

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2016/CLE/GEN/00778**

BETWEEN

TYRANIQUE LAEISHA THURSTON

Plaintiff

AND

LIVINGSTON A. CASH JR.

1st Defendant

and

SOPHIA BROWN

2nd Defendant

Before: DEPUTY REGISTRAR *EDMUND TURNER*

Appearances: Mr. Nathan Smith for the Plaintiff
No appearance by the Defendants

Hearing Dates: 28th May 2019, 17th July 2019, 9th August 2019, 25th September 2019

J U D G M E N T

Deputy Registrar TURNER:

Due to a lack of pleading in the Originating Summons filed on 30th May 2016 and a lack of proving the same, the award in damages would be but a mere token figure in the amount of about of about **\$5,000.00**.

Brief Facts

By conveyance dated 7th August, 1996, Mr. Tyrone Thurston became the fee

simple owner of lot no. 905, Pine wood Gardens. In early 2010 Mr. Tyrone Thurston agreed to sell the said lot for the sum of \$150,000.00, to the First and Second Defendants. A second Demand Mortgage dated 1st June 2010 was drafted between Mr. Thurston and the Defendants whereby they agreed to pay \$150,000.00 less \$3,000.00 deposit together with 7% interest at \$1,139.69 and insurance at \$135.00 monthly totaling \$1,274.69 and rounded off to \$1,275.00. As of 1st June 2010 the Defendants took possession of the subject property and agreed to pay \$1,275.00 to Mr. Tyrone Thurston. The Defendants remained at the premises until March of 2018, remained at the said lot for an additional twenty seven (27) months, and accrued further arrears of \$34,425.00 at \$1,275.00 per month.

The Defendants having failed to comply with the **Order of Justice Indra Charles** dated 15th November 2016, and filed on 1st February 2017, a Default Judgment was filed on 25th September 2017. The result of the same was to give the Plaintiff possession of lot number Nine Hundred and Five (905) in the subdivision known as Pinewood Gardens, New Providence. It is to be noted that at no time for the purposes of the said assessment of damages did the Defendants make an appearance. Counsel for the Plaintiff was instructed by the Court to ensure that the Defendants were served accordingly. In the Affidavit of Service of the Plaintiff filed on 1st July 2019, that on 22nd June 2019, the Defendants were served with a Notice of Adjourned Hearing but made no appearance at court on 28th May 2019 by the Defendants. In addition, the Court directed that a further Notice of Adjourned Hearing be served on the Defendants, and the same was filed on 30th July 2019, and served on the Defendants on 3rd August 2019, however, on 9th August 2019, no appearance was made at all by the Defendants. As a result, it can be seen that the Defendants have made no effort to attend Court in the subject matter.

Power of Attorney

Mr. Tyrone Thurston, who has appeared in person in this matter, has legal authority to act on his daughter's behalf. The Plaintiff on 30th October 2018 executed a Power of Attorney appointing her father Mr. Tyrone Thurston to act as her true and lawful Attorney to act on her behalf regarding the subject property located at Lot No. 905 Cascarilla Street, Pinewood Gardens. As a result, there has been no appearance in this matter by the Plaintiff, but instead by Mr. Tyrone Thurston.

Conveyancing and Law of Property Act

It is seen that pursuant to section 20 of the Conveyancing and Law of Property Act, Chapter 138, a freehold owner of property can enter into a lease arrangement of property whilst in possession of the same. The Plaintiff initially agreed to sell the subject lot to the Defendants. In a second Demand Mortgage, it is seen that the Defendants then agreed to pay \$150,000.00 less \$3,000.00 deposit together with 7% interest at \$1,139.69 and insurance at \$135.00 monthly totaling \$1,274.69 and rounded off to \$1,275.00. As of 1st June 2010 the Defendants took possession of the subject property and agreed to pay \$1,275.00 to Mr. Tyrone Thurston. In making reference to the **Conveyancing and Law of Property Act, Chapter 138**, in particular section 20(12), it is seen that, i.e.:

'A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted would be binding.'

As a result, Mr. Thurston, in the event of a breach can take legal action against the Defendants, as a result, the Originating Summons filed on 30th May 2016, and the current circumstance regarding assessment.

Plaintiff's Claim

The Plaintiff is claiming **\$88,955.97** in debt owed by the Defendants at the time of filing the Originating Summons. The Defendants then remained an additional twenty-seven (27) months and accrued further damages of **\$34,425.00** at **\$1,275.00** monthly, and **\$53,300.00** in costs of repair to the subject property for a subtotal of **\$176,680.97**. As a result, the Plaintiff's Claim is for, i.e.:

<u>Special Damages</u>	\$
Debt at time of filing of Summons	88,955.97
Damages for remaining at premises	34,425.00
Structural damage	53,300.00
Total	<u>\$176,680.97</u>

Specifically Pleading Special Damages

Special Damages must not only be specifically pleaded, but must also be proved as well, see **Shutt v. Island Construction Co.** per Sawyer J. The aforementioned view re Special Damages is recognized in law, as well as the particulars of Order 38 of the Rules of The Supreme Court 1978, and the fact that '**any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the**

examination of witnesses orally and in open court. In addition, reference can be made to the case of **Garland v. Perez and General Rent-a Car (Bahamas) Limited BS 1995 SC74** where reference was made to **Ikiw v. Samuels [1963] 2 All E.R. 879** per Lord Diplock at pg. 890, i.e.:

'Special damage in the sense of monetary loss which the Plaintiff has sustained up to the date of trial must be pleaded and particularized, otherwise it cannot be recovered in my view...one can recover in an action only special damages which has been pleaded, and of course, proved.'

If the Originating Summons filed on 30th May 2019 is perused, it can be seen that '**Damages**' is pleaded and not special damages. Towards this end, Special Damages cannot be claimed in this matter as they have not been specifically pleaded. As a result, only damages pleaded at the time of filing the Originating Summons will be allowed, i.e. **\$88,955.97**. However, the same has not been proven, and as a result, the amount to be allowed for assessment will be minimal, i.e. **\$5,000.00**. Please note that the counsel who prepared the aforementioned Originating Summons is not the Counsel currently seeking assessment of damages.

Analysis

The counsel who originally drafted the Originating Summons is not the counsel seeking an assessment of damages. On 3rd August 2018, a Notice of Change of Attorney was filed in the subject matter. Due to the fact that Special Damages was not specifically pleaded, or proven, the same cannot now be assessed. In addition, even though 'Damages' is pleaded in the Originating Summons filed, the same have not been proved. Towards this end, at most the Plaintiff can only expect a token figure re assessment in the subject matter.

Costs

The Defendants are to pay the Plaintiff's costs of an occasioned by this action in an amount to be taxed if not agreed.

Conclusion

As a result, the Plaintiff is entitled to a token figure of **\$5,000.00**.

Edmund Turner
Deputy Registrar
19th September 2019