

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

2020/CLE/GEN/01371

BETWEEN

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Claimant

AND

SHERELYN MARIE SHERMAN

Defendant

Before: The Honourable Justice Camille Darville Gomez

Appearances: Mr. Christopher Francis for the Claimant
Mrs. Sherelyn Marie Sherman pro se

Hearing Date: 16th October, 2024

Permission to file a Reply and Defence and Counterclaim pursuant to CPR 10.3(8), 10.9(1)(b) and 18.4(2)(b), 26.1(2)(k) – action commenced by Originating Summons – Defendant filed a Defence and Counterclaim – action at Case Management Conference (“CMC”) stage – no CMC held –no trial date - no prejudice – the overriding objective

RULING

DARVILLE GOMEZ, J

[1.] I gave my decision orally on 29th November, 2024 and promised to give reasons later, I do so now.

Background

[2.] This action was brought on 23rd December, 2020 by the Claimant for relief pursuant to the Rules of the Supreme Court, Order 77 rule 4 and Order 73, rule 2 for inter alia (i) delivery of possession; (ii) payment of the sum of \$330,155.40; (iii) interest; (iv) damages; and (v) costs. It was brought prior to the commencement of the Civil Procedure Rules, 2022 and was commenced by Originating Summons. There were several affidavits filed by both parties and the Defendant is vigorously defending the action and has sought damages against the Claimant.

The Instant Application

[3.] The instant action is an application by the Claimant by Notice of Application filed on 24th September, 2024 for leave to file a Reply and Defence to Counterclaim in response to the Defence and Counterclaim filed on 27th July, 2023. It is supported by an Affidavit filed on 9th July, 2024.

The History

- [4.] The history of some of the filings is necessary in order for the Court to properly consider this application. I set them out in the next paragraphs.
- [5.] Prior to July, 2023, the parties had been filing affidavits advancing their respective positions; the Claimant providing evidence to support its claim for the reliefs sought, and the Defendant disputing them and providing evidence to support her claim for damages. This culminated in the Defendant's application for leave to file a Defence and Counterclaim.
- [6.] On 20th July, 2023 the Court granted leave for the Defendant to file a Defence and Counterclaim; she did so on 27th July, 2023.
- [7.] On 25th October, 2023, the Claimant applied for (a) delivery up of possession of the subject property; (b) an order that the Plaintiff be allowed to exercise its power of sale over the subject property and (c) an order that the Claimant be allowed to make a further application on an adjourned date to have the Defendant's Defence and Counterclaim struck out and/or dismissed on the grounds that it (i) discloses no reasonable cause of action, (ii) it is scandalous, frivolous or vexatious, or (iii) it is an abuse of the Court's process; and/or in the inherent jurisdiction of the Court.
- [8.] By order dated 27th October, 2023 the following was ordered: (i) the Defendant do immediately deliver up vacant possession to the Claimant of the subject property; (ii) the Claimant be allowed to exercise its power of sale over the Mortgaged Property; and (iii) the matter do stand adjourned until the 18th June, 2024 at 10:00.
- [9.] The matter proceeded on 18th June, 2024 and was again adjourned to 9th July, 2024 (the "July" hearing).
- [10.] On 8th July, 2024 in the afternoon, the Court and the Defendant were emailed an unfiled Summons for leave to enter a Reply and Defence to Counterclaim and an Affidavit in support of Summons for leave to enter a Reply and Defence to Counterclaim.
- [11.] At the July hearing, the Claimant attempted to make an application for leave to enter a Reply and Defence to Counterclaim. The Affidavit in support of the leave to enter a Reply and Defence to

Counterclaim was filed on 9th July, 2024, however, the Summons (it ought to have been a Notice of Application) was not filed. Counsel for the Claimant produced a Curia Support Notice evidencing that (i) a Summons for leave to file a Reply and Defence to Counterclaim; and (ii) an Affidavit in support of Summons for leave had been successfully uploaded on 8th July, 2024. However, only the Affidavit had been successfully filed by 9th July, 2024.

- [12.] The Defendant acknowledged receipt of the email containing the application for leave to enter a Reply to Defence to Counterclaim. The Defendant objected to the Court hearing the application because she did not have the requisite notice of the application in order to consider it.
- [13.] The Court adjourned the hearing and scheduled a Case Management Hearing on a date to be agreed between the parties. The Defendant submitted that at the July hearing she had advised the Court of her intention to apply for leave to enter judgment in default of Defence. The Court's record did not reflect this; however, what is pellucid is that this application for leave to enter judgment in default of Defence was not before the Court on that date (either filed or unfiled).
- [14.] On 30th July, 2024, the Defendant laid over to the Court a Notice of Application for Judgement in Default of Defence. However, given that the Court had already adjourned the July hearing for the parties to agree a date for a Case Management hearing and the Claimant had already given notice to the Defendant of its intention to apply for leave to file a Reply and Defence to Counterclaim, the Court did not sign it. This act appeared to have been an attempt to circumvent or hijack the hearing of the Claimant's application to which the Defendant had objected to having the Court consider at the July hearing. In fact, prior to 9th July, 2024, the Defendant (by her own evidence) had not attempted to make an application for leave to enter judgement in default of defence.
- [15.] The Court reached out to the parties and requested that they appear on 7th August, 2024 for an urgent hearing to address this issue. The parties would not appear before the Court until 24th September, 2024 at which time, the Claimant had filed its Notice of Application for permission to file a Reply and Defence to Counterclaim against the Defendant; it was supported by its earlier Affidavit of Tricia S. Johnson filed on 9th July, 2024. The Court adjourned the hearing of the application to 16th October, 2024 (the "October hearing").
- [16.] By the time of the October hearing, the Defendant had filed her Notice of Application to enter Judgment in default of Defence (on 3rd October, 2024) and an affidavit in support. The Defendant submitted that she had notified the Court at the hearing on 9th July, 2024 of her intention to apply for leave to enter judgment in default of defence.

HELD: For the reasons hereinafter set out, I have granted the Claimant permission to file a Reply and Defence to Counterclaim. I have awarded costs to the Defendant to be summarily assessed in accordance with the Civil Procedure Rules, 2022.

Analysis and Disposition

- [17.] The Claimant relied upon the following provisions of the Civil Procedure Rules, 2022 (“CPR, 2022”):
- (i) Part 10.3(8) which permits the Defendant to apply for an order extending the time for filing a defence.
 - (ii) Part 10.9(1)(b) which gives the court the discretion to permit a Claimant to file a Reply to Defence at any time;
 - (iii) Part 26.1(2)(k) which gives the court power to extend the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed.
- [18.] While the Claimant did not cite Part 18.4(2)(b), this provision is similar to Part 10.9(1)(b) because it grants the Court a similar discretion to permit a defendant to file a Counterclaim at any time with the court’s permission.
- [19.] Therefore, it is obvious that the Court has the discretion to grant the Claimant leave to file a Reply and Defence to Counterclaim in response to the Defence and Counterclaim filed by the Defendant.
- [20.] The Defence and Counterclaim was filed on 27th July, 2023 and the Claimant’s application for leave was made over 11 months later (assuming that the Court considers that the application was made in July, 2024) or over 14 months later (using the date of the actual filing of the Notice of Application in September, 2024).
- [21.] I refer to the Supreme Court Civil Procedure Rules, 2022 Practice Guide, January, 2024 at page 103 at Part 10.3(4) as follows:
- “The Court’s express power pursuant to r. 26.1(2)(k) to grant an extension even after the expiry of the relevant deadline is subject to the overriding objective of the Civil Procedure Rules. Accordingly, the onus is on the applicant to seek the extension promptly as soon as the need for the same is apparent. This obligation can be discerned from the Court’s approach to extension applications made both “in time” and “out of time”. In cases of the former, the Courts have signaled that the key consideration is the overriding objective, rather than treating the application as one for a relief from sanction. By contrast, instances of the latter are to be approached strictly as a relief from sanction, even where a sanction had not been stipulated. In either event, the relevant factors the Court would consider include: (1) the prejudice to the parties, (2) the merits of the claims, and (3) the circumstances of the case.*
- [22.] In the case, **Captain Joseph J. Moxey v Bahamasair Holdings Limited and Bahamas Airline Pilots Association (10 October 2023)** the Court was asked to grant leave to file a Defence and did so saying:

“38. *I believe BAPA’s case is arguable and, despite filing the document out of time and beyond the time permitted for such filing, I do not see any injustice or prejudice that Mr. Moxey would suffer if I were to permit such extension.*

39. *Another aspect of civil practice and procedure, which ensures Mr. Moxey is not disadvantaged, is the fact that he is at liberty to prepare and file a Reply to BAPA’s Defence. Keeping the overriding objective in mind, I see no reason why I would not grant the leave requested. I acknowledged the delay, but it does not appear egregious to me and there is a strong Defence which ought to be considered and answered.”*

[23.] Therefore, Senior Justice Fraser considered the overriding objectives, the injustice or prejudice that would be caused, the extent of the delay in applying and the merits of the intended defence.

[24.] I also refer to the three stage test in **Denton and Others v TH White Ltd. and Another Decadent Vapours Ltd v Bevan and Others Utilise TDS Ltd v Davies and Others** [2014] 4 Costs LR 752 because the Claimant’s application is “out of time”; the time for the filings having passed including by agreement between the parties, per Part 10.3(4) of the CPR, 2022.

[25.] The stages are as follows: (i) identification of the breach (viz., the failure to comply with the rule, practice direction or court order) and the seriousness and significance of it; (ii) consideration of the reason for the failure or default; and (iii) a consideration of all the circumstances of the case, such as the promptness of the application and past or current breaches.

[26.] The Claimant had this to say as the reason for its delay:

“3. The Plaintiff herein intended to make application to have the said Defence and Counterclaim struck out, and upon withdrawing its application through advertence failed to file a Defence to Counterclaim.

4. There was no Case Management Conference herein after the Originating Summons was converted to a Writ action and therefore, it is still within the power of the Court to grant leave out of time for filing further pleadings.”

[27.] The Defendant has sought to rely on prejudice and unfairness to her should the Court accede to this application given that there has been a delay of over 11 months from the time that the Claimant gave notice of the application by email and she filed her Defence and Counterclaim (or even longer if the date that the Notice of Application is used).

[28.] However, the prejudice that she has or would suffer is not obvious, given that there has been no CMC and therefore, no trial date. In fact, at the July hearing, the court requested that the parties agree a mutually convenient date for the CMC.

- [29.] Moreover, the Defendant did not make her application for leave to enter judgment in default of defence until after the Claimant's application for leave to file a Reply and Defence to Counterclaim was made. [My emphasis added]
- [30.] Even if it was accepted that she notified the Court of her intention to make such an application, it was done at the July hearing which was after the Claimant had filed its application for an extension of time to file its Reply and Defence to Counterclaim (of which she was notified of via email, the day before the hearing). Further and in any event, she did not produce any document whether filed or unfiled at the July hearing or even before that date to demonstrate her intention to make such an application.
- [31.] Therefore, in the Court's view, the Defendant sought to gain an unfair advantage or ambush the Claimant by attempting to file her leave to enter judgment in default of defence in advance of the Claimant's application for leave to file its Reply and Defence to Counterclaim.
- [32.] The overriding objective of the CPR, 2022 is to ensure that a case is dealt with justly and at proportionate cost. Therefore, the primary concern of the court is doing justice.
- [33.] It is worth highlighting that despite the delay in the filing of the application for an extension of time to file a Reply and Defence to Counterclaim, the Court granted to the Claimant after the filing of the Defence and Counterclaim, two of the reliefs sought in its Originating Summons. This was done by an Order dated 27th October, 2023. Therefore, the only issues left for determination are the payment of the sums owed pursuant to the mortgage and the Defendant's damages claim. These issues existed from the outset and the Claimant is only seeking to defend the original claim made in its Originating Summons.
- [34.] Therefore, I have reviewed the draft Reply and Defence to Counterclaim, I have considered the relevant factors in determining whether to grant the extension including inter alia, the seriousness or significance of the breach, the reason for the delay, the prejudice or injustice to be suffered by the Defendant and the overriding objective.
- [35.] For the reasons aforesaid, I exercise my powers pursuant to Part 10.3(8), 10.9(1)(b), Part 18.4(2)(b) and Part 26.1(2)(k) of the CPR, 2022 and grant the Claimant permission to file a Reply and Defence to Counterclaim.
- [36.] The Defendant, an attorney by profession of over 20 years call laid over her Statement of Account claiming costs of \$27,511. I considered them and found them unreasonable on many levels including primarily because they refer to judgment in default of defence which I found to have been improperly advanced and references to consultation with Senior Counsel. Therefore, I have

considered that a reasonable sum would be \$2,000 in the circumstances and therefore, award the same.

[37.] Accordingly, my Order shall read as follows:

- (i) The Claimant is granted leave to file and serve its Reply and Defence to Counterclaim on the Defendant in the form as exhibited in its Affidavit filed on 9th July, 2024 by no later than 9th December, 2024.
- (ii) The Defendant may file a Reply to the Defence and Counterclaim within fourteen (14) days from the date of service of the Reply and Defence to Counterclaim.
- (iii) The Court will schedule a Case Management Conference at a date mutually convenient to the parties within the next thirty (30) days.
- (iv) The Claimant shall pay costs to the Defendant which the Court has summarily assessed in accordance with the CPR, 2022 in the sum of \$2,000. These costs are to be paid on or before the date of the Case Management Conference.

Dated the 2nd December, 2024


Camille Darville-Gomez
Justice