THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2006/0383

BETWEEN:

MAUDLYN ELAINE BASCUS
Also known as PATRICIA BASCUS

Claimant

And

ERROL JAMES
As Executor of the Estate of McDonald Bascus, deceased

Appearances:
Mr. Hugh Marshall Jr. and Mrs. Cherrisa Roberts-Thomas for the Claimant
Mr. Alfred Mc-Kelly James for the Defendant

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2007: April 22, 30
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RULING

[1] Thomas J: By an application, filed on 9th March 2007, the Applicant/Claimant seeks to strike out the Defendant/Respondent's Statement of Case. In particular the Court is being asked to order that: (a) the affidavit of Errol James filed on 7th February 2007 in response to the Fixed Date Claim Form in this cause of action be struck out as disclosing no, or no reasonable defence; (b) that judgment be entered in favour of the Applicant/Claimant and (c) cost be awarded to the Claimant.

[2] Learned counsel for the Applicant/Claimant in his submissions contends that the Defendant's affidavit in opposition to the substantive claim, filed on 9th February, 2007, and

that of 16th April 2007 are in violation of Part 30.3 (1) of CPR 2000 in that they contain hearsay evidence. In this regard the application refers to paragraphs 4, 5, 6 and 10 of the affidavit of 7th February 2001.

[3] With reference to paragraph 4 of the said affidavit of 7th February 2007, learned counsel contends that the deceased was a trustee of the matrimonial property on behalf of the Claimant and himself.

[4] On the question of hearsay evidence, learned counsel, Mr. Hugh Marshall Jr. argues that Mr. Errol James' affidavit refers to matters of which he had no knowledge. According to him, it does not contain facts which he can prove. The same allegation is also made in relation to the affidavit of 16th April 2007.

[5] It is the further contention of learned counsel that the only defence is contained in paragraphs 4, 5, 6 and 10 of the affidavit of 7th February 2007. These paragraphs contain hearsay evidence and are in conflict with Part 30.3 of CPR 2000 and do not fall within any of the exceptions to the rule against hearsay. Still further, learned counsel contends that the deceased was under no obligation to give information to the Defendant and if there was the sources should have been disclosed to the Court in accordance with Part 30.3 (2) of CPR 2000. Such information should have been included in the affidavit of 7th February 2007. In saying that the deceased was under no obligation to give information Mr. Hugh Marshall cited the case of SIMON v. SIMON et al (1936) p. 17 which illustrates this role to this effect.

[6] In response learned counsel for the Defendant/Respondent contends affidavit evidence can be included in an affidavit and identifies paragraph 5 of the Claimant's affidavit of 20th July 2007. He contends also that paragraph 4 of the Defendant's affidavit of 7th February 2007 is based on information contained in the Claimant's affidavit. Learned counsel then referred to paragraphs 5, 6 and 10 of the Defendants affidavit and demonstrated the source of the information. Specifically in relation to paragraph 10 of the said affidavit, learned counsel said that it was part of the will and as such it cannot be hearsay as it

reflects what the will says. And according to counsel the will is exhibited. Further, he say there is no contest as to the validity of the will.

[7] For the foregoing reasons, the Defendant/Respondent says that the application must be dismissed.

[8] In rebuttal, learned counsel for the Claimant argues that even if the source of the information in the Defendant's affidavit, is the Claimant's affidavit, this must be stated. Finally, learned counsel maintained that those offending aspects of the Defendant's affidavit are contrary to rules of procedure, contrary to law and an abuse.

ANALYSIS

[9] Rules 30.3 (1), (2) and (3) of CPR 2000 provide as follows:

> "30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
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> (2) An affidavit may contain statements of information and belief –
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> (a) if any of these Rules so allows; and
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> (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application provided that the affidavit indicates –
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> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
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> (ii) the source of any matters of information and belief.
>
> (3) The Court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."

[10] The Defendant's affidavit of 7th February 2000 is the affidavit in response in the substantive matter so that based on Rule 30.3 (2) that affidavit may not contain hearsay evidence. There is therefore no contest in terms of the hearsay contained in paragraphs 4, 5 and 6 of said affidavit as these are fact which the deponent cannot prove from his own knowledge.

[11] The affidavit of 16th April 2007 really seeks to amplify the content of the will and as such do not assist paragraphs 4, 5 and 6 of the affidavit aforesaid. And merely to deny that the content of the affidavit "in any way [amounts] to hearsay" does not advance the Defendant's case in any way.

[12] The other aspect of the application relates to the striking out of the Defendant's statement of case. This is regulated by Rule 26.3 (1) of CPR 2000 and is in these terms:

> "26.3 (1) In addition to any other powers under these rules, the Court may strike out a statement of case or part of a statement of case if it appears to the court that
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> (a) there has been a failure to comply with a rule, practice direction order or direction given by the Court in proceedings;
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> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
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> (c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
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> (d) the Statement of case or part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10".

[13] The Claimant's application is centered on paragraphs (c) and (d) above. This must rest on the submissions relating to the hearsay contained in the Defendant's affidavit of 7th February 2007. On the other hand, Part 10 of CPR 2000, referred to in paragraph (d), regulates Defences which includes an affidavit in this context. In particular Rules 10.5 (4) and (5) provide as follows:

> "(4) If the defendant denies any of the allegations in the claim form or Statement of Claim –
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> (a) the defendant must state the reasons for doing so; and
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> (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
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> (5) If, in relation to any allegation in the claim form or statement of claim the defendant does not –
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> (a) admit it, or
>
> (b) deny it and put forward a different version of events the defendant must state the reasons for resisting the allegation".

[14] In terms of the broader picture of striking out, the learning in BLACKSTONE'S CIVIL PRACTICE 2002 at paragraph 33.5, page 327 is couched in these terms:

> "Under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly. The reason was, and this has not changed, that the exercise of the jurisdiction deprives a party of its right to a trial, and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial."

[15] The learned authors continue:

> "In *McPhilemy* v *Times Newspapers Ltd* (1999) 3 All ER 775 one of the first cases decided under CPR, the Master of the Rolls said that the powers of the court to restrain excess do not extend to preventing a party from putting forward allegations which are central to its case. That said, it is open to the court to control how those allegations are litigated with a view to limiting costs."

[16] When the hearsay is struck from paragraphs 4 and 5 the residue of those paragraphs are mere denials without more. These offend against Rules 10.5 (4) (a) and (5) (b).

[17] Therefore, on account of the hearsay contained in paragraphs 4, 5 and 6 of the Defendant's affidavit and further that paragraphs 4 and 5 of the said affidavit also offend against Rules 10.5 (4) (a) and (5) (b) "they" fall to be struck out.

[18] As far as paragraph 10 of the Defendant's affidavit is concerned, the Court considers that this merely reflects the content of the will and is central to the substantive matter.

[19] IT IS HEREBY ORDERED as follows:

1. Paragraphs 4, 5 and 6 of the Defendant's affidavit of 7th February 2007 are struck out by virtue of the fact they offend against Rules 26.3 (c) and (d) and or offend against Rule 10.5 (4) (a) and (5) (b) of CPR 2000.

2. The Defendant must pay the Claimant costs in the amount of $1000.00. Such costs to be paid by the estate of the deceased.

ERROL L. THOMAS
Judge