

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2016/0070

BETWEEN:-

THE BANK OF NOVA SCOTIA

Claimant

And

PHILOMEN JOHN

(As Personal Representative of the estate of Raphael John (deceased))

Defendant

Appearances: Miss Joelle Harris of Harris, Harris & Didier for the Claimant
Mr Jeffery Douglas Murdock led by Mrs Heather Felix Evans for the Defendant

2017: February 06, 09

- [1] **STEPHENSON J.:** At the commencement of the trial on a mortgage claim brought by the claimants ("Scotia Bank") counsel Mrs Heather Felix Evans for the defendant made an *in limine* application for a document contained in the trial bundle to be expunged from the record and that the claimant be not allowed to rely on the said document.
- [2] The defendant is being sued in her capacity as Personal Representative of her deceased husband's estate. Scotia Bank has sued for the balance outstanding on a defaulted mortgage loan made to the deceased husband of the defendant.

HISTORY OF PROCEEDINGS

- [3] This matter commenced in by way of fixed date claim on the 7th March 2016. The fixed date claim was supported by affidavit evidence. The claimant is essentially, seeking to recover a sum of money being the

balance of principal, charges, and interest owing to the claimant by the Raphael John now deceased on a mortgage loan made to him.

- [4] An affidavit in reply (defence) to the claim was filed on behalf of the defendant on the 24th March 2016. In her defence the defendant admitted that her husband died on June 27th, 2004 and that she was appointed executrix to his estate. The defendant averred, however, that she had no knowledge of the deceased's alleged indebtedness to the Scotia Bank until it was brought to her attention in or about 2014 more than ten years after his death.¹
- [5] The defendant disputed the claim for a number of reasons and averred *inter alia* that the claimant failed to state or provide any evidence of the date that the last payment was made towards the alleged loan of Raphael John.²
- [6] The defendant also stated "*I have never made a payment toward this alleged loan of Raphael John, deceased; therefore no payment has been made towards this alleged loan since the death of Raphael John, that is, for more than 11 years prior to the filing of this mortgage claim;*"³
- [7] The defendant also stated in her affidavit that "*I am advised by my solicitor and verily believe to be true that assuming this loan existed at the time of Raphael John's death, the claimant's cause of action in respect thereof arose prior to the death of Raphael John, deceased; and I have been advised by my solicitor and verily believe to be true that this claim is statute barred as regards recovery ...*"⁴
- [8] The first hearing of the fixed date claim took place on the 7th April 2016. Leave was granted to the claimant to file and serve an amended statement of claim and supplementary affidavit in support.
- [9] An amended fixed date claim was filed on the 21st April 2016 supported by an affidavit filed on even date and an affidavit in reply to the amended claim was filed by the defendant on the 10th May 2016 and a claimant's reply to the defendant's affidavit was filed on the 25th May 2016.
- [10] A pre-trial order was made by the court on the 2nd June 2016. By virtue of the case management order the parties were ordered to disclose all documents which they seek to rely on in the matter on or before the 4th July 2016, directions were also given regarding the filing of trial bundles. The trial of the matter was fixed for the 28th November 2016.
- [11] In her affidavit in reply to amended mortgage claim filed on the 10th May 2016, the defendant maintained her position on the alleged loan and reiterated all her previous averments.
- [12] The claimant in its reply denied that the claim was statute barred as alleged and Mr Mervin Burton on behalf of the bank in his affidavit filed on the **25 May 2016** averred that the "*last payment made by the late Raphael John*

¹ See Paragraph 4 of affidavit in reply to the mortgage claim filed on the 24 March 2016

² Ibid paragraph 5 (iii) in is noted that this paragraph was later deleted from the statement of case but for the purposes of this ruling it is important to note that the defendant did at some point state that they saw no documentation provided by the bank evidencing the last payment by the deceased.

³ Ibid paragraph 5(vi)

⁴ Ibid paragraphs 5(vii) & (viii)

was made within 12 years prior to the date of filing this claim”.⁵This statement was repeated in the witness statement of Mr Mervin Burton dated the 31 August 2016

[13] It is interesting to note that the grounds upon which the defendant laid her defence was “ as a result of reviewing all the documents disclosed by the claimant and the witness statement of Mervin Burton, the defendant is of the view that she has further very good grounds for defending this claim. ... ”⁶

[14] At the pre-trial hearing of the matter on the 2nd June 2016, the defendant was granted leave to file a supplementary affidavit on or before the 10th June 2016.

[15] On the 3rd June 2016 the defendant filed a supplementary affidavit and in that affidavit, she amended her defence proffered in previous defences but she, however, maintained, that the claim is statute barred as regards recovery.

[16] The defendant couched her defence as follows:

“I have been advised by my solicitor and verily believe to be true that assuming this loan existed at the time of Raphael John’s death, this claim is statute barred as regards recovery of:

- (i) the principal sum, as more that 12 years have elapsed from the date on which the right to receive the money accrued to the 7th March 2016 (the date of filing the claim); and*
- (ii) the arrears of interest, or damages in respect of such arrears, which accrued more than 6 years prior to the 7th March 2016 (the date of filing the claim)”⁷*

[17] On the 23 September 2016, the defendant filed yet another application for leave to further amend her amended defence which leave was granted to include the following additional grounds of defence:

“(a) the claimant’s apparent failure to renew or further renew the registration of the mortgage bill of sale, which failure renders the bill of sale void under section 9 of the Bills of Sale Act of Dominica;

(b) the assertion that the claim on the promissory note/contract is statute-barred as more than six years have elapsed since any payment on the note or under this contract; and

(c) the assertion that there is no evidence of any agreement between Raphael John, deceased, and the claimant by which the properties of Raphael John, deceased, are pledged as security for the alleged loan.”⁸

[18] The defendant was granted leave to file the further supplementary affidavit in reply to the amended mortgage claim which was filed on the 20th October 2016.

[19] A reply to the defendant’s further supplementary affidavit in reply to amended mortgage claim was filed by the claimant on the **21 November 2016** addressing the additional grounds of defence filed by the defendant (emphasis mine).

⁵ See paragraph 1 of affidavit of Mervin Burton filed on the 25 May 2016

⁶ See Paragraphs 7 of the defendant’s application dated 22nd September 2016

⁷ See Paragraph 8 of 3rd affidavit Philomen John filed on the 3rd June 2016

⁸ See application filed on behalf of the defendant dated the 23rd September 2016 and as a result of this application the trial date set for the 28th November 2016 was vacated.

[20] The claimant's evidence as filed in the witness statement of Mervin Burton dated and filed on the 21st August 2016 and in the affidavit of Mervin Burton filed on the 21st November 2016 stated that the last payment made on the loan was on the 11th March 2004 and that therefore the claim is not statute barred as claimed by the defendant⁹.

[21] Trial was fixed for today the 6th February 2016. That trial bundles were belatedly filed on the 3rd February 2017. It is noted that there was no application from the claimant to deem the bundles clearly filed out of time as properly filed.

[22] In the bundle of documents filed by the claimant was a transaction report dated the **4th February 2016** evidencing a payment by the defendant on the 11th March 2004¹⁰. This is the document which is the centre of the defendant's in limine application.(emphasis mine)

The application

[23] Learned Counsel Felix Evans on behalf of the defendant applied to the court for the court disallow the claimant from relying on this document and that it be expunged from the trial bundle. In short learned counsel was saying that the court ought not to allow the defendant to rely on this document as in spite of requests from the defendant for discovery of all documents relating to the claim the claimant has never disclosed this document and that this is an attempt to introduce the document at the last minute which is tantamount to ambushing the defendant. Learned Counsel submitted that this would be prejudicial to the defendant.

[24] Learned Counsel submitted that the purpose of discovery is to allow the parties to properly prepare their case and in order that the strength and weakness of the case could be properly assessed.

[25] Learned Counsel Felix submitted that this should not be allowed and learned counsel based her submissions on the following:

- I. Part 28.4 of the Civil Procedure Rules
- II. **Prudence Robinson –v- Sagicor General Insurance Inc.**¹¹
- III. **RBTT Bank of the Caribbean Limited –v- Rolston Robinson et nor**¹²
- IV. **Elwardo Lynch –v- Ralph Gonsalves**¹³
- V. **Gregory Ferrari –v- The Central Water and Sewerage authority**¹⁴

⁹See Paragraph 6 of Witness Statement and paragraph 3 of the affidavit of Mervin Burton

¹⁰ See pages 49-53 of the Trial Bundle no.2 filed on the 3rd February 2017

¹¹ SLUHCV2008/0736

¹² High Court Claim NO 17 OF 2003 (St Vincent & The Grenadines)

¹³ CIVIL APPEAL NO 18 OF 2005 (St Vincent & The Grenadines)

¹⁴ High Court Civil Claim No. 302 of 2004

[26] The document which has been included in the trial bundle was also not disclosed pursuant to the pre-trial order made by the court.

[27] Miss Joelle Harris on behalf of the defendant sought to submit that the document was disclosed previously however when pressed for dates as to when the document was previously disclosed and after searching and reviewing her file counsel stepped back from that position and submitted that the document was not in fact previously disclosed.

[28] Counsel then sought to make an oral application for relief from sanctions. Counsel at the court's urging made reference to Part 26.8 of the CPR 2000 and conceded that there was no affidavit evidence before the court as is required by CPR. She also conceded that she could not satisfy the conditions of CPR 26.8. to make the necessary application for relief from sanctions.

Court's Considerations

[29] The issue to be decided is whether the claimant should be permitted to include in their trial bundle a document (a transaction record) which they failed to disclose to the defendant before the commencement of the proceedings, upon specific request for all documents relating to the loan in issue or pursuant to the court's order for disclosure. It is also relevant that the claimant is in breach of the trial directions made by this court in this matter in that they failed to file the trial bundles in time or comply with other orders in a timely manner.¹⁵ There is also no application for relief from sanctions before the court in compliance with the requirements of CPR 2000.

[30] In the case at bar, the sanction for not disclosing a document is that the claimant will not be allowed to use the document filed.

[31] In this case the claimant filed its affidavit in response to the defendant's affidavit¹⁶ which included the defendant's claim that the loan subject of the litigation was statute barred and the court notes that the claimant made an averment regarding the last payment made to the loan since 25th May 2016 and again on 21 November 2016 in pursuit of their case that the claim was not statute barred. It is noted that the date that appears on the document that is being objected to that supposedly reflects to last date of payment to the loan subject matter of the claim at bar is the 25th May 2016. Therefore it seems clear to the court that both parties knew of this statement by the claimant since May 2016 and not for the first time on Thursday 2nd February 2017. It also means that the claimant knew that this was their response to the defendant's claim that the claim at bar is statute barred and had the document in their possession.

[32] I am required to take all circumstances into consideration and it is noted that this statements coupled with no documentary evidence could have signaled to the defendant that there was no proof of the statement.

¹⁵ The Claimant filed the trial bundles on the 3rd February 2017 and their list of issues on the 3rd February 2017

¹⁶ See affidavit of the defendant dated 24th March 2016

- [33] Learned Counsel Felix Evans did submit that the claimant is a bank and the claimant ought to have known that if it was their intention to rely on this payment that they should have provided the banking documents to prove same. This I would think will have to been in the form of not only the print out which they have included in the trial bundle but there must be the loan payment ticket or similar documentation which would inform the defendant fully of the payment made.
- [34] Part 26 of CPR 2000 does grant the court some residual discretion regarding whether or not to allow the use and reliance on a document not disclosed in a timely manner and in this case not disclosed in spite of requests from the defendant for same.
- [35] I am cognizant of the fact that this discretion must be exercised judiciously and in keeping with the overriding objective and I am compelled to take into account the entire circumstances of the case, I am to also consider the question of proportionality.
- [36] Learned Counsel Felix Evans did submit that the claimant is a bank and the claimant ought to have known that if it was their intention to rely on this payment that they should have provided the banking documents to prove same. This would have been in the form of not only the print out which they have included in trial bundle but there must be the loan payment ticket or similar documentation which would inform the defendant fully of their case. I also note that learned Counsel has submitted that requests have been made of the bank for all documentation regarding and related to the loan and this document was not forthcoming, it is also noted that the fact of these requests was averred by Mr Burton in one of his early affidavits filed in the matter. Therefore I agree with counsel that for the document to appear at this late stage must be an attempt at ambush.
- [37] This is also a document that clearly would have informed Mr Burton for him to make the statement as to the last day of payment.
- [38] In the case at bar, the bank has failed to give disclosure of a transaction report which is clearly relevant to their case. The very fact that the payment was referred to in the claimant's affidavit and witness statement and they were in fact initially alerted to the fact that they did not provide any written support to claim that there was payment, proves that it ought to have been obvious to their lawyers that this document existed and not disclosed.
- [39] Even after the trial directions order and many amended pleadings also a vacated trial date disclosure still was not made. I pause to note that the claimant failed to comply with the case management directions in its entirety and failed to make the proper application for extension of time or relief from sanctions as the case would be.
- [40] Learned Counsel Miss Harris for the Claimant sought to minimise the non-disclosure by indicating to the court that there was a need for housekeeping and indicating her embarrassment, but I consider this to be more than a case for housekeeping. It would have been a housekeeping matter if the document had been disclosed when there was a request made not only by counsel who currently has conduct of the case but also firstly by the first lawyer representing the defendant and the disclosed document was then omitted from the bundle; but no this

was a situation where the document which was clearly an important part of the claimant's case was never disclosed.

[41] This clearly denied the defendant the opportunity to have sight of and to be able to consider the effect of this seemingly critical contemporaneous record of the "last transaction" on the loan account. This in my view is contrary to the furtherance of the overriding objective of the Civil Procedure Rules to ensure that the cases are dealt with expeditiously and fairly.

[42] In the case of **Woods –v- Martin**¹⁷SalmonLJhad this to say about situations when important banking documents were omitted from discovery

"...the solicitors' duty, however, does not stop there. It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit. In this case, I am regretfully driven to the conclusion that this duty was not performed by the defendants' solicitors. ..."

[43] It is well-recognised law and practice that the disclosure of key documents in cases before the court is absolutely fundamental to the court if there is to be an accurate and efficient fact finding which is being sought by the litigants. In my judgment taking into consideration all the circumstances of the case and the possible prejudice to the defendant, it is only fair and just not to allow the claiming to rely on the document they are seeking to introduce belatedly at this stage and I so order.

[44] The trial in this matter will continue on the 8thday of March 2017.

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M E Birnie Stephenson
High Court Judge

¹⁷ [1959] 1 QB 55 @60