices of the any work if done and he had given no authorization to carry out such work.

6. Mr. Callender exhibited Whatsapp messages between May 6 and August 2, 2022 to the Intended Appellant informing him that rent was due for May, June and July, 2022.
7. That the information deposed to by Ms. Major was obtained from Counsel Johnson and not from the Intended Appellant. That he and his attorney, Counsel Thompson attended before the Magistrate on September 15, 2022. That the Magistrate heard both sides and made an Order that the Intended Appellant vacate the Property on or before 30 days after the hearing, that is, October 13, 2022. On October 14, 2022, Counsel Thompson wrote to the Magistrate indicating that the Intended Appellant had not vacated the Property. On October 18, 2022, the Magistrate ordered the Police to remove the Intended Appellant from the Property. He denied that he had unjustly enriched himself and more importantly, he stated that the Intended Appellant has provided no evidence as to why he did not file his appeal within the required period nor had he provided evidence to support his appeal.

Particulars of Claim

8. The Intended Respondent's Particulars of Claim set out in the Magistrate's Court Summons dated and filed in the Magistrate's Court on September 1, 2022, is as follows:

“1.The Plaintiff is and was at all material times the owner and Landlord of the subject premises. The Defendant is and was at all material times a monthly periodic tenant of the subject premises

2. On or about the 17th July, 2017 the Plaintiff and Defendant entered into negotiations to lease the subject premises known as Lot 50 and 51 Fortune Bay.

3. The Plaintiff and the Defendant agreed terms of a Lease; however, the lease was never executed.

4. On or before the 1st day of August, 2017 the Defendant entered into possession of the said premises and became a monthly periodic tenant.
5. The Defendant agreed and the Plaintiff accepted \$5,000 per month for rent.
6. The Plaintiff gave **Notice to Quit**, and the Defendant was given appropriate notice seeking possession on or about **8th day of April, 2022**.
7. The Defendant has refused to vacate the premises.

And the Plaintiff Claims
Vacant Possession
An Order of Eviction
Costs

9. The Learned Magistrate after hearing the evidence on behalf of the parties ruled in favour of the Intended Respondent. The Minutes, that is the Record, of the hearing on September 15, 2022, are as follows:-

“Both Parties appeared.

Plaintiff represented by Attorney Kwasi Thompson.

Defendant represented by Attorney Osman Johnson

Eviction to vacate pursuant to monthly rent.

Rent owed Five Thousand (\$5,000.00) Dollars, seeking Thirty (30) days.

No sign lease.

Attorney Osman apologies for Defendant refuses that proper type of service was carried out.

Objection due to service not personally done.

Attorney Kwasi Thompson:-

“Counsel for Defendant told Sean Calendar that all communication to be done through the Attorney spoke to Osman Johnson before service was done and Osman Johnson agreed to accept service”.

So Attorney Thompson served the Defendant that day.

Attorney Kwasi Thompson:-

“Plaintiff flew from Nassau to be here with cost”.

Defendant Attorney accept the position of Plaintiff on eviction.

Court's Order:

Defendant to vacate premises (Lot#s: 50 & 51 Fortune Bay, Freeport, Grand Bahama) on or before expiration of Thirty (30) days as of today's date with cost in the sum of Five Hundred (\$500.00) dollars."

10. The proposed grounds of appeal contained in the Notice of Appeal are as follows:

- (1) That the Honourable Magistrate contrary to the Magistrate's Act, Schedule and the Procedural Rules did not allow the Appellant an opportunity to present his Defence and/or Counterclaim after the completion of the Respondent's Evidence.
- (2) That the learned Magistrate erred in law and/or in practice by failing to allow the Appellant an opportunity to submit either a Defence and/or Counterclaim to the Respondent's Summons.
- (3) That the learned Magistrate ought to have held that that the Appellant was entitled to submit a Defence and/or Counterclaim to the Respondent's Summons and ought to have considered the said Defence and Counterclaim in his overall adjudication of the Respondent's Summons.
- (4) That the Appellant was accordingly not given a fair hearing contrary to his rights under the law.
- (5) That the learned Magistrate erred in law and/or in practice by failing to give consideration to the fact that the Appellant paid the Respondent two (2) months' rent in advance during each pay period and should therefore be entitled to a corresponding Notice period.
- (6) That the learned Magistrate ought to have held that the Appellant was entitled to more than a thirty (30) day notice period to vacate the said premises in consequence and consideration of his advance payments to the Respondent.
- (7) That in the alternative, the learned Magistrate erred in law and/or in practice by failing to Order that the Respondent refund the Appellant any sums forwarded in advance payments and prior to granting an Order for eviction on September 15, 2022.
- (8) That according to the provisions of Sections 52 and 53 the Magistrate's Act the Magistrate's Court does not have the jurisdiction and/or discretion to make any order as it concerns a party interest in any real estate and/or property and did not have the jurisdiction and/or discretion to order that the Appellant be evicted from the said property at #50 & 51 Fortune Bay Inlet, Freeport Grand Bahamas Island, one of the

Islands of the Commonwealth of the Bahamas. Therefore, the decision of the Deputy Chief Magistrate is against the provisions of the Magistrate's Act and is void.

(9) That such further or other ground which this Honorable Court deems just and appropriate.

Intended Appellant

11. Mr. Osman Johnson Counsel for the Intended Appellant submitted that:

- Ms. Major's Affidavit is compliant with Part 30.3 of the Civil Procedure Rules ("CPR"). She indicates her source of information and her belief and she refers to the record.
- Section 56 of the Magistrate's Court Act sets out the appeal process and the Court's power to grant leave.
- Pursuant to Part 1.2 of the CPR and the Overriding Objective principle, the application should not be dismissed due to its late filing.
- The Intended Appellant was evicted when he was owed rent. As a result, the Intended Defendant was unjustly enriched.
- There was nothing to suggest that the money was withheld on the basis of damage to the Property or waiver of the security deposit.
- The Intended Appellant cannot be responsible for the failure on the part of the Magistrate to keep a proper contemporaneous record of what took place before him.
- The Magistrate would have been told that 2 months rent had been paid in advance. He should have returned one month's rent to the Intended Appellant.

Intended Respondent

12. Mr. J. Kwasi Thompson Counsel for the Intended Respondent submitted that:

- There are 3 issues before the Court, the delay in making the application, the cause of the delay, whether the Intended Appellant has a valid reason for filing the application outside of the 7 day period, whether the Intended Appellant has any prospect for success and whether the Intended Respondent will suffer prejudice. Ms. Major's Affidavit does not speak to delay.
- The crux of Counsel Johnson's case is that there was 2 months rent owing. Even if it is accepted that the Intended Appellant paid for August and September, he

still did not vacate until October 20.

- The Intended Appellant has produced a Statement from a legal secretary and Counsel Johnson has attempted to give evidence, neither of which is evidence.
- Mr. Callender was before the Magistrate and his evidence is that he had not received 3 months rent and this has not been disputed.
- The Intended Appellant needs permission from the Supreme Court to file an appeal out of time. Permission has not been granted and so there is no stay.
- The Notice of Appeal has been filed wrongly. If we accept that it had been filed properly as of October 17, 2022, the Intended Appellant had been evicted since October 13. What was there to stay?
- The Intended Appellant accepted the eviction and that is what the transcript says.
- There is no question of a defence or Counterclaim. None was filed.
- Rental payment was made bi-monthly. On occasion rent was paid 2 months in advance. But this was not a bi-monthly tenancy. This was not stated at the Magistrate's Court hearing by Counsel Johnson nor is it on the record that this was a bi-monthly tenancy.
- Counsel Johnson seeks to introduce fresh evidence. None of these arguments were presented to the Magistrate and should be barred now.
- Mr. Callender was specifically involved in this case, while Ms. Major was not, and her evidence is hearsay. Mr. Callender's evidence should be preferred.
- There was no evidence provided to justify the delay nor any evidence or law that the Intended Appellant has any prospect of success.

Issues

The Test

13. The Court must consider (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended and (4) the degree of prejudice to the Intended Respondent if the application is granted.

Analysis and Conclusions

14. McCowan LJ in Norwich and Peterborough Building Society v Steed [1991] 2 All ER 800 set out the principles the Court should consider on an application for leave to extend the time to appeal. These principles are: (1) the length of the delay; (2) the reasons for the

delay; (3) the chances of the appeal succeeding if time for appealing is extended and (4) the degree of prejudice to the intended respondent if the application is granted.

Length of the Delay and Reason for Delay

15. The Magistrate's decision was given on September 15, 2022. The Intended Appellant was given 30 days from September 15, 2022 to vacate the premises. The time in which to file an Appeal in the Supreme Court and to be entitled to an automatic stay pending the appeal was 7 days as of September 15, 2022, September 22, 2022. The Summons seeking leave was filed in the Supreme Court on October 17, 2022, some 25 days after the time in which the appeal should have been filed had expired.
16. Applying the principles or the test laid down in **Norwich and Peterborough Building Society v Steed** I find that 25 days outside of relevant period is not so egregious a delay that would justify denying this application. However, the test does not stop there. The applicant must explain the reason for the delay in filing the application. As has been argued by Mr. Thompson, and I accept, that the Intended Appellant has given no reason for the delay. Additionally, the Minutes from the trial before the Learned Magistrate reflects that both parties were represented by Counsel at the time although Mr. Grande was not present. Counsel for the Intended Appellant would have been aware of the time permitted by law to file his appeal.

Appellant's chances of Success on appeal

17. As I understand the Intended Appellant's primary ground for pursuing an appeal it is that the subject tenancy being a bimonthly tenancy and not a monthly tenancy the Intended Appellant should have been given 60 days to vacate and as he was only given 30 days he is owed 2months rent, further that he expended \$11,000.00 in repairs and other items to the premises according to Ms. Major's Affidavit.
18. As I pointed out several times to Counsel Johnson, the Minutes from the Magistrate is the official record, the transcript of the proceedings. It is palucidly clear that the only objection to the proceedings raised by Mr. Johnson was concerning service of the Summons. It seems that the Court accepted Counsel Thompson's submission that Mr. Johns agreed to accept service on behalf of his client. Improper service has not been raised by the Intended Appellant in this application. The next pertinent note made by the Magistrate is that the Defendant's attorney accepted the Plaintiff's position on the

eviction. The Magistrate then proceeded to give the Defendant a reasonable time to vacate the premises.

19. There is no indication on the record that the issues argued by Mr. Johnson in this application were raised before the Magistrate. There was no suggestion that the tenancy was a bimonthly tenancy or that the 30 day period to vacate was inadequate. As argued by Mr. Thompson, although not disputed by Mr. Johnson, the Defendant filed no defence or counterclaim, therefore the Magistrate was obliged or at liberty to accept each and every particular of claim set out by the Plaintiff in its Summons. As submitted by Mr. Thompson new evidence should not now be admitted. I am not persuaded that it would be in the interest of justice to permit it and in any event, I accept that Ms. Major would not have the capacity to do so and Counsel Johnson cannot do so from his seat.
20. The Court must be careful in deciding this issue not to conduct a mini appeal concerning the merits of the case, so I proceed cautiously here. Mr. Johnson argues additionally by his intended grounds of appeal that the Intended Appellant was not permitted to present a Defence or Counterclaim. The Minutes disclose no attempt by Counsel Johnson to seek leave to file a Defence/Counterclaim and that such a request was denied. He also argues that the Magistrate had no jurisdiction to rule on the issue of ownership to the Property. Again, there is no indication this was raised before the Magistrate nor was it raised in these proceedings. There seems to be no dispute that this is a landlord and tenant dispute. These grounds as pleaded in my view have no prospect of success. I am satisfied having reviewed the particulars of claim and the Record from the Magistrate's Court, the Notice of Appeal and the arguments posed by Mr. Thompson, that the Intended Appellant has no real prospect of succeeding on appeal. I see no indication that the Magistrate's conclusions and Order are unreasonable or unsafe.

Prejudice

21. Lastly, if leave is granted it is the view of the Court that the Intended Respondent will suffer a great degree of prejudice in that it will continue to incur legal expenses in defending an appeal which in my view must fail.

Disposition

22. Having heard Counsel for the Appellant and the Respondent, having considered very carefully the submissions made by the parties, and having accepted the submissions

made by Mr. Thompson and for the reasons stated, I refuse the application for leave and hereby dismiss the Intended Applicant's application.

Costs

23. Costs are awarded to the Intended Respondent in the fixed sum of \$1,000.00. These costs and the previous sum ordered of \$750.00 are to be paid to the Intended Respondent within the next 30 days.

Dated 9th day of January A.D. 2024


Petra M. Hanna-Adderley
Judge

