

CASE TYPE: MORTGAGE CLAIM

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
(CIVIL)

CLAIM NO. DOMHCV 257 OF 2016

BETWEEN

ROYAL BANK OF CANADA

CLAIMANT

AND

MERVIN ANDREW

DEFENDANT

Before: Madam Justice M E Birnie Stephenson

Appearances: Miss Chelsea Frampton of Prevost & Roberts for the Claimant/Applicant
Mr Joshua Francis holding for Mrs Gina Dyer Munro of Dyer & Dyer for the
Defendant/Respondent

2017: On written submissions filed on
March 31 and April 3
April 7

RULING ON WRITTEN SUBMISSIONS

[1] **Stephenson J.:** This is an application to strike out an affidavit in reply filed by the defendant on the grounds that the affidavit in reply does not disclose any reasonable ground for defending the claim in that the defendant's reliance on the allegation that the claimant did not advise him to seek independent legal advice has no legal basis in the particular circumstances of the case at bar and that the defendant's allegation that he was unduly influenced has no merit and is frivolous. The Claimants also claim that there was never an agreement for the defendant to cease payments while procuring sale of the mortgaged property and in the circumstances the defendant's statement in that regard is without merit.

The Claim

[2] On the 5th August 2016 the claimant bank filed a fixed date claim against the defendant seeking judgment of a sum of money being the amount due and owing inclusive of interest and other charges by the defendant to the claimant as a result of two mortgage loans made by the claimant to the defendant. The defendant it is contended by the claimant signed two promissory notes as evidence of the loans and they also contend that the loan was secured by way of mortgage taken on the property of the defendant.

[3] This claim is supported by an affidavit in support of mortgage claim filed on even date pursuant to Parts 8.1(1)(c), 66.3 and 66.4 of Civil Procedure Rules 2000. ("CPR") The claimants exhibited the various documents comprising the loan documents and the demand letter sent to the defendant in support of their claim.

[4] A notice of relief sought pursuant to Rule 66.3(b)(ii) was also filed by the claimant on the 5th August 2016.

[5] The defendant matter was served by way of advertisement with leave of the court and the defendant filed and served his acknowledgement of service of fixed date claim form on the 8th December 2016

indicating on the said acknowledgment of service that he received the fixed date Claim form on the said date. The defendant also stated that he did not admit the whole of the claim and that it was his intention to defend same.

The Affidavit in reply (The Defence)

[6] On the 5th January 2017 the defendant filed his affidavit in reply to the claim. In his reply the defendant admitted that he was a customer of the claimant bank and that he did borrow money from the claimant bank but he disputed the way in which the documents were executed and contends that when he signed the loan documents he did so without independent legal advice. Further, that he was informed and verily believed that the claimant had a legal obligation to clearly explain and to ensure that he understood the terms and conditions of the loan before he executed the promissory note.

[7] The defendant further averred that the copies of the loan documents and exhibits attached were not legible and in the circumstances the relevant dates on the documents were indecipherable.

[8] The defendant further averred that as it regards the second loan, that he refused to sign the letter which was delivered to him in June 2009 and as such the Promissory note was dated 9th December 2009.

[9] It is the defendant's contention that the claimant failed to provide him with independent legal advice on the loan especially since the claimant knew he was not "*in accordance with*" the terms and conditions of the loan. The defendant therefore contended that he disputed the agreement, executed in the absence of independent legal advice and that he was unduly influenced to execute the documents.

¹ Paragraph 9 of the Defendant's affidavit in reply sworn to on the 4th January and filed on the 5 January 2017.

[10] The defendant also contends that when the loan went into arrears that he was advised by the bank that he would have the option to refinance his loan and that this agreement to refinance was never honoured by the bank.

[11] The defendant also went on to submit that there was an agreement with the bank during the course of his relationship with the bank that he would sell the mortgaged property and that he approached the claimant bank informing them of the intended sale and that in those circumstances he would hold back on any payments as the sale was expected to clear off the amounts owing to the bank, which course of action was approved by the Claimant bank.

[12] The defendant also claimed that the proposed sale fell through and again, he approached the claimant bank and in spite of the agreements obtained from the claimant to reconsider refinancing the loan that the bank commenced the proceedings in the case at bar to recover sums owed by him to it.

[13] The Defendant also went on to deny that some of the loan documents relied on by the claimant are incomplete resulting in him averring that he did not agree with the terms and conditions of the loan and that the claimant's claim regarding the interest accrued is incorrect as there was no fixed agreement on the interest.

[14] The defendant at the end of his affidavit in reply averred that that the claimant should refinance his loan obligations with them as they have promised to do and that he believes that this is the best and fair resolution to the matter considering the claimant's breaches in its interaction with him. The claimant also stated that he is willing to resolve the matter.²

[15] The defendant also averred that he has been advised by his solicitors and verily believed that the claimant is not entitled to have the mortgaged property sold pursuant to the terms of the Title By Registration Act³.

The Claimant's reply to the affidavit in reply

² Ibid paragraph 28

³ Chapter 56:50 of the Laws of the Commonwealth of Dominica

[16] The Claimant filed an affidavit in reply to the defendant's affidavit sworn to and filed on the 4th February 2017. The claimant opposed the defendant's averments and denied that the bank was required to provide the defendant with independent legal advice as claimed. The claimant also denied the defendant's averments regarding his disagreements about the terms and conditions of the loans granted to him and the averments made by the defendant.

Application to strike

[17] On the 7th March 2017, the claimant applied to have the defendant's affidavit in reply struck out on the grounds that it did not disclose any reasonable ground for defending the claim in that his allegation that he was not advised by them to seek independent legal advice has no legal basis in these circumstances. Further, that the defendant's allegation that he was unduly influenced has no merit and is frivolous and that there was never an agreement with the defendant that he should cease making payments on his loan whilst he pursued possible sale of his property.

[18] The defendant opposed the application to strike and asked the court to dismiss the claimant's application with costs. The defendant in his affidavit filed on the 31st March 2017 averred that the issue of undue influence is a question of fact which requires to be ventilated at a full blown trial.

[19] The defendant further averred that the legal issue of undue influence raises equitable considerations which are to be taken by the court and that the defence is available to him as the principle applies even in a banker customer relationship.

[20] The defendant also contends *inter alia* the issue of independent legal advice is pertinent to the circumstances of the case at bar and that his affidavit contains serious live issues of fact which can only be properly determined by the hearing of oral evidence at trial.

[21] On the first hearing of the application, the parties were ordered to file their submissions in both soft and hard copies for the court's consideration the application was adjourned to the 7th April 2017 for

hearing. The Claimants filed their submissions in both hard and soft copy on the 3rd April 2017 and the defendant filed his on the 31st March 2017 in hard copy solely.

[22] Before dealing with the law regarding applications to strike, the defendant sought to make a preliminary point that the affidavit is not amenable to be struck out as it does not fall within the definition of statement of case as provided for in the interpretation section of CPR and therefore rule 26.3(1) (b) of CPR which grounds the claimant's application does not apply to the case at bar.

[23] I must be guided by the rules of procedure contained in CPR and I therefore ask myself what guidance can be obtained from same.

[24] Proceedings regarding fixed date claims are governed by part 27.2⁴. Part 27(2) provides

"(2) On that hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference. "

The powers of a case management include fixing the first hearing of the fixed date claim and if there is no defence filed the court may treat the first hearing of the claim as a trial of the matter. So we know that the defendant to a fixed date claim can file a defence if he wishes to defend the claim brought against him.

[25]. Part 10 of CPR addresses the filing of defences and the consequences of not doing so. Part 10(2) states

"If - (a) a claim is commenced by a fixed date claim form in Form 2 and there is served with that claim form an affidavit instead of a statement of claim; or (b) any rule requires the service of an affidavit; the defendant may file an affidavit in answer instead of a defence".

[26] In the case at bar the claimant filed an affidavit in support of the fixed date claim filed instead of a statement of claim as is permitted. The defendant desiring to defend the claim then filed an affidavit in reply setting out his defence to the matter.

[27] Part 10(3) of CPR states

"In this Part the expression "defence" includes an affidavit filed under paragraph (2)".

⁴ A note under Part 8.5 of CPR states that "part 27.2 deals with the procedure under a fixed date claim"

[28] Therefore relating this provision to the defendant's affidavit filed pursuant to part 10(2) of CPR the said affidavit falls to be considered as a defence as is defined in Part 2.4 of CPR⁵ and in the circumstances of this case would be amenable to be struck out as a defence pursuant to part 26(3) of CPR.

General Principles and consideration in applications to strike out:

[29] In civil litigation, the courts have the power to remove the whole or part of a statement of case⁶. The power to do so may be exercised on the application of an opposing party in the matter where *inter alia* the statement of case does not disclose a cause of action, such that there is no reasonable ground for bringing or defending the claim, that inadequate reasons are given for a denial in a defence, or the proceedings are an abuse of the process of the court.

[30] The power to strike out may also be exercised by the court of its own motion, without notice to the parties. Striking out particulars of claim and defences may also be ordered by courts as a measure to address repeated failures by a party to comply with case management directions, practice directions or other orders of the court.

[31] The Court has a wide discretion to strike out a party's statement of case either in the whole or in part. Part 26 (3) of the CPR 2000 ("CPR") provides that:

"(1) In addition to any other power 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

- a there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;*
- b the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*
- c. the statement of case or the 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; ... "*

[32] The power to strike out is one that must be used sparingly as was held in **Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al.**⁷ The rationale for this cautious approach has

⁵Part 2.4 provides "statement of case" means – (a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and ..."

⁶It is noted that the respondent has sought to make a point in limine regarding whether or not the Affidavit in Reply as filed by the respondent is amenable to being struck out as it is not a statement of case within the definition of statement of case

⁷ Antigua and Barbuda High Court Civil Appeal No. 20A of 1997

been stated in **Tawney Assets Limited v East Pine Management**⁸ and has been applied by this court on numerous occasions.

[33] Justice of Appeal I D Mitchell QC had this to say :

“The striking out of a party’s statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial”⁹

[34] In **Ian Peters v Robert George Spencer**¹⁰ it was held that that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. This ruling as been applied by our courts over and over again.

The defence of Undue Influence and the allegation that the bank should have ensured that the defendant obtained independent legal advice.

[35] Does the defence as filed by the defendant disclose a reasonable ground for defending the claim in the case at bar?

[36] I ask myself the following questions:

- a. What are the facts relied on by the defendant?
- b. What reason does the defendant have for not admitting the claim?
- c. What is the version of the transaction offered by the defendant and that of the claimant?

[37] In dealing with these applications I am not required to review matters in great detail, neither am I required to mount an in depth inquiry into the allegations and facts of the case particularly as it

⁸HCVAP 2012/007 (Territory of the Virgin Islands)

⁹ *ibid* at paragraph 22

¹⁰Antigua and Barbuda High Court Civil Appeal No. 16 of 2009

regards to the basic agreement between the parties. (Re: **Hilary Bowman Case**¹¹, **Eastern Caribbean Flour Mills case**¹²

[38] A perusal of the defence and reply to the defendant's affidavit in reply suggests that there are disputes as to the facts as relied on by the defendant, in that the defendant avers that there were certain conversations and understandings as to his dealings with the claimant bank. The claimant bank on the other hand denies that these interactions occurred. There is also a dispute raised as regarding the documents signed and when they were signed which are being relied on by the claimant bank in its claim. There are clearly disputes as to facts.¹²

[39] I come now to the defence of undue influence and the assertion by the defendant that claimant bank failed to ensure that he obtained independent legal advice. The defendant in mounting this defence may well be swimming against the tide, so to speak.

[40] Learned Counsel on behalf of the defendant MrsGina Dyer Munro submitted that this defence is available to the defendant in exceptional circumstances of the banker customer relationship. Learned Counsel Miss Chelsea Frampton on behalf of the bank contended on the other hand, that this is not a defence that is available to the defendant at all and that the said defence has no reasonable prospects of succeeding in the circumstances of this case.

[41] A court may set aside a transaction for undue influence which falls to be considered in two categories, that is actual influence and presumed undue influence. The court as a judge of the facts will have to consider the allegations made by the defendant. The court will have to look at the circumstances surrounding the loan documents and based on the affidavit before the court. I am of the view that a proper assessment can only be done and made after the parties have given their evidence and after they are cross examined. To deny the defendant the opportunity to fully flesh out his defence would be unfair to him and definitely not in keeping with the court's pursuance of the Furtherance Overriding Objective of CPR.

[42] The defendant in this case alleges that there was a relationship or trust and confidence between him and the bank. In the case of **Lloyds Bank –v- Bundy**¹³it was held that it is possible though not usual for the relationship between banker and customer to become one to which the principles of

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¹³ [1975] QB 326

undue influence may apply. In the case of **National Westminster Bank –v- Morgan** ¹⁴it was held that a presumption of undue influence may arise but it was emphasized in that case that ordinarily there was no such presumption even if the Banker gives an explanation of the terms of the transaction before the customer enters into it.

Disposition

[43] In the face of these decisions it is my view that the defence as raised by the defendant is not entirely hopeless, and as has been said before, he may be swimming against the tide but to deny him the opportunity to explore his defence would be grossly unfair and I find that it would be severely prejudicial to him and would not be in keeping with the pursuit of complying with the furtherance Overriding Objective of CPR. Therefore in the circumstances of this case, I would decline to strike out the defendant's defence as prayed for by the claimant with costs in the cause.

[44] I wish to thank counsel for their excellent written submissions made in this matter.

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M E Birnie Stephenson
High Court Judge

¹⁴ [1985] 1 ALL E R821, [1985] AC 686

