EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

[CIVIL]

CASE NO. DOMHCV2012/0369

BETWEEN:

SIMEON ALBERT

Claimant

and

MICHAEL COIPEL

OSCAR COIPEL
MAXIMEA POWELL

Defendants

Appearances:

Mr. Lennox Lawrence for the Claimant

Mrs. Zena Moore-Dyer of Dyer & Dyer for the Defendants

2014: February 14th

2015: April 22nd

DECISION

[1] **THOMAS, J. (Ag.):** The matter on which a decision is required is a Notice of Application to Strike Out filed on 24th January 2014. The applicant seeks the following orders:

1. That paragraphs 26 to 30, 35 to 37 and 44 and or such parts of the Witness Statement of Michael Coipel filed on 25th October, 2013 containing any reference to allegations of a $600.00 or a cheque in relation thereto be struck out.
2. That paragraph 13 of the Witness Statement of Maximin Powell and or such other reference to $600.00 or a cheque in relation thereto as contained in the said Witness Statement filed on the 25th October, 2013 be struck out.

3. That all and any reference in Witness Summary or Witness Statement to an allegation to $600.00 and or any reference to Cheque no. 956 be struck out.
4. That the order on Ex Parte Application obtained by the Defendant on the 9th October, 2013 be set aside or varied and that the Defendants be ordered to disclose the name and address of the said witnesses for whom leave was granted to file witness summaries.

Grounds of the Application

[2] The grounds of the Application are:

1. That the case before the Court relates to an allegation that the Applicant being the Chairman of the Canefield Urban Council did prevail upon a truck driver to make an invoice for $800.00 for a job which an earlier invoice had been submitted for $400.00. Further the second Defendant did indicate that he had a copy of the cheque and a copy of the invoice. Additionally the third Defendant did publish and allege that he had seen the cheque and he had gone into the bank and witnessed the crime.
2. In their defence the first and third Defendants admit the following words "a truck driver put a used starter on the Council's truck and then the Chairman turn around and ask him to put it for $800.00 instead of $400.00 so that he the driver would receive $400.00 and the Chairman $400.00. Further the first Defendant clearly affirmed that the words were true in substance and in fact.
3. Pleadings having been closed in this matter the Defendants utilized this procedure of witness summaries and witness statements to amend their statement of case and to introduce allegations not forming part of the case and or of their defence.

4. Stated otherwise, the Defendants now seek to introduce a new defence by the use of witness summaries and witness statements which is not a procedure permitted in the Civil Procedure Rules.
5. CPR 2000 part 29.64 mandates that the names and addresses of intended witnesses or other sufficient means of identifying the intended witnesses must be disclosed.
6. The Affidavit of Michael Coipel filed on 8th October, 2013 is based strictly on a belief and is unsupported by any objective evidence. Further there is no evidence of any threat, interference or risk to the intended witnesses.
7. The Affidavit of Michael Coipel upon which the Application was based failed to disclose what independent and objective evidence excited this belief referred to in paragraph 6. Accordingly there was no tangible, credible or objective evidence or allegation of fact or particulars that would justify a departure from the mandatory provisions of CPR 2000 part 29.6 (4).

Evidence

[3] The applicant in his Affidavit in Support of the Application makes mention of the matter before the court and goes on to identify certain admissions by the first and third defendants which bear on the said Application.

[4] At paragraphs 5 to 10 of his said Affidavit in Support the applicant reveals the following information given to him and which he verily believes, as follows:

5.[1] I am informed by my legal practitioner and verily believe that pleadings having been closed in this matter however the Defendants have utilized this procedure of witness summaries and witness statements to effectively amend their statement of case and to introduce allegations not forming part of the case and or of their defence.

6. The Defendants now seek to introduce a new defence by the use of witness summaries and witness statements which is not a procedure permitted in the Civil Procedure Rules.

[1] This is a true reflection to paragraphs of the said Affidavit

7. Part 29.6(4) of CPR 2000 mandates that the name and address of intended witnesses or other sufficient means of identifying the intended witnesses must be disclosed.
8. The Affidavit of Michael Coipel filed on 8th October, 2013 is based strictly on a belief and is unsupported by any objective evidence. Further, that "belief" is not evidence and that there is no evidence of any threat, interference or risk to the intended witnesses.
9. Further, the said Affidavit of Michael Coipel upon which the Application is based failed to disclose what independent and objective evidence excited this belief referred to in paragraph 6. Accordingly, there was no tangible, credible or objective evidence or allegation of fact or particulars that would justify a departure from the mandatory provisions of CPR 2000 part 29.6 (4).

Issues

[5] The issues for determination are as follows:

1. Whether the Applicant is entitled to an order striking out any reference to any allegation relating to "$600.00" as contained in the witness statement of Michael Coipel, Maximea Powell, and any other witness statement and reference to cheque no. 956?
2. Whether the order granted ex-parte to the defendants pursuant to Rule 29.6 (4) of CPR 2000 on 9th October, 2013 should be set aside or varied?
3. Who is liable in costs?

Issue No. 1

Whether the applicant is entitled to an order striking out any reference to any allegation relating to "$600.00" as contained in the witness statement of Michael Coipel, Maximea Powell, and any other witness statement and reference to cheque no. 956?

Submissions

[6] In support of the applicant's contention the following is submitted:

"12. A party's witness statement must contain **evidence of a witness** upon which that party intends to rely on **in relation to any issue of fact to be decided at the trial.**
Authority: CPR 2000 Part 21.4 (1)

13. It is well settled that the facts in which a party wish to rely on are contained in the Statement of Claim or in the Defence.
Authority: CPR 2000 Part 8.7 (1)
CPR 2000 Part 10.5 (1)

14. It is submitted that a witness statement must fall within the ~~fore~~ four walls of a Statement of Claim on behalf of or of the Defence.

15. In the instant case the allegation on which the parties are joined and for determination at trial is the issuance of a cheque of $800.00 by the Claimant to a third party which cheque

a) one of the Defendants said he saw;

b) the 1st and 3rd Defendants clearly state that the cheque was for the sum of $800.00,

c) and which the Defendants alleged is true in substance and in fact.

16. **From the statement of case there is no allegation of $600.00.** This is not the case for the Claimant neither is it the case for the Defendant. This is highlighted even further where the Defendants have said in their Amended Defence that the allegation of an issuance of a cheque for $800.00 is true in substance and in fact. This essentially is a defence of justification.
Amended Defence of 1st and 3rd Defendants at paragraph 16, 17, 25 and 26

17. From this new witness statements where the Defendants now rely on a cheque for $600.00 which was neither the defamatory statement made, nor the statement which was said to be true in substance and in fact, the defendants have now established that their defence of justification fails, that the statement of was materially false and that judgment should be entered for the Claimant.

18. It is well settled that a party is not permitted to approbate and reprobate at the same time. Where the Defendants relies on a defence of justification in their defence they should not be permitted to approbate on justification of $800.00 and reprobate by a reliance on an assertion of $600.00 which does not form part of their defence."

[7] As far as the defendants are concerned, the submissions respecting the application to strike out parts of witness statements fall within the following propositions, in relation to the mention of cheque no. 956: both the claimant and the defendant have indicated their intent to rely on the same, none of the grounds of admissibility and reference to the cheque no. 956 in the witness statement would help in the final resolution of the case.

[8] The submissions on behalf of the defendants continue thus:

"11. Moreover, as all parties to the proceedings intend to rely on cheque no. 956, reference to it in the Witness Statements of the said Defendants would help in the final resolution of the case and as such, the Application of the Claimant to strike out such pat of the Witness Statement should be disallowed.

12. Further, the UK CPR 32.4 which deals with Witness Statements is on all fours with our CPR 2000 Rule 29 and as such, the practice as explained in **Zuckerman on Civil Procedure Principles and Practice Second Edition- Adrian Zuckerman** is instructive. In **Zuckerman on Civil Procedure Principles and Practice Second Edition – Adrian Zuckerman,** the Learned Author when dealing with objections to a Witness Statement or part of it had this to say:-

> "**A party may object to a Witness Statement or parts of it. Where the objection is on grounds of inadmissibility, such as where a party objects to the inclusion of "without prejudice" communications in a Witness Statement, the objection may be conveniently dealt with soon after exchange of witness statements. Objections taken on any other grounds however may not be easily disposed with prior to trial. For example, if an objection is taken on grounds of irrelevance or on the grounds that the statements would excessively complicate the case, it may be difficult to decide the validity of the objection without knowing how the case may develop. But the court may order parts of a witness statement to be struck out if it is clear that there are bound to hinder the final resolution rather than help it."**

13. It is respectfully submitted that in these circumstances as both parties have indicated that they intend to rely on cheque no. 956, all parts of the Defendants' witness statements dealing with cheque no. 956 are relevant and would assist in the final resolution of the case and they should not be struck out."

Reasoning and conclusion

[9] In civil proceedings governed by CPR 2000, each party is bound by his pleaded case filed in accordance with the said Rules.

[10] Of relevance are the following provisions of CPR 2000. Part 8.7 (10 and (3) and 10.5 (1), (3):

> "8.7 (1) The claimant must include in the claim form or in the statement of claim, a statement of all the facts on which the claimant relies.
>
> (3) The claim form or statement of claim must identify any document which the claimant considers to be necessary to his or her case.

10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

a) are admitted;
b) are denied;
c) are neither admitted nor denied, because the defendant does not know whether they are true; and
d) the defendant wishes the claimant to prove."

[11] It is therefore accurate to say that the statement of claim or defence are the basic and fundamental instruments of the pleadings on which either side sets out their case; and the Rules of CPR 2000, as set out above, make clear the need to set out facts to be relied on.

[12] Accordingly, witness statements or witness summaries must take their colour from the context of the case set out in the statement of claim or defence.

[13] In seeking to persuade the court that the inclusion of reference to cheque no. 956 of $600 in the witness statements are within the law, learned counsel turns to Zuckerman on **Civil Procedure Principles and Practice.** But while the extract quoted recognizes the right of a party to object to parts of a witness statement after the exchange of witness statements or prior to trial; these are confined to 'inadmissibility', in the case of the former and 'irrelevance' in the latter. The interpretation of the Rules is not in issue directly.

[14] The court considers that the extract from Zuckerman does not assist the defendants. For as noted before, it is the claimant's contention in that the defendants' case relate to a cheque no. 956 in the amount of $800.00, as contained in the defence.

[15] Even though, as claimed in the submissions on behalf of the defendants, the parties intend to rely on cheque 956 does not bring the reference to "$600.00" rather than $800.00 within letter of the law. The rule is that pleadings must be certain. Thus the submission on behalf of the claimant that the reference to $600 in the witness statements constitutes a new defence would be correct. And the court would add that it is in the wrong place. In any event, Rules 8.7A and 10.7 of CPR 2000 put the matter beyond doubt. They read as follows:

8.7A "The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.

10.7 The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree."

[16] The claimant's argument or the application is that the defendants are seeking to rely on facts that are not set out in the defence. This contention also negates any agreement. Further, there is no evidence of any permission of the court for the defendants to do as they did or otherwise.

[17] It is the order of the court that the allegation to '$600.00', or a cheque in relation thereto, or an unqualified reference to cheque no. 956 be struck from the witness statements or witness summaries filed on behalf of the defendants.

Issue No. 2

Whether the order granted ex-parte to the defendants pursuant to Rule 29.6 (4) of CPR 2000 on 9th October, 2013 should be set aside or varied?

Submissions

[18] Learned counsel for the claimant submitted the following on behalf of the claimant:

"19. The further issue centers around the Defendants legal obligation to comply with CPR Part 29.6 particularly 29.6 (4) and overriding objectives of the CPR.

20. In their Affidavit in Support of Application seeking a waiver of the requirements of CPR Part 29.6(4) the Defendants rely on a subjective "belief" unsupported by evidence, particulars or any objective grounds on which the belief if founded. CPR Part 30.3(2) (b) (ii) mandates that an affidavit discloses the source of that belief.

21. The Defendants' failure to provide the source on which the belief is founded is a fatal omission that should result in the application being denied. ~~Such an affidavit having failed to provide~~ In failing to provide particulars, the Defendants have radically breached or not complied with requirements of the CPR ad further seeks to deny the Claimant a fair hearing.

22. It is submitted therefore that an unsubstantiated instantiated belief or a belief devoid of particulars or objective facts is essentially devoid of merit and should not be the basis upon which the CPR Part 29.6 (4) should be side stepped. **Stated otherwise a Court ought not to direct a waiver of Part 29.6 (4)**

where objective facts and particulars are not provided to the court."

[19] In the case of the defendants the following is submitted:

> "16. The Ex-parte Application upon which this Order was made and given was obtained on 9th October, 2013 and served on the Solicitor on the 10th October, 2013.
> 17. The Application by the Claimant to set aside or vary the Order was made over 3 months after the Claimant was served.
> 18. Reference is made to CPR 2000 Rule 39.5 (1) and (2) which states that such an Application must be made within 14 days after the date on which the Order was served on the Applicant.
> 19. As the Applicant has made the Application over 3 months after the Order was served on him and there is no application to extend time, the Court ought not to entertain the Claimant's Application to set aside the Ex-parte Order made on the 19th October, 2013.
> 20. In the circumstances, it is respectfully submitted that [on] the about authorities, the Claimant's application to strike out parts of the Witness Statements and the Ex-parte Order made on the 9th October, 2013 and served on the Claimant's Solicitor on the 25th October, 2013 should be dismissed with costs to the Defendants."

Reasoning and conclusion

[20] Part 30.3 (2) of CPR 2000 addresses the content of affidavits. It speaks thus:

> (2) An affidavit may contain statements of information and belief –
> (a) if any of these Rules so allows; and
> (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 –
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
> (ii) the source of any matters of information and belief.

[21] The issue is focused on Rule 30.3 (b) and went narrower on sub-paragraph 30.3 (b) (ii).

[22] The submissions on behalf of the claimant converge on the contention that the defendants rely on a subjective belief unsupported by evidence. A further contention is that a court should not direct the waiver of Part 29.6 94) where objective facts and particulars are not provided.

[23] On the other hand, learned counsel for the defendants cites Parts 39.5 (1) and (2) of CPR 2000 in support of the contention that the order in issue should not be set aside. The point is also made that the application to set aside the order was made over three months after it was served on the applicant and there is no application to extend time.

[24] The court considers that the issue turns on Rule 11.16 of CPR which provides that:

> 11.16 (1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
>
> (2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.
>
> (3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.

[25] The court accepts as correct, the contention of learned counsel for the defendants in saying that the application was made some three months after it was served on the claimant, rather than 14 days. At the same time there is nothing on the face of the order to suggest that there was compliance with Rule 11.16 (3).

[26] In the circumstances the court considers that the justice of the situation is that the order must be set aside and a new application made for the purposes of Rule 26.9 (4) of CPR 2000 within 14 days of the date of this order and served on the claimant. The new application will be heard on a date fixed by the court office; and notified to both parties.

Issue No. 3

Who is liable in costs?

[27] In the circumstances of this application there is no order as to costs.

ORDER

[28] IT IS HEREBY ORDERED AS FOLLOWS:

1. The allegation of $600.00 or a cheque in relation thereto or an unqualified reference to cheque no. 956 be struck out from the witness statements filed on behalf of the defendants.
2. The order made on 13th October, 2013 is set aside since it was not made within 14 days after the date of the order since notice of the application was not given to the claimant.
3. A new application for the purposes of Rule 26.9 (4) of CPR 2000 must be filed within 14 days of this order and served on the claimant.
4. The new application will be heard on a date fixed by the court office and notification to both parties.
5. There is no order as to costs.

Apology

[29] Their can be no doubt that this decision is out of alignment in terms of normal delivery. But this is due entirely to a number of factors over which the judge hardly has control. In the circumstances a sincere apology is tendered to the parties concerned and to counsel on both sides.

.....

Errol L. Thomas

High Court Judge (Ag.)