

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

2016/CLE/gen/0607

BETWEEN

SHEILA NARINE

Plaintiff

-AND-

THE REPRESENTATIVE OF THE ESTATE OF THE LATE TERRY FERNANDER

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Elvis Hanna for the Plaintiff
Mr. Joseph D'Arceuil for the Defendant

Hearing Date: 5 October 2020

Contempt of court – Civil contempt - Consent Order – Breach of Consent Order – Notice of Motion seeking committal – Objections raised – No Penal Notice – Personal service necessary – Whether estate has the ability to pay - Powers of judge in committal proceedings – Order 52 rules 3 and 4 of the Rules of the Supreme Court, 1978 – Debtors Act Chapter 70, s. 4(b)

The Plaintiff brought an action against the Defendant, Terry Fernander seeking damages in the sum of \$22,251.79 for breach of contract. Before a Defence was filed, Mr. Fernander died causing an Amended Writ of Summons to be filed substituting the Defendant to “The Representative of the Estate of the late Terry Fernander”. The wife of the Deceased, Marie Brigette Fernander, as the Representative of the Estate of the late Terry Fernander, filed a Defence on 21 August 2017. The Defendant neither admitted nor denied the debt. Instead, she puts the Plaintiff to strict proof of her allegations. At the Pre-Trial Review on 1 October 2019, the Defendant withdrew her Defence and the parties entered into a Consent Order. Paragraph 3 of the Consent Order states: “Judgment is hereby entered for the Plaintiff in the amount of \$22,251.79”. The Consent Order was signed by both Counsel as well as Mrs. Fernander. There and then, the Court also initialed the Consent Order.

Having failed to make any payment, the Plaintiff applied for leave to bring committal proceedings. The Defendant was present in Court on that day as she was served. Routinely, these applications are heard *ex parte*. The Court granted leave and fixed the hearing of the Contempt Proceedings to 10 September 2020.

On 10 September 2020, the Defendant appeared with her Counsel and raised a procedural challenge namely that the Defendant was not served with the Notice of Motion and accompanying documents after leave was granted within the time frame fixed by law..

On 10 September 2020, the Court ordered the Plaintiff to file and serve the Notice of Motion. The Court then requested that both Counsel present written submissions with respect to the hearing of the Notice of Motion fixed for hearing in Open Court on 5 October 2020. In the intervening period, the Plaintiff filed the Notice of Motion on 16 September 2020 which was served on the Defendant on 17 September 2020. In this regard, Although no affidavit of service was filed, I believed Counsel for the Plaintiff that the Defendant was served. In any event, she was present in Court with her Attorney.

In the meantime, on 29 September 2020, the Defendant filed a Summons and an Affidavit of the Defendant for dismissal of the Notice of Motion on five grounds namely: (1) there is no application before the Court; (2) RSC Order 52 must be strictly complied with in that there must be 8 clear days between the service on the Defendant and the hearing of the Notice of Motion; (3) the Order must be indorsed with a Penal Notice; (4) the Defendant must be personally served and (5) the Plaintiff must prove that the Defendant's estate has the means to pay the judgment debt: section 4(b) of the Debtors Act, Chapter 70.

The Plaintiff was succinct in her submissions. She argued, in her Supplemental Submissions dated 5 October 2020, that in accordance with Order 52, rules 3 and 4, the Court has the power to correct mistakes in service and to dismiss or grant the Order.

HELD: Dismissing the Defendant's application for dismissal of the Notice of Motion with costs to the Plaintiff in the sum of \$7,500 to be paid by 30 April 2021.

1. Since committal orders affect the liberty of the subject, such rules that exist in relation to them must be strictly obeyed. However, disobedient the party against whom the order is directed may be, unless the process of committal has been carried out strictly in accordance with the rules, that party is entitled to his freedom.
2. By RSC Order 52 rule 3(2), a Notice of Motion for committal must be entered for hearing within 14 days of leave being granted; otherwise the leave shall lapse. In the present case, the Order for leave was granted on 16 July 2020. At that time there were two Supreme Court (Covid 19) Rules 2020 in place which extended time until 7 September 2020. Therefore, the Notice of Motion filed on 16 September 2020 and served on the Defendant on 17 September 2020 was within the prescribed time. In the event that I am wrong to apply the Covid 19 Orders to the present case, when the parties appeared before me on 10 September 2020, this Court directed the Plaintiff to serve the Notice of Motion upon the Defendant.
3. Modern case law demonstrate that the omission of the penal notice is not fatal to enforcement by committal once the person who is sought to be committed was well aware of the consequences of disobedience: **Sofroniou v Szgetti** [1991] FCR 332 and **Circuit Judge of Staines County Court** [2000] 2 FLR 69. The case of **American Express Travel Related Services Co. v King** [2004] BHS J. No. 35 No. 1113/2001 applying **Beeston Shipping Ltd v Babnaft International SA, The Eastern Venture** [1985] 1 All ER 923 distinguished. In the present case, the Order was a Consent Order signed by both parties so there is no requirement for a penal notice.

4. Normally, no order will be issued for committal of a person unless he has been personally served with the order; disobedience to which is said to constitute the contempt. In the present case, the Court finds that the Defendant was properly served with the Notice of Motion to attend Court although no affidavit of service was filed. I accept the words of Counsel for the Plaintiff that the Defendant was served.
5. The question of whether the Defendant's estate has the means to pay the judgment debt is premature at this time. There is no denying that there is a Consent Order in existence calling for the attendance of the Defendant for the purpose of being orally examined.

RULING

Charles J:

Introduction

[1] In this action, Sheila Narine ("the Plaintiff") seeks damages for breach of contract. She alleged that she paid Terry Fernander, now deceased, the sum of \$44,139.52 for repairs to her residence which were not completed. As a consequence, she had to employ another contractor to complete the work and she paid an extra \$22,251.79 which she now claims in damages.

Procedural history

[2] On 29 April 2016, the Plaintiff filed a Writ of Summons indorsed with a Statement of Claim seeking damages for breach of contract. She alleged that on or about 30 November 2013, she contracted with the Defendant to repair the pool on her property at a cost of \$16,000. Subsequently, on 7 January 2015, she again contracted with him to do some additional work to her residence at a cost of \$25,000. The total cost of all the repairs was \$41,000. The Plaintiff alleged that she paid the Defendant a total of \$44,139.52. In breach of the contracts, the Plaintiff had to employ another contractor to complete the unfinished work. She paid him \$22,251.79 which she now claims. She also seeks interest at the statutory rate pursuant to the Civil Procedure (Award of Interest) Act 1992 and costs.

[3] On 14 July 2016, the Defendant entered a Memorandum of Appearance and on the same day, Prestige Legal Services issued a Notice to act on behalf of the Defendant.

- [4] On or about 8 November 2016, the Defendant died. As a result, the Plaintiff filed an Amended Writ of Summons on 8 June 2017 to substitute the name of the Defendant to “The Representative of the Estate of the late Terry Fernander”.
- [5] On 21 August 2017, the wife of the late Terry Fernander, Marie Brigette Fernander, (“the Defendant”) filed a Defence. The gist of the Defence is neither an admittance nor a denial of the allegations of the Plaintiff. Instead, the Defendant puts the Plaintiff to strict proof of whether there was a contract or, in the alternative, the pool was substantially completed and nothing is due or owing to the Plaintiff.
- [6] The parties came before me on 18 September 2018. Directions were given for trial. The Court gave dates for a Further Case Management Conference, Pre-Trial Review and Trial. The trial of this action was to take place on 12 November 2019.
- [7] On the Pre-Trial Review date of 1 October 2019, Counsel for the Defendant, in the presence of the Defendant, expressed to the Court that he was seeking leave to withdraw the Defence since the parties have settled the matter by a Consent Order.
- [8] There and then, the Consent Order was signed by Counsel for the Plaintiff as well as Counsel for the Defendant and the Defendant. I also initialed the Consent Order which reads:

ORDER

“IT IS HEREBY ORDERED BY CONSENT THAT:

- 1. The Defendant hereby withdraw her Defence.**
- 2. The Trial Date of 12th November, 2019 is hereby vacated.**
- 3. Judgment is hereby entered for the Plaintiff in the amount of \$22,251.79.**
- 4. Cost to the Plaintiff to be taxed if not agreed.”** [Emphasis added]

- [9] The effect of the Consent Order was that the Defendant agreed to pay to the Plaintiff the sum of \$22,251.79 and costs to be taxed if not agreed. No date was

stipulated for the payment of the judgment debt and costs. In fact, more than 18 months later, the Defendant has not paid one cent toward the judgment debt and costs.

[10] The Defendant having defaulted, on 16 April 2020, the Plaintiff filed a Summons for Leave for a Committal Order. A Statement in Support of the Committal Order was also filed on 16 April 2020.

[11] On 16 July 2020, the Defendant was present when I granted leave to the Plaintiff to make an application for committal. The hearing of the Notice of Motion for committal (“the Notice of Motion”) was set for 10 September 2020 in Open Court.

[12] On 10 September 2020, Mr. D’arceuil who appeared for the Defendant submitted that the Notice of Motion was not proper because the Defendant had not been served with it (“Notice of Motion”) after leave was granted. In fact, it appears that the Defendant had been served with the Summons for leave to bring committal proceedings and the Statement in support which probably explained her presence in court at the leave hearing (which is routinely done *ex parte*). The Court then ordered that the Defendant be served personally with the Notice of Motion and all supporting documents.

[13] On 16 September 2020, the Plaintiff filed the Notice of Motion and an Affidavit in support of the Notice of Motion pursuant to RSC O. 52 r. 3. These documents were served on the Defendant on 17 September 2020.

[14] On 29 September 2020, the Defendant filed a Summons for Dismissal of the Notice of Motion for failure to comply with RSC O. 52.

RSC O. 52: committal for contempt of court

[15] It is a well-established principle that the jurisdiction of the court in contempt proceedings arises out of its inherent jurisdiction to enforce its own orders. The chief instance of civil contempt is disobedience to an order of the court by a party to the proceedings.

[16] RSC O. 52 deals with committal for contempt of court. O. 52 r. 3 expressly provides that:

“(1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Supreme Court and, unless the Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or judge under Order 65, rule 4, the judge may dispense with service of the notice of motion under this rule if he thinks it just to do so. [Emphasis added]

[17] RSC O. 52 r. 4 states:

“Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Supreme Court to make an order of committal of its own motion against a person guilty of contempt of court.” [Emphasis added]

[18] According to RSC O. 52 r. 4, a court has the power to enforce its own orders, including the power to make an order of committal on its own motion in respect of a person guilty of contempt of court.

The Summons seeking dismissal of Notice of Motion

[19] Learned Counsel for the Defendant Mr. D’Arceuil raised five objections to the Notice of Motion filed by the Plaintiff on 16 September 2020 and served on the Defendant on 17 September 2020.

The objections

Failure to comply with RSC O. 52 r. 3(2)

[20] The first objection raised by Mr. D’Arceuil concerns RSC O.52 r. 3(2) which provides that if the Notice of Motion is not filed within 14 days from the date that

leave was granted, the leave lapses. By extension, the Notice of Motion also lapses or expires. Accordingly, says Mr. D'Arceuil, there is effectively no application before the Court. In this regard, Counsel submitted that since the liberty of the subject is involved, the Rules must be strictly adhered to. In this regard, he relied on the case of **Strachan v Clarke** [1992] BHS J. No. 46 at para 7. I do not find this case to be helpful to the issue at hand.

[21] During a remote hearing on 20 July 2020, learned Counsel Mr. Hanna who represented the Plaintiff was physically present in court. So was the Defendant but without her Attorney. On this day, the Court granted the order for leave to bring committal proceedings. The Hearing of the Notice of Motion was set for 10 September 2020. In the intervening period, two Supreme Court (Covid 19) (No. 2) and (No.3) Rules were enacted extending time fixed under the Rules of the Supreme Court to 10 August and to 7 September 2020 respectively. The latter of those Rules ((Covid 19) (No. 3) Rules 2020) states at section 2 that:

“Any period of time fixed by –

(a) The Rules of the Supreme Court; or

(b) A practice direction, court order or direction,

which was further extended pursuant to rule 2 of the Supreme Court (Covid 19) (No. 2) Rules, 2020, is hereby further extended until the 7th day of September, 2020.” [Emphasis added]

[22] Therefore, the time stipulated in the leave order granted on 16 July 2020 would have been further extended to 7 September 2020 by virtue of these Rules. It follows that the Notice of Motion which was filed on 16 September 2020 fell within the ambit of the Supreme Court (Covid 19) (No. 2) and (No. 3) Rules, 2020 respectively.

[23] Consequently, the Notice of Motion filed on 16 September and served personally on the Defendant on 17 September 2020 is within the prescribed time fixed by the Rules.

[24] In the event that I am wrong to apply the Covid 19 (No. 2) and (No. 3) Rules, 2020, when the parties came before me on 10 September 2020, I directed the Plaintiff to file and serve the Notice of Motion upon the Defendant.

[25] In my judgment, this objection has no merit and must fail.

No penal notice

[26] The second objection advanced by Mr. D'Arceuil is that the Plaintiff has approached this Court to have the Defendant incarcerated for non-payment on a judgment debt but the Consent Order granted on 1 October 2019 was not endorsed with a penal notice. In his submissions, Mr. D'Arceuil was unable to refer me to any rule/law where a consent order must be endorsed with a penal notice. He nevertheless relied on the case of **American Express Travel Related Services Co. v King** [2004] BHS J. No. 34 No. 1113/2001 per Longley J at para 8.

[27] Learned Counsel Mr. Hanna who appeared for the Plaintiff submitted that the Court has wide powers under RSC O. 52 r. 4 to make an order for committal of its own motion against a person guilty of contempt of court.

[28] In **American Express Travel Related Services** (supra), Longley J (as he then was) referred to **Beeston Shipping Ltd v Babanaft International SA, The Eastern Venture** [1985] 1 All ER 923. In that case, the UK Court of Appeal held that where an order is made under RSC 48, r. 1 requiring a judgment debtor to attend for oral examination on his debts as such time and place as may be appointed and the examination is adjourned to an appointed date, then if the debtor is not served with an amended order with a new date for the examination, his failure to attend would not constitute a contempt of court because there must be strict compliance with the rules of court before an order can be enforced by committal proceedings. In my view, the facts of **American Express Travel related Services** and **Beeston** are distinguishable from the facts in the instant case which deals with a consent order.

[29] It is a fact that the Consent Order is not endorsed with a penal notice. However, RSC O. 52 is silent on penal notices generally. This is unlike the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (similar to Civil Procedure Rules (U.K.)). EC CPR 53.3 sets out the condition which ought to be satisfied before a committal order is made. It states:

“Subject to rule 53.5, the court may not make a committal order unless -

(a)

(b)

(c) At the time the order was served it was endorsed with a notice in the following terms:

“NOTICE: If you fail to comply with the terms of this order, proceedings may be commenced against you for contempt of court and you may be liable to be imprisoned.”

[30] Modern case law seem to suggest that the omission of the penal notice in an order is not fatal to enforcement by committal once the person who is sought to be committed was well aware of the consequences of disobedience: **Sofroniou v Szgetti** [1991] FCR 332.

[31] The Court may dispense with a penal notice under the power to dispense with service: **Jolly v Circuit Judge of Staines County Court** [2000] 2 FLR 69 but the onus is on the Applicant to demonstrate that no injustice would be done by waiving the defect of the presentation of the penal notice.

[32] In the instant case, the parties entered into a Consent Order. The Defendant and her Attorney were present and signed the Consent Order. Thereafter, the Court approved the Order. I am satisfied that the Defendant was fully aware of the terms of the Consent Order and no injustice would be done by waiving this defect if indeed there was a defect. I am also satisfied that the Defendant, ably assisted by her Attorney, knew very well the consequences of not obeying a Consent Order which they signed in my presence.

Eight clear days' notice

[33] The third objection relates to 8 clear days' notice. Given my findings (supra), this objection is now moot.

Personal service necessary

[34] According to Mr. D'Arceuil, it appears from the face of the record that the Defendant had not been served with the Notice of Motion nor does it appear that one has been filed.

[35] Generally speaking, no order will normally be issued for the committal of a person **unless he has been personally served with the order, disobedience to which is said to constitute the contempt. The court may dispense of personal service where the respondent is evading service.** [Emphasis added]

[36] Failure to comply with the proper procedure, such as personal service, is not necessarily fatal to the lawfulness of a contempt order. The court has complete discretion to perfect an invalid committal order in a contempt case, but the power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of the contempt and other court users. Where the contemnor has not suffered any injustice by the failure to follow the proper procedures (such as service) the committal order could stand subject to variation to take account of any technical or procedural defects.

[37] An alleged contemnor is entitled to know, before the hearing of the committal application, of what he is accused and the supporting evidence. Thus, where he had not been served with the notice of motion to commit him, and did not know until the day of the hearing (save indirectly) what was alleged against him, the judge erred in refusing an adjournment for service of the relevant documents. Even where an alleged contemnor is legally represented, he must nevertheless be given the opportunity to mitigate the proposed penalty, where the judge has the intention

of imposing a term of imprisonment: **Taylor v Persico** (1992) The Times, February 12, CA.

[38] In the present case, the Plaintiff contended that the Defendant was served on 17 September 2020. Although no affidavit of service has been shown to me, I do not disbelieve the Plaintiff. In any event, Counsel for the Defendant and the Defendant are both present in Court. The Court has the power under RSC O. 52 r. 3(4) to dispense with service of the Notice of Motion.

Ability to pay

[39] The question of whether the Defendant's estate has the means to pay the judgment debt is left to be seen. The issue is premature at this point in time but there is no denying that there is a Consent Order in existence calling for the attendance of the Defendant for the purpose of being orally examined.

Conclusion

[40] A person who seeks to commit another to prison for contempt of court takes an extreme step with possible grave consequences. Therefore, it is incumbent on such person to fully comply with O. 52. In my judgment, the Plaintiff has complied with O. 52 r. 3.

[41] I will hear the Notice of Motion on Thursday 15 April 2021 at 2.30 in the afternoon.

[42] The Plaintiff, being the successful party, is entitled to her costs. At the hearing, Mr. Hanna stated that if he were successful, he would seek costs of \$10,000 calculated as follows: 30 hours x \$500 per hour. Mr. D'Arceuil submitted that his costs are \$15,000: 30 hours x \$550 per hour. In the exercise of my discretion, I consider \$7,500 to be reasonable costs. I will order that the costs be paid by 30 April 2021.

Dated this 6th day of April, A.D., 2021

**Indra H. Charles
Justice**