THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2018/0262

BETWEEN:

ST. LUCIA WORKERS CREDIT UNION LIMITED

Claimant

and

PETER DELBERT FERDINAND

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Ms. Beverley Downes for the Claimant
Mrs. Andra Gokool-Foster for the Defendant

2018: November 20;
2019: January 29.

RULING

[1] CENAC-PHULGENCE J: The claimant, St. Lucia Workers' Credit Union Limited, ("SLWCU") filed a claim against Peter Delbert Ferdinand ("Mr. Ferdinand") for the sum of $92,287.79 representing the balance due and owing on a loan of $90,000.00 on 4th June 2018.

[2] SLWCU is a society registered under the Co-operative Societies Act. By hypothecary obligation dated 25th March 2009 registered as Instrument Number 1549/2009, Mr. Ferdinand agreed to act as surety for a loan of $90,000.00 granted by SLWCU to the principal debtor Claudius Pierre.

[3] Claudius Pierre defaulted on the loan payments. A claim was filed against Claudius Pierre on 5th August 2014 and on 31st August 2015, judgment in default was obtained against Claudius Pierre for $92,598.05 together with interest at the rate of 12% per annum on the said sum from 12th September 2011 to the date of payment and fixed costs in the sum of $2,127.50.

[4] SLWCU alleges that Mr. Ferdinand has not settled the debt despite being jointly and severally liable with Claudius Pierre for its repayment.

[5] On 4th July 2018, Mr. Ferdinand filed an application to strike out the claim and statement of claim seeking an order that the claim be struck out as being an abuse of process and that the action is prescribed in accordance with the Civil Code.

[6] The grounds of the application are as follows:

(a) SLWCU filed a claim SLUHCV2014/0533 on 5th August 2014 against the principal debtor, Claudius Pierre for non-payment of the debt on a breach of contract which occurred on 12th September 2011.

(b) By default judgment dated 31st August 2015 in that claim, SLWCU has already secured the exact amount being claimed against Mr. Ferdinand in this fresh claim;

(c) SLWCU did not join Mr. Ferdinand to the previous claim;

(d) The cause of action giving rise to this claim arose in 2011 and the claim is prescribed;

(e) SLWCU is seeking to gain an unfair advantage having already obtained judgment in default against Claudius Pierre;

(f) SLWCU is seeking to commence an action in 2018 against Mr. Ferdinand for a breach which occurred in 2011 and for which judgment was entered in 2015.

[7] SLWCU filed an affidavit in reply on 4th September 2018 to which the defendant responded by affidavit filed on 16th October 2018. Submissions were filed by both parties as ordered by the Court.

[8] SLWCU says that they were not obliged to join Mr. Ferdinand as a party to the claim against the principal debtor. The two were jointly and severally liable for the loan and so SLWCU could choose to sue the parties separately if it so wished. The claim is seeking to recover the judgment debt for which he and the principal debtor are jointly and severally liable.

[9] SLWCU alleges that Mr. Ferdinand's liability to pay the debt is not dissolved because a judgment was previously obtained against the principal debtor. SLWCU denies that the claim is prescribed and says the loan was granted in 2009 for a period of five years and so the loan could have been paid at any time within that period. SLWCU had up to six years after the end of the loan period to file a claim against him.

[10] Mr. Ferdinand says he was jointly not severally liable with Claudius Pierre and ought to have been sued simultaneously with Claudius Pierre. Mr. Ferdinand says the cause of action did not arise on the basis of the amount of time that was given for repayment of the loan but rather from the date of the first default. Even if one wanted to say that the cause of action arose five years after the loan was granted, then 3 years from that date would take you to 2017. SLWCU filed the claim in June 2018 and so it is prescribed. It is Mr. Ferdinand's contention that it is article 2122 which is the applicable provision and not 2121 and therefore the period for filing of the claim in these circumstances would be 3 years.

Issue (a)

Whether the surety can be sued after the creditor has obtained judgment against the principal debtor

[11] Counsel for the claimant submitted that unless otherwise provided for in a contract of guarantee, the liability of a surety towards a creditor is co-extensive with that of the principal debtor and therefore liability is joint and several. Counsel referred to

the case of Development Bank of St. Kitts and Nevis v Brian Browne et al[1] at para 30 where the learned judge said the following:

> "…Each person who has agreed to pay the debt has effectively entered into a separate contract to pay the debt. The promisee has a joint and a separate remedy against each. It is in this context that the case law has to be understood. When there is release, it extinguishes the single performance. Where it is a question of recovering the debt, the promisee has the right to sue each and every promisor on the several and separate contract to pay."

[12] Counsel for the claimant also referred to article 1837 of the Civil Code which makes the surety liable to pay the debt when he has bound himself jointly and severally with the other. Article 1837 states:

> "The surety is liable only upon the default of the debtor, who must previously be discussed, unless the surety has renounced the benefit of discussion, or has bound himself or herself jointly and severally with the debtor. In the latter case the liability of the surety is governed by the rules with respect to joint and several obligations."

[13] Counsel for the defendant submitted that the claimant has not done what is necessary to enforce the debt but seeks to recover against the defendant in his individual capacity. The judgment was obtained against the principal debtor and so it is an absurdity to seek to have a judgment which was not obtained against the defendant enforced against him. There is no jurisdiction to permit enforcement of a judgment against a person who was not a party to the claim. Further counsel argues that the claimant did not comply with article 2085 and therefore is precluded from filing action against the defendant whether jointly or severally.

Analysis:

[14] Halsbury's Laws 4th Edition Volume 9, at paragraph 624 states that the doctrine of merger of cause of action "has no application in cases where liability of the debtor is several as well as joint" and states that in this case there could have been no merger.

[1] SLUHCV2012/0084, delivered 8th April 2014, (unreported).

[15] The mortgage document at the proviso to clause 5 states as follows:

> "Provided that if any of the said instalments or any payments of interest or any part thereof respectively shall be unpaid for twenty-one days after the date on which it ought to be paid as aforesaid or if the PRINCIPAL DEBTOR and/or THE SURETY shall fail to perform any of their obligations under this Hypothecary Obligation other than the obligation in regard to the payment of the PRINCIPAL SUM or interest at THE AGREED RATE THE PRINCIPAL DEBTOR and/or THE SURETY will pay to the MORTGAGEE on demand such part of THE PRINCIPAL SUM as shall for the time being remain unpaid and will pay interest thereon at THE AGREED RATE."

[16] This provision clearly speaks to joint and several liability and the surety cannot run away from this fact. This is the nature of this contract. It therefore means that a claim can be brought against the surety even though one has already been brought and judgment obtained against the principal debtor once the claim is not prescribed.

Issue (b)

When did the cause of action arise?

[17] Counsel for the claimant argued that the cause of action arose when the claim was filed against Mr. Ferdinand on 4th June 2018 and placed him in default. Counsel refers to the case of Nelson and others v FirstCaribbean International Bank (Barbados) Limited PC Appeal No. 0043 of 2013. Counsel also refers article 999 of the Civil Code which provides that a creditor may place a debtor in default … by commencement of a suit or by a demand which must be in writing. Article 1001 provides that once there has been a default under article 999, a claim for damages for non-fulfilment of an obligation is sustainable.

[18] The mortgage document provides that where there has been default in the repayment of one of the instalments, the principal debtor and surety will pay to the mortgagee on demand such part of the debt that is outstanding.

Issue (c)

What is the relevant prescription period?

[19] Counsel for the claimant argued that article 2121(4) is the applicable provision and it provides that any claim of a commercial nature is prescribed by six years. Counsel for the claimant submitted that in Nelson the Privy Council said that the six-year prescription period runs from the date of maturity. Counsel submitted further that under article 2089, a judicial demand brought against the principal debtor, or his acknowledgement interrupts prescription as regards the surety. The judicial demand was served on the principal debtor on 26th January 2015. Prescription would therefore start afresh for the defendant as of that date. Counsel submitted that a hypothecary obligation does not fall within article 2122(2).

[20] Counsel for the defendant argued that article 2121 does not apply to this case and it is article 2122(2). Counsel argued that article 2085 required that the claimant serve a judicial demand on the defendant which signals that prescription is interrupted.

Analysis

[21] I deal with issues (b) and (c) together.

[22] Article 2121of the Code provides as follows:

> "2121. The following actions are prescribed by 6 years:
> 1. …
> 2. …
> 3. …
> 4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of merchandise, whether negotiable or not, or upon any claim of a commercial nature, reckoning from maturity; bank notes, however, being excepted from this prescription;
> …"

[23] Article 2122 of the Code provides as follows:

> "The following actions are prescribed by 3 years;
> 1. For seduction, or lying-in expenses;

2. For damages resulting from delicts or quasi-delicts, whenever other provisions do not apply;
3. For wages or salaries of employees not reputed domestics and who are engaged or hired for a year or longer period;
4. For sums due to schoolmasters and teachers, for tuition, and board and lodging furnished by them."

[24] Article 999 of the Civil Code provides four ways in which a debtor can be placed in default, either by the terms of the contract, through lapse of time specified for its performance, by mere operation of law, by the commencement of a suit or by a demand which must be in writing except in the case of a verbal contract.

[25] The provisions of the mortgage document speak to where any instalment has been unpaid for twenty-one days after the date on which it ought to have been paid or if the principal debtor and/or the surety fail to perform any of their obligations under the contract, the principal debtor and/or the surety will pay on demand the unpaid sum.

[26] The loan period is stated as sixty months so that the date of maturity of the loan would have been in 2014.

[27] The Court notes that in the Nelson judgment, the Privy Council expressed doubt as to whether article 2121(4) would be applicable in circumstances such as these. The issue was not before the Court for determination. The Court went on to say that it appears very arguable that claims for breach of contractual obligations are subject to the thirty-year prescription period under article 2103. The case therefore did not decide the point and cannot be used as the authority on the point. This Court is of the view and finds that the applicable article is article 2121(4) as this is a commercial contract. The cause of action in this case is neither in relation to a delict nor quasi-delict.

[28] This would mean that the claimant would have had six years from 2014 to pursue the debt against the principal debtor and/or the surety. The instalment payments

not having been made from 12th September 2011, the claimant chose to exercise its option to recover from the principal debtor. At this point, the cause of action would have arisen from 12th September 2011 and the period of prescription would run from that date. The claim would therefore have been prescribed on 11th September 2017. The claim was filed in 2014. If I am wrong on the applicable prescription period, it can only be that the relevant article is 2103 which would then make the prescription period thirty years.

[29] Article 2085 states that a judicial demand in proper form served upon the person whose prescription it is sought to hinder, or filed and served conformably with the Code of Civil Procedure when a personal service is not required interrupts prescription. Counsel for the defendant argued that there was no demand made of the defendant and therefore article 2085 could not apply.

[30] Counsel for the claimant argued that the obtaining of the default judgment was a judicial demand and therefore interrupted prescription. However, the judgment was obtained against the principal debtor and not the surety. It is incorrect that a judgment properly obtained against a party is a judicial demand. It is the commencement of a suit or a demand in writing which qualify as a judicial demand.

[31] The position was clarified by Gordon JA in David Sweetnam et al v The Government of Saint Lucia[2]

> "It must therefore follow that prescription in St. Lucia is only interrupted civilly by the commencement of a suit before a court of competent jurisdiction and the proper service of such suit on the party whose prescription it is sought to interrupt. This conforms absolutely with the plain ordinary meaning of the language of article 2085."

[32] It is clear that the filing of a claim and the proper service on a defendant to that claim interrupts prescription. As regards the surety, the filing of the claim in 2014 against the principal debtor and its service on him on 26th January 2015 meant that the

[2] SLUHCVAP2005/0042 at para 11.

prescription period began to run again from the date of service (26th January 2015) in relation to the surety. Therefore, the cause of action against the defendant would become prescribed on 25th January 2021.

[33] Given the fact that a claim can be brought against the surety as he is jointly and severally liable, there is nothing preventing the claimant from bringing an action against the surety even if it is for the same debt once the relevant prescription period has not run. The Court therefore finds that there is no basis for striking out the claim and that the claim is not prescribed.

[34] The Court considered the submission of counsel for the defendant that in light of the fact that this issue has not been ventilated before the Court that no costs should be awarded and although objected to by counsel for the claimant, the Court is minded to not make an order for costs.

Conclusion

[35] The Order is as follows:

(a) The application to strike out the claim is dismissed with no order as to costs.

(b) The defendant is to file a defence to the claim within 14 days of today's date and the matter shall thereafter proceed in accordance with the Civil Procedure Rules 2000.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar