[2019] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 221/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN ANTHONY THARPE APPLICANT

AND JMMB MERCHANT BANK LTD RESPONDENT

Applicant in person

Mrs Symone Mayhew and Miss Leslie-Ann Stewart instructed by Symone Mayhew for the respondent

12 March 2019

MCDONALD-BISHOP JA

[1] Mr Anthony Tharpe ("the applicant") has brought two distinct but related applications for the consideration of this court in these proceedings. The first is an application for permission to appeal an order of Master Harris, made in the Supreme Court on 27 September 2018, in which she granted summary judgment in favour of JMMB Merchant Bank Ltd ("the respondent"). The second application, as stated by the applicant, is for this court to grant, "an automatic stay estopping the Registrar of Titles

from transferring Title to subject property of the Action with the stay of any transfer of titles retroactive to the commencement date of this action until the matter is settled".

[2] The learned Master had refused the applicant's oral application for permission to appeal. He now renews the application, in writing, before this court.

[3] At the commencement of the hearing, the applicant indicated that the second application would not be pursued as the property in question had already been transferred by the Registrar of Titles. The application for the automatic stay was, therefore, withdrawn.

[4] An insight into the factual background to the application for permission to appeal as well as the history of the proceedings in the Supreme Court should prove useful.

The factual background

[5] On 3 July 2017, the applicant brought a claim against the respondent seeking permanent injunctive reliefs and damages for, among other things, breach of contract, breach of promise, breach of agreement, intentional economic damage as well as aggravated, special and exemplary damages, interest and costs.

[6] The applicant's claim was that he had entered into a binding agreement with the respondent to pay the sum of $8,250,000.00 to settle an outstanding loan, held against property located at Friendship Mountain, Montego Bay in the parish of Saint James ("the property"). The property was owned by Mr Steven McPherson and Ms Winnifred McPherson.

[7] The respondent was known as Capital and Credit Merchant Bank Limited but changed its name to JMMB Merchant Bank Limited and then to JMMB Bank (Jamaica) Limited. In March and December 2008, the respondent had extended loans to Mr Steven McPherson, in the sum of $1,500,000.00 and $6,000,000.00, respectively. The loans were secured by a first legal mortgage over the property and supported by a personal guarantee in the name of Ms Winnifred McPherson.

[8] Mr McPherson defaulted on the loan and despite demands from the respondent failed to make good the default. Consequently, the respondent commenced steps to exercise its statutory power of sale.

[9] The applicant, who is a developer, entered into an arrangement with Mr McPherson to negotiate with the respondent to pay the outstanding loan as well as develop the property. He called himself the "successor developer".

[10] By email of 4 August 2016, the applicant entered into discussions with the respondent, indicating that he had the permission of Mr McPherson to repay the outstanding loan and offered the sum of $8,000,000.00 in full and final settlement of the debt. This offer was rejected by the respondent and it made a counter-proposal to the applicant of $9,000,000.00.

[11] The applicant, again, wrote to the respondent on 28 April 2017, offering a revised sum of $8,250,000.00 in settlement of the debt. The respondent responded by letter of 9 May 2017, indicating an "interest in the [applicant's] intent" to pay off the loan. The respondent, however, requested from the applicant a loan payoff proposal, a

letter of authority from Mr McPherson as well as other documents requesting for it to accept the payoff amount and thereafter, to forward the certificate of title and relevant mortgage discharge documents to his attorney-at-law. This information was necessary for the offer to be referred for consideration by the respondent's credit risk department before any proposal from the applicant could be accepted.

[12] There was, however, no response to the respondent's letter. In the interim, the loan remained outstanding and the respondent continued to advertise the property for sale, pursuant to its statutory power of sale. In or about May 2017, the respondent received an offer from a third party to purchase the property, which it accepted and a binding agreement for sale was subsequently executed.

[13] In June 2017, Mr McPherson, through his attorney-at-law, wrote to the respondent enquiring about the status of his outstanding loan account. The respondent told him that having received no communication from the applicant to its letter of 9 May 2017, it had exercised its power of sale.

[14] The respondent's affidavit, filed in support of the application in the court below, exhibited all the relevant correspondence, which have been examined by this court.

[15] The applicant sought to challenge the respondent's exercise of its statutory power of sale. He maintained that he had entered into an agreement with the respondent to settle the outstanding loan in the sum of $8,250,000.00. He further stated that on the basis of that agreement, he had taken steps and expended money in order to qualify for financing and to make the payment to the respondent as agreed. He

contended that there had been a breach of the agreement by the respondent, it having sold the property to a third party.

[16] The respondent denied being liable to the applicant for breach of contract and/or promise, and/or agreement or any at all. It averred that it was not liable to the applicant for the reliefs sought, including the claim for aggravated and exemplary damages.

The application for summary judgment

[17] On 5 December 2017, the respondent filed an application, intituled, "Application for Summary Judgment", in which it sought, among other things, the following orders:

a) mediation be dispensed with;

b) the applicant's claim be struck out; and

c) in the alternative, that summary judgment is entered in favour of the respondent against the applicant.

[18] The respondent contended that mediation was inappropriate and that the applicant had failed to demonstrate that he had reasonable grounds for bringing the claim and that he had a real prospect of succeeding on the claim. As such, the claim should be struck out or, in the alternative, summary judgment be granted in its favour in accordance with rule 26.3(1)(c) and 15.2(a) of the Civil Procedure Rules, 2002 ("the CPR").

[19] The respondent's principal averment in contending that the claim ought to be struck out or that summary judgment be granted, was that there was no contract between itself and the applicant to settle the debt, which had been owed by Mr McPherson and, as such, it was entitled to exercise its power of sale.

[20] The application was supported by the affidavit of Mr Leroy Chambers, Recoveries Officer of the respondent. To this affidavit were disclosed several pieces of written communication between the applicant and the respondent as well as between the respondent and Mr McPherson. The documentary evidence adduced by the respondent supported its contention that there was no agreement with the applicant, enforceable at law, and that it was, therefore, entitled to sell the property.

[21] No affidavit was filed by the applicant, in response, in keeping with rule 15.5 of the CPR. Therefore, the only evidence which was before the learned Master was that of the respondent, which, for all intents and purposes, would have stood unchallenged.

[22] The primary issues for determination on the application for summary judgment before the learned Master was (a) whether there was a binding agreement between the applicant and the respondent; and (b) whether the respondent was entitled to enforce its power of sale to sell the property to a third party.

[23] It is against this background of the competing cases and the issues identified for determination on the summary judgment application by the respondent that the learned Master entered summary judgment in its favour.

[24] No reasons were made available to this court by the learned Master. However, implicit in her decision to grant summary judgment must have been her acceptance of the respondent's contention that the applicant had no real prospect of succeeding on the claim or on any of the issues identified for resolution, which is the test to be applied in an application for summary judgment.

The application for permission to appeal

[25] In his proposed grounds of appeal, which are disclosed in the application for permission to appeal, the applicant contends that he seeks to challenge certain findings of fact and law of the learned Master. He sets out several grounds in his proposed notice of appeal, amounting to over 21, which need not be detailed for present purposes.

[26] The applicant's main complaints in the proposed grounds of appeal, as helpfully distilled and summarised by counsel for the respondent, are as follows:

a) the learned Master erred in granting summary judgment as she inaccurately identified the main issues in dispute between the parties (grounds 13, 14, 15, 16 and 22);

b) the learned Master failed to recognise that the respondent had failed to put in evidence all information concerning an agreement reached between the parties (grounds 17, 18, 19, 20, 23, 24, 25, 28 and 29);

c) the learned Master relied on the basis of "a voluntary abandoned" pleading by the respondent for summary judgment, which was improper and erroneous. The respondent had abandoned the issue of whether it was entitled to exercise its power of sale (grounds 12 and 21); and

d) in circumstances where there was at least one fact in issue between the parties, summary judgment was improper (ground 26).

[27] The applicant's core contention, as garnered from his proposed grounds of appeal, his extensive written submissions and his oral arguments before this court, is that the learned Master erred in granting summary judgment in a claim, which ought to have proceeded to trial because there were disputed issues of fact for resolution by the court as it relates to the existence of a binding agreement between the parties.

[28] The applicant contends that there was an agreement between himself and the respondent that possessed all the elements of a binding contract, and so, the learned Master would have erred in agreeing with the respondent that there was no legally enforceable contract.

[29] The applicant further avers that the mortgage held by the respondent against the property was invalid by virtue of the Limitations of Actions Act. According to the applicant, he and Mr McPherson were in possession of the property for in excess of 12 years before the respondent contracted to sell the property. By virtue of this, he says,

the respondent's power of sale as mortgagor would have been extinguished. He maintains that the Registrar of Titles had failed to give regard to that fact, which was one to which the respondent had not responded.

[30] The applicant, therefore, maintains that in all the circumstances as detailed by him, and in the light of the relevant authorities, the grant of summary judgment was not proper or in keeping with the overriding objective of dealing with the case justly, as, it could not be said that his claim was without a real prospect of success.

[31] The respondent's response to the application for permission to appeal is comprehensively detailed in its filed written submissions, which have been supplemented by oral submissions made by counsel on its behalf. The respondent's primary contention is that the applicant's proposed grounds of appeal are without merit. It contends that there is no evidence that the learned Master misapplied the principles of law or misconceived the facts so that her decision is so palpably wrong to warrant the interference of this court.

Analysis and findings

[32] Having considered the statements of case of both parties that were before the learned Master, the proposed grounds of appeal, the submissions advanced on the parties' behalf in this court, both written and oral, as well as the applicable law, I agree with the respondent that the proposed appeal is without merit. Summary judgment was properly entered by the learned Master and the concomitant award of costs to the

respondent is justifiable. There is, therefore, no real chance of the applicant succeeding on appeal. I say so for the reasons detailed below.

Principles governing application for leave to appeal

[33] Rule 1.8(9) of the Court of Appeal Rules, 2002 ("the CAR") states that as a general rule, permission to appeal in civil cases will only be given if the court considers that the appeal has a real chance of success. This has been established, on strong authority from this court, to mean that the applicant must show that there is a realistic, as opposed to a fanciful, prospect of success. See **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paragraphs [26]-[27] and **Duke St John-Paul Foote v University of Technology Jamaica and Elaine Wallace** [2015] JMCA App 27A, adopting Lord Woolf MR's formulation in **Swain v Hillman and another** [2001] 1 All ER 91.

[34] It stands to reason, then, that for the applicant to succeed on the application, he must satisfy this court that the learned Master erred as a matter of law, in the exercise of her discretion, when she granted summary judgment in favour of the respondent.

[35] Given that this court is being called upon to disturb the exercise of the learned Master's discretion, the guiding principles enunciated by Lord Diplock in the oft-cited case of **Hadmor Productions Limited v Hamilton** [1982] 1 All ER 1042, 1046 and reiterated by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, at paragraphs [19] and [20], have been borne in mind.

[36] In considering the application, I have also been guided by the dicta of the Privy Council in the relatively recent case of **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12, in treating with the use of the summary judgment machinery. Their Lordships have provided sufficient guidance to a court in determining whether the summary judgment machinery should properly be invoked. They instructed, in so far as is immediately relevant, that:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
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> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.
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> 18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:
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> > 'The court may give summary judgment on the claim or on a particular issue if it considers that -
> >
> > (a) The clamant has no real prospect of succeeding on the claim or the issues; or

> (b) The defendant has no real prospect of successfully defending the claim or the issues.'
>
> That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.
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> 19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant...
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> 20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim:..."

[37] The applicant failed to comply with the requirements of rule 15.5 of the CPR, which states that a respondent to a summary judgment application who wishes to rely on evidence must file and serve affidavit evidence on the applicant or any other party to the proceedings. It follows that the learned Master was not obliged by law to have regard to any fact raised by the applicant, which was not contained in his statement of case or in an affidavit.

[38] Also, the applicant's submissions before this court that the statute of limitation applies and raises a triable issue on the claim, is not accepted. The statute was never

pleaded on the applicant's statement of case and he is bound by his pleadings. Furthermore, it would not apply to the respondent's exercise of its power of sale.

[39] It is quite clear on all the evidence presented, and on the parties' statements of case, that there was no binding agreement in law between the applicant and the respondent. The unchallenged evidence before the learned Master, and which has been reviewed by this court, reveals that immediately prior to the respondent's exercise of its power of sale, the material communication between the applicant and the respondent, was, firstly, that which was contained in email dated 28 April 2017. In that email, the applicant wrote to the respondent, offering the sum of $8,250,000.00 in settlement of the debt. The second communication was the response of the respondent to the applicant's offer, by the letter of 9 May 2017, expressing its interest in the applicant's intention to pay off the loan and requesting certain documentation from the applicant, including, a loan payoff proposal. There was no response by the applicant to the respondent's letter and request.

[40] The applicant had put forward no evidence before the learned Master, challenging the veracity of the respondent's case in respect of the foregoing matters, supported as it was by contemporary documentation.

[41] The evidence reveals that negotiations were still ongoing between the parties as can be seen from the last piece of communication from the respondent. The respondent had done nothing more than to express its interest in the "intent" of the applicant to make the payment and requested certain information from him, which was never

received. There was no unequivocal and unqualified acceptance by the respondent of the applicant's offer to pay the sum indicated by him, which would constitute an agreement. In more expansive terms, there was no offer from the applicant, which was crystallised into a binding agreement by any acceptance on the part of the respondent, supported by consideration moving from the applicant to the respondent, which are three fundamental prerequsites for a binding contract in law.

[42] It was, therefore, open to the learned Master to accept the case presented by the respondent that there was no binding agreement between the parties, enforceable at law, to ground a claim for breach of contract, promise or agreement. Therefore, the applicant had no realistic prospect of successfully establishing, as a matter of fact or law, that there was a binding agreement capable of enforcement at law which would have rendered him entitled to the various remedies he was seeking. The learned Master was also entitled to conclude, as she obviously did, that the respondent had the right to exercise its power of sale.

[43] The summary judgment machinery was properly invoked as a matter of fact and law and the learned Master was correct in granting summary judgment in favour of the respondent.

[44] Indeed, the learned Master could have properly found that the applicant's statement of case revealed no reasonable cause of action against the respondent or any reasonable grounds for bringing the claim, which could have led to an order striking out the claim, pursuant to rule 26.3(1)(c). The claim that the respondent was liable for

breach of promise, contract or agreement, as alleged by the applicant was bound to fail.

[45] In such circumstances, the finding by the learned Master that summary judgment was appropriate, cannot be disturbed by this court.

[46] There is no reasonable prospect of the applicant successfully arguing on appeal that the learned Master erred in granting summary judgment.

Conclusion

[47] The court has considered the comprehensive submissions of the applicant, for which he must be commended as a self-represented litigant, but, unfortunately, this court cannot agree that there is a proper basis to disturb the order of Master Harris granting summary judgment in favour of the respondent with costs. There is no real chance of the applicant succeeding on appeal.

[48] For the foregoing reasons, I would refuse the applicant's application for permission to appeal with costs to the respondent.

F WILLIAMS JA

[49] I agree.

FRASER JA (AG)

[50] I agree.

MCDONALD-BISHOP JA

ORDER

i. The application for permission to appeal the order of Master Harris, filed on 8 October 2018, is refused.

ii. Costs of the application to the respondent to be taxed, if not sooner agreed.