

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SKBHCV2011/0320**
Consolidated with Claim Number: SKBHCV 2016/0311

Between

ADAM BILZERIAN

Claimant

and

KEVIN ANDREW HORTSFORD

Defendant

APPEARANCES:

Paul Bilzerian appearing for Adam Bilzerian claimant in person
Defendant in person

November 15, 2017

JUDGMENT

1. **ACTIE A:-** The parties in the matters are well known for the many interlocutory applications. The claimant applications before the court are for summary judgment to be entered against the defendant. The two claims have since been consolidated by Lann's J.
2. Before proceeding to deal with the substantive applications I wish to deal with a few house-keeping matters for effective case management of the claims.
3. Counsel Mr. Terrence Byron has presented himself as counsel for the defendant however he contends that he is not representing the defendant. The court notes that all the filings have been in the name of the defendant in person. CPR 63.3 provides that if a person who has previously acted in person instructs a legal practitioner, that legal practitioner must comply with CPR 63.2. Mr. Byron has not indicated in what capacity is he is appearing for the defendant. I am of the view that having failed to place himself on the record in accordance with Rules and stating that he is not representing the defendant he should not be allowed to present the defendant's case.
4. In relation to claim no. 2016/0311, the court notes that the pleadings in the statement of claim from paragraphs 11 to 13 refer to the terms of the judgment of Thomas J which was set aside by the Court of Appeal. It is necessary for the claimant to file an amended claim obliterating the offending paragraphs to reflect the current position. It is noted that the order of Master Glasgow dated 2nd February 2017 directed the defendant to file an amended defence within 14 days. The defendant in breach of the order and without any application for an extension of time filed an amended defence on the 16th October 2017, some 8 months after the order of

master Glasgow. This is a blatant disrespect of the court order without any lawful excuse and accordingly the amended defence filed on 16th October 2017 is struck out and the reply to the amended defends also fails.

Application for Summary Judgment in claim SKBHCV2011/0320

5. The claimant on 16th January 2012, Bilzerian filed an application pursuant to CPR 15.2 for summary judgment on the grounds that the Horstwood does not have any real prospect of succeeding on his defence. In the application, Bilzerian sought declaratory reliefs namely:- (i) that he owns all the issued and outstanding shares of CBS;(ii) that the defendant is not a shareholder nor does he hold any position in CBS; (iii)The defendant is not a shareholder nor does he hold any position in Lemon Grove;(iv) An injunction restraining the Defendant whether by himself, his agents or assigns from in any way interfering in the running of the affairs of either CBS or Lemon Grove.
6. The facts giving rise to the claim are that on or about 18th January 2010, Bilzerian loaned Horstwood the sum of USD385,000.00 secured by promissory notes which required repayment with interest on or before 17th January 2011. On 17th January 2011, Horstwood, CBS and Lemon Grove acknowledged that were unable to honour the debt and would do so by 1st March 2011 which was approved in a forbearance agreement extending the payment to 1st March 2011. Horstwood, CBS and Lemon Grove failed to make the agreed payment on the 1st March 2011 which resulted in a further extension to 20th May 2011 and then to 20th July 2011. On 22nd July 2011, Horstwood, CBS and Lemon Grove informed Bilzerian that they were unable to satisfy the debt.
7. On 24th August 2011,Bilzerian, Horstwood, CBS and Lemon Grove entered into an agreement on terms, acknowledging the default of the payment of the debt and Bilzerian assumed ownership of all shares of CBS and Lemon Grove in exchange for a release from any further liability on the promissory notes. Horstwood resigned as Manager and Director of CBS and Lemon Grove effective August 22, 2011. Horstwood acknowledged that he was not authorized to take any action of any kind on behalf of CBS or Lemon Grove without disclosing that he no longer represents either of them. In August 2011, Bilzerian was appointed Director, Manager and President of CBS and Lemon Grove. Horstwood was removed from the directorship and relinquished his positions as President and Manager.
8. On 25th October 2011, Horstwood sent a letter to Bilzerian claiming to be CEO of CBS and Lemon Grove and demanded that Bilzerian immediately cease and desist from representing as President of CBS or Lemon Grove. Both CBS and Lemon Grove are indebted to financial institutions which are subject to litigation before this court. Bilzerian contend that Horstwood has refused to turn over CBS and Lemon Grove to Bilzerian and continues to interfere in the affairs of both companies.
9. The application for summary judgment was heard and granted by Thomas J on the 2nd March 2012. The Court of Appeal set aside the order for summary judgment and remitted the matter to the court below to determine the application.in accordance with the CPR2000..
10. For the purposes of moving the claim forward, Bilzerian agrees to the amended defence, albeit late, filed by the defendant on 16th October 2016.

11. Horstwood denies a loan from the claimant but admits that one Paul Bilzerian arranged the loan from a third party company. Horstwood avers that the loan was arranged by Bilzerian who was aware that the defendant's company was in need of funds in respect of a property transaction. Horstwood avers that the agreements were signed under economic duress and coercion. Horstwood contends that Bilzerian orchestrated extortionate conditions with draconian penalties in the said agreements..
12. Bilzerian contends that Horstwood having had independent legal advice and having received the loan, he is estopped from pleading duress.

Law and Analysis

13. **CPR 15.2** gives the court a discretionary power to enter summary judgment on a claim or on a particular issue if it considers that the:-
 - (a) Claimant has no real prospect of succeeding on the claim or the issue or
 - (b) Defendant has no real prospect of successfully defending the claim or the issue
14. The Court of Appeal in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**¹ states that summary judgment should only be granted by a court in cases where it is clear that a claim or (**defence**) on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. Pereira C.J then George-Creque JA, at paragraph 21 stated:

"[21] The principle distilled from these authorities by which a court must be guided may be stated thus: Summary Judgement should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in *Swain v Hillman* is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment."

¹ HCVAP2009/008 delivered on 11th January 2011.

15. In **Bolton Pharmaceutical Co 100 Ltd. v Doncaster Pharmaceuticals Group Ltd and Others**²Mummery LJ stated:

“17. It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.” (emphasis added)

16. Horstwood admits signing the loan agreements, first in favor of International Investments and then later in January in favor of Bilzerian but contends that the agreements were signed under economic and physical duress. A contract can be avoidable if economic duress is proved. In order to prove economic duress as alleged, it is for the defendant to prove that the claimant applied illegitimate economic pressure and “But for” that illegitimate economic pressure, the defendant would not have entered into the disputed contract.
17. Although there is no obvious conflict of fact that Horstwood signed the loan agreements, however the pleadings have raised issues of duress and unconscionable bargain which are matters for determination at trial. The court will not make a final decision of the issues raised without exploring the evidence which would be tantamount to conducting a mini trial, which is the very same practice denounced in authorities in an application for summary judgment. The defendant will have to discharge the burden of economic duress and to prove that there were no other alternatives available to him. A full investigation is necessary into the facts of this case after disclosure of all the relevant evidence.
18. I am of the view that the claimant has not made a case for summary judgment and accordingly the application is dismissed. The court takes into consideration that the parties are pro se litigants and awards costs in the cause to avoid any further delay in the matter which hinges on numerous other matters in the system.
19. Having so ruled, the claimant has withdrawn the application for summary judgment in relation to claim No 2016/0311 and the parties agreed to the issue of trial directions to expedite the claim which has engaged so much of the court limited resources.

Order

20. In summary, it is ordered and directed as follows:-

² [2006] EWCA Civ 661,

- (1) The application for summary judgment filed by the claimant in claim **SKBHCV2011/0320** is dismissed.
- (2) Leave is granted to the claimant to withdraw the application for summary judgment filed in claim **SKBHCV 2016/0311**.
- (3) Costs in the cause.

**AGNES ACTIE
MASTER**

BY THE COURT

REGISTRAR