SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 875 of 1994

BETWEEN:

NATO'S EDUCATIONAL AND SPORTS SUPPLIES LTD.

Plaintiff

and

NILES NATHANIEL

Defendant

Mr. K. Monplaisir Q.C. and Mr. P. Straughn
for the Plaintiff
Mr. P. Husbands Q.C. and Mr. V. LaCorbiniere
for the Defendant

1996: January 12 and 16

J U D G M E N T

MATTHEW J. (In Chambers).

The Plaintiff is a company with only three shareholders who are also the only directors of the company. The three shareholders are also three brothers whose names are as follows:

(a) Henry Nathaniel;

(b) Niles Nathaniel; and

(c) Albert Nathaniel.

Unfortunately there are serious differences between Niles Nathaniel and his two brothers and so on November 15, 1994 the Plaintiff filed a writ of summons indorsed with statement of claim asking for the following relief:

(1) An account of all the monies received and disbursed from the operations of the Company from the year 1978 - 1993 and for the period up to 28th September, 1994.

(2) An account of the finances that have come to the hands of the Defendant which was transferred to his account from the Company.

(3) A Declaration that the properties purchased in the name of the Defendant as set out in the paragraph 5 of the Statement of Claim are held by him as constructive trustee for the Plaintiff Company.

(4) An order that the said Defendant transfer the aforesaid properties in the name of the Plaintiff Company.

(5) An Order that the amounts in the name of the Defendant in A/C No: 700366 and A/C No: 202516 at the Bank of Nova Scotia be transferred to the Plaintiff.

(6) Further or other relief.

(7) The costs hereof.

The Defendant entered appearance on November 17, 1994 and filed a defence and counterclaim on February 7, 1995 which in essence denies the Plaintiff's claim and asking for rental in respect of the Defendant's properties and other claims in excess of $3,000,000.00.

In the interim there has been lengthy interlocutory proceedings between the parties and in one case a written judgment was given by d'Auvergne J. on March 15, 1995 in which she ordered the Defendant to deliver up all financial records and bank statements which were required by Messrs Coopers and Lybrand, the auditors of the company. The learned Judge did not order the Defendant to deliver all bank statements of any bank account in the name of the Defendant or to freeze Accounts Nos. 700366 and 202516 in the name of the Defendant at the Bank of Nova Scotia as the Plaintiff had sought.

On November 9, 1995 the Plaintiff filed a summons asking for an order of injunction to restrain the Defendant from locking or in any way preventing the Plaintiff from entering and using the ground floor of the premises in occupation by the Plaintiff until after the trial of the action or until further order.

The summons was supported by an affidavit filed by Henry Nathaniel on the same day in which he stated that on August 24, 1995 when he went to the warehouse the Defendant said to him in the presence of his employees and a police officer that he will put padlocks on the doors so that the Plaintiff would not be able to remove its goods and that one week later he went to the warehouse and found four additional padlocks on the doors to the warehouse and since then the Plaintiff has been unable to use the warehouse.

Joseph Lubin, an employee of the Plaintiff, also filed an affidavit in which he recorded the words of Niles Nathaniel to Henry Nathaniel as follows:

> "You are taking my goods, I will fence there and put padlocks on the doors."

Niles Nathaniel filed an affidavit in opposition. In that affidavit he stated that the property was purchased with his own funds and it is presently registered as Block and Parcel No. 1047C 72. He stated that his brothers had acknowledged that the property was his and he referred to a hypothecary obligation, instrument No. 5688/89 in support.

He stated that he had consistently asked Henry Nathaniel to take an inventory of the goods moved from the warehouse and Henry had refused to do so. He said the Plaintiff is indebted to him for rental of the warehouse and had refused to pay him.

He did not deny making the threat to put padlocks on the doors to the warehouse and in effect carried them out.

In reference to the paragraphs of the affidavits of Henry Nathaniel and Joseph Lubin in that context the Defendant's answer was to repeat paragraph 4 of his affidavit. I think he meant paragraph 5 where he was alleging that he had asked Henry to take an inventory which Henry had refused to take and the fact that the Plaintiff

owed him money for rents of the warehouse.

SUBMISSIONS OF COUNSEL

Learned Counsel for Plaintiff submitted that the Defendant had put padlocks on the premises which the Company uses as a warehouse since August last and because the Plaintiff does not want to break the locks and create a disturbance, Plaintiff has brought this summons to obtain injunctive relief.

Counsel observed that the Plaintiff had used the property for several years and that fact was not in dispute as can be gleaned from paragraphs 5 and 7 of the affidavit of the Defendant in opposition to the grant of the injunction.

Counsel cited the case of AMERICAN CYANAMID v. ETHICON LTD. 1975 AC and asked that the status quo be preserved.

Counsel also referred to the last two paragraphs of the case MERCHANT - ADVENTURERS LTD. v. M. GREW & CO. LTD. 1972 1 Ch. 242 at page 256.

Learned Counsel for the Defendant in a well prepared document elaborated his submissions in opposition to the grant of the injunction. Counsel submitted that the property part of which forms the warehouse belongs to the Defendant and in support he produced two deeds of sale by the Urban Development Corporation to the Defendant dated December 15, 1980 and March 20, 1981. In further proof of ownership Counsel submitted a hypothecary obligation in favour of the Bank of Nova Scotia dated November 20, 1989 where the said property of the Defendant was used as security for the mortgage. Counsel said by that document the Plaintiff had recognised the Defendant as owner of the property.

Counsel further submitted that since the Defendant has been in continuous possession of the property for upwards of ten years he

has an unassailable title to the property pursuant to Article 2112 of the Civil Code.

Counsel then submitted that as owner of the property the Defendant is entitled to an adequate rent for the use of his premises for the warehousing of the Plaintiff's goods and submits that by virtue of Articles 1525, 1526 and 1529 of the Civil Code the lessor is entitled to seize so much of the Plaintiff's goods for the payment of the rent.

Let me interrupt here to comment on that submission. Counsel states that the owner of the property is entitled to an adequate rent. One of the contentions of learned Counsel for the Plaintiff is that there is nothing in the record to show that the property is rented to the Plaintiff for a particular amount. There must be some credence to this contention for the Defendant cannot speak of a specific rent agreed between the Parties. All he can say is that Defendant is entitled to an adequate rent.

Article 1509 of the Civil Code states what a lease is. It states:

> "The lease or hire of property is a contract by which one of the parties, called the lessor, grants to the other, called the lessee, the enjoyment of property, during a certain time, for a rent or price which the latter binds himself to pay, either expressly or by implication."

It seems to me that for there to be a lease there must be an agreement as to rent and if there is no lease one may find it difficult to apply the provisions of Articles 1525, 1526 and 1529 of the Civil Code.

I said I was interrupting the submissions of learned Counsel for the Defendant to make the above comments because this is not one of the planks on which I hope to base my decision even though it tends to weaken the arguments of the Defendant.

Learned Counsel for the Defendant submitted that the Defendant has an interest to require a proper inventory to be made of all goods taken from the warehouse and he ventured to propose as a solution to this unfortunate scenario that the Plaintiff be permitted to remove goods from the warehouse on condition that a proper inventory is made by the Plaintiff at the time of the removal of the goods with a copy given to the Defendant on every occasion.

Another proposal to this solution by the Defendant was that the Plaintiff be ordered to remove the cautions placed on the Defendant's premises at the Land Registry. Counsel said that the placing of the caution was in flagrant disregard of the judgment of d'Auvergne J. delivered on March 15, 1995.

CONCLUSIONS

One of the grounds for opposing the grant of the injunction is that Defendant is owner of the property and is entitled to rents and because he is not paid rent he can prevent the Plaintiff from taking its goods from the warehouse.

One of the allegations in the statement of claim which commenced these proceedings on November 15, 1994 is that during the period July 1978 up to September 28, 1994 the Defendant wrongfully and fraudulently took the funds of the Plaintiff and purchased certain properties. This is found at paragraph 5 of the statement of claim. In the particulars to that paragraph 10 properties are so identified and the first two comprise the property part of which forms the warehouse.

In his prayer to the counterclaim filed on February 7, 1995 the Defendant states he is entitled to rent for the warehouse.

The issue of the ownership of the property has not been determined and is a substantive matter to be decided at the trial. The Defendant cannot use an undetermined issue to found a right on

which to prevent the Plaintiff from the use of its goods.

The Defendant has sought refuge under Article 2112 of the Civil

Code which states:

> "He who acquires a corporeal immovable in good faith under a written title, prescribes the ownership thereof and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title during ten years."

To rely on this article a person must be in good faith. The allegation of the Plaintiff from the very start is that Defendant fraudulently obtained the properties. Article 2112 cannot be a bar to the challenge of the Plaintiff.

So the Defendant's right to rental of the warehouse is yet to be determined.

The Defendant submits that the Plaintiff should make an inventory of its own goods and give him a copy. This assumed right is again based on his ownership of the premises in question but this as I have stated has not been settled. If that is the case how can Defendant dictate to the Plaintiff what to do about its own goods? In any case even one could adopt the extra judicial solution of the Defendant that is impracticable as learned Counsel for the Plaintiff has shown because in a warehouse goods constantly move in and out and the value of such inventory may be doubtful.

Learned Counsel for the Defendant has asked that the Plaintiff be ordered to remove the caution not only against the property with which this injunction is concerned but also the other cautions on the other several properties of the Defendants. This is a red herring. I am not going to be drawn into this. If as Counsel indicated the placing of the injunction is in flagrant disregard of

an order of a Judge of this Court then the appropriate redress for contempt should be taken and such a process is not investigated in Chamber proceedings. Secondly, the issue of caution on properties are substantive matters certainly not less important than interlocutory injunctions and to be dealt with as a side issue in the matter substantively before me. Indeed Sections 86 to 90 of the Land Registration Act 1984 set out the jurisprudence as to how cautions are lodged and how they are withdrawn or removed.

Thirdly, I have read the judgment referred to and dated March 15, 1995. There is no mention of anything in the judgment which either expressly or impliedly indicates that the Plaintiff should not put cautions on the Defendant's properties.

In his prepared statement learned Counsel for the Defendant intimated that when an attempt was made in interlocutory proceedings for a declaration that the properties purchased in the name of the Defendant be held as constructive trustee of the Plaintiff/company and an order that the Defendant transfer the properties in the name of the Plaintiff/Company, the declaration and order were both refused in a judgment delivered on March 15 last year.

I regret to say that this is grossly inaccurate. The judgment of March 15, 1995 had nothing to do with declarations in respect of properties. The declaration and order in question are part of the substantial relief sought in the statement of claim. The judgment of March 15, 1995 deals only with a summons dated November 24, 1994 where the Plaintiff sought orders for the Defendant to deliver certain financial records and bank statements to Messrs Coopers and Lybrand; for him to produce all bank statements from any bank account in his name; and for freezing Account Nos. 202516 and 700366.

As regards the grant of the injunction I have regard to the classic

case of AMERICAN CYANAMID v. ETHICON LTD 1975 A.C. 396 and to the analysis of the principles found at pages 471 and 472 of the United Kingdom Supreme Court Practice 1979.

I am satisfied that there is a serious question to be tried and that the application is not frivolous or vexatious and therefore I go on to consider whether the balance of convenience lies in favour of granting or refusing the relief sought.

In suit 187 of 1995 between BARBARA KIDDELL and WINDJAMMER CO. LTD. delivered on May 31, 1995 I also considered the case of American Cyanamid and asked the question whether the Applicant had established that she had an arguable claim to the right to put up an electric post on the land in question. I referred to:

SMITH v. INNER LONDON EDUCATION AUTHORITY 1978 1 AER 411 and SISKINA v. DISTOS COMPANIA NAVIERA SA. 1979 A.C. 240 and found the Applicant had not established the right and consequently I refused the application for an injunction.

In my judgment the Plaintiff here has established that he has a good arguable claim to right he seeks to protect.

It is also my view that damages would not be adequate to compensate the Plaintiff for its losses. I think the Plaintiff's established business is being disrupted and that such disruption is a matter which would be extremely difficult to quantify in damages. As was stated at page 256 of Merchant - Adventurers' case.

My order is that

1. Upon the Plaintiff undertaking to abide by any order this Court may make as to damages in case the Court shall be of opinion that the Defendant shall have sustained any, by reason of this order, which the Plaintiff ought to pay.

   IT IS ORDERED that the Defendant be restrained and an order of

injunction is granted restraining the Defendant whether by itself or by its servants, or agents or otherwise from locking or in any way preventing the Plaintiff from entering and using the ground floor of the premises in occupation by the Plaintiff as its warehouse until after the trial of this action or until further order.

2. The Defendant shall pay the Plaintiff's costs in the sum of $650.00.

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A.N.J. MATTHEW
Puisne Judge