Republic of Trinidad and Tobago

In the High Court of Justice

Claim No. CV2011-02972

Between

CARYN SOBERS

Claimant

and

PRICESMART TRINIDAD LIMITED
PS OPERATIONS LIMITED

Defendants

Before the Honourable Mr. Justice James C. Aboud

Dated: 22 March 2012

Representation:

- Mr. Moore, instructed by Ms. Roberts for the claimant
- Mr. Farees Hosein, instructed by Ms. Neebar for the defendants

REASONS FOR DECISION

1. On 27 February 2012 I refused the claimant's application for an interim payment. These are my reasons for doing so.

2. The Claimant was a cashier at Pricesmart, Chaguanas, employed for a period of three months, who brought an action for personal injuries against her employers. This is what is stated in paragraph 2 of the statement of case:

> "On 1st July 2009 at the Defendant's premises at Pricesmart Membership, Chaguanas, during the course of her employment as a front end cashier with Defendant No. 1 and/or Defendant No. 2…the Claimant was cashing items for a customer when she lifted a pack of washing detergent which was located on the bottom rack of the customer's trolley to scan and felt a crack in her left wrist which was caused by the negligence of the Defendants in failing to provide a safe system of work"

3. Briefly stated, the claimant pleads that she underwent a course of physiotherapy, then, when pain persisted, she had an operation on her left wrist. A long period of post-operative physiotherapy then ensued. Attached to the statement of case are three medical reports from Dr. Araujo, her orthopedic specialist, dated 4 August 2009, 3 December 2010 and 19 February 2011. The most recent of these reports discloses that:

> "She has a previously unrecognized tear of the *ligamentum cruetum* of the TFCC, which unfortunately means that she will need a re-exploration and repair of this back to the ulnar styloid with a bony ligamentous repair if necessary".

Dr. Araujo therefore recommends a second surgery to correct the "previously unrecognized tear".

4. The defence alleges that the cashiers are provided with hand held scanners which are to be used to scan the bar codes of heavier, bulkier items without having to lift, remove or take them out of the trolleys. Further, if an item has to be moved to access the bar code the cashiers are allegedly directed to leave the item in the trolley and request assistance from the customer or a supervisor. Finally, the defendants say that if she nonetheless chose, contrary to her instructions, to lift a heavy item she should have used two hands instead of one. The Defence denies negligence and avers contributory negligence in the alternative.

5. The application for the interim payment is made principally to cover the costs of the second surgery, as well as to provide seven months of her wages, a total sum of $57,980. A payment of interim costs is also sought. The affidavit supporting the application contained the following statements of fact in paragraph 6:

> "…My job was to cash items purchased by customers. This involved scanning the bar code of an item with a portable scanner. Heavier items were scanned without removing them from the trolley; lighter items were placed on the conveyor belt by customers, scanned and then lifted or moved by me to the end of the cash-out counter where the customer would place them back into the trolley. Other such items not placed on the conveyor belt were lifted out of the trolley and scanned by me."

6. At paragraph 10 the events of 1 July 2009 are narrated. This is what is said to have happened:

> "I lifted a pack of washing detergent which was located on the bottom rack of a customer's trolley when I immediately felt a crack in my left wrist. I ignored the crack and continued cashing. At about 11:30 am whilst I was on my lunch break I noticed that my left wrist was swollen and was in pain."

7. The supporting affidavit contains a history of the claimant's medical treatment. She visited Dr. Araujo after receiving treatment by a general practitioner. Her hand was placed in a splint and an MRI was obtained. She was sent to a clinic for physiotherapy. Some six (6) months after the event the claimant underwent surgery to repair a tear of the TFCC. Dr. Araujo performed the surgery. The claimant says that she believed that the injuries were repaired. She says that she began her post-operative physiotherapy on 12 April 2010 and it continued until 27 October 2010, a period of over six months. She said that notwithstanding her surgery she was still experiencing pain. In February 2011 she re-visited Dr. Araujo who advised her that she had "an unrecognized tear of the TFCC". She attached his medical report dated 19 February 2010, to which I have previously referred.

8. The claimant says this at paragraph 23 of her supporting affidavit:

> "I verily believe that Dr. Araujo did not notice the second tear of the TFCC when he performed the initial surgery."

The claimant does not disclose the source of this opinion evidence. It is not proven whether the second tear was in existence before the first surgery, and was not noticed by the doctor prior to or during the first surgery, or whether the tear occurred after the surgery, and was only recognized during the post-operative period. Positive evidence, one way or the other, was not adduced.

9. Among all the bundles of documents annexed to the statement of case and the supporting affidavit are a series of progress notes handwritten and issued to Dr. Araujo by the physiotherapist at the clinic. This is what is recorded in the physiotherapist's hand in the progress note dated 22 July 2010:

> "Patient fell with both arms outstretched on 14 July 2010. Please refer to Hand Evaluation Form for further details. Patient presents with some decreased ROM and B strength s/p fall on 14 July 2010. Prior to fall patient has been gradually increasing use of left wrist for functional activities".

10. The claimant's fall occurred approximately three months into her post-operative physiotherapy, which began in April 2010. Dr. Araujo's medical report of 19 February 2011, which anchors the statement of case and the application for the interim payment, does not mention this event. Nowhere in the supporting affidavit does the claimant disclose that she fell on her hands. The physiotherapist's notes are first highlighted by Dr. Victor Coombs, a specialist who examined all the claimant's medical records, and who wrote a report dated 9 October 2011. This report was put on the court's files for the first time as an attachment to the Amended Defence. The amendment was effected by operation of the rules on 11 November 2011, nine days after the application for interim relief was filed. At the time of filing the application for an interim payment the claimant would not have been aware of Dr. Coomb's report, nor his observations about the contents of the physiotherapist's hand written notes.

11. These are the salient conclusions in Dr. Coombs' medical report: the claimant's injury leave of 27 months is extremely excessive by international standards; the kinematics of the traumatic event while cashing at Price Smart would most likely have caused a simple type 1 injury with an excellent prognosis; the excessive sick leave or injury leave suggests the possibility of a pre-existing pathology or another non-work related injury; the patient fell on her hands in July 2010; the permanent partial disability of 21% whole body is excessive as the average disability is in the range of 8% to 12%. Dr. Coombs ends his report by saying that the patient is not a candidate for medical boarding or separation on medical grounds.

12. The defendants' affidavit in opposition puts liability and quantum in stark dispute. Liability is contested on the grounds set out in the defence, which are more fully amplified in the affidavit. Attached to the affidavit is a photograph of a cashiers' counter at Pricesmart, at the side of which are written the following words in large red script: "Leave Heavy Items on Cart". Quantum is disputed on the basis of Dr. Coombs' report which contradicts the medical report of Dr. Araujo in every material respect.

13. Parts 17.4 and 17.5 of the CPR govern applications for interim payments. An application must be supported by evidence which must, among other things, state the claimant's assessment of the amount of damages that is likely to be awarded and set out the supporting documentary evidence (Part 17.4 (4)). The court may only make an order for an interim payment "if it is satisfied that, if the claim went to trial, the claimant would obtain judgment…for a substantial amount of money or costs" (Part 17.5 (1) (d)). The court "must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment" (Part 17.5 (4)).

14. In order to establish that a claimant will obtain judgment for a substantial sum the claimant must show that, at the trial, (a) he is bound to win and (b) that the win will be for a substantial amount of money. It is not enough to show that the claimant is likely to succeed at trial: the court must be satisfied that he is bound to succeed (See: *Civil Litigation, 12th edition, by O'Hare and Browne, 2005, p 353* and also *British and Commonwealth Holdings v Quadrex [1989] QB 842*.) The following passage of Sir Nicholas Browne-Wilkinson V. C. at p 865 of *Quadrex* is helpful: "the rule (meaning the predecessor to the CPR Part 25 UK) requires the court, at the first stage, to be satisfied that the plaintiff will succeed and the burden is a high one; it is not enough that the court thinks it likely that the plaintiff will succeed". Saying that a party is bound to succeed, or will succeed, amounts to a forecast of inevitable victory.

15. With respect to satisfactory proof that the win will be for a substantial sum there is no guideline as to what sum is substantial. The amount will vary with the circumstances of each case. According to the authors of *Civil Litigation, 12th edition,* at p 355, the application must be supported by evidence which deals with the following, among other things:

- The sum of money sought
- The items or matters in respect of which the payment is sought
- The sum of money for which final judgment is likely to be given
- Details of special damages and past and future losses

16. The court's power to make an order for an interim payment is entirely discretionary. However, in Part 17.5 (4), which I referred to above, the court's discretion is partially removed: "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment". This is a prohibition that is dependent on two separate findings. In what order must these findings be made? This is what Langley J helpfully said in relation to this rule in *Spillman v Bradfield Riding Centre [2007] EWHC 89 QB*:

> "Thus the rule requires the court (granted the other conditions are satisfied) to determine, first, 'the likely amount of the final judgment'; second, what is a reasonable proportion of that amount; and third, to address any other maters it considers material to the exercise of the overall discretion whether or not and if so in what amount to order payment".

17. I refused the application because I am not satisfied at this stage of the proceedings, and based on the evidence presented in the claimant's supporting affidavit, that she is

bound to win *and* that the win will be for a substantial amount. I gave three reasons in my oral decision.

18. Firstly, I expressed the view that the events of 1 July 2009 (when the claimant was cashing at Price Smart) were not sufficiently explained or described in the affidavit evidence to satisfy the inevitable victory test set out in *Quadrex*. If, as she testified, "heavier items were scanned without removing them from the trolley", why did she attempt to lift the "pack of laundry detergent"? Did she misjudge its weight? What was its actual weight? Was it a heavy item? The affidavit does not say why she attempted to lift it, but the statement of case says that she did so in order "to scan" it. Assuming that I receive these words in the statement of case as evidence in the application (which I ought not to), where was the bar code located? Why didn't the claimant roll or maneuver the trolley to gain access to the bar code on the pack? What, exactly, is "a pack of laundry detergent"? Is it a cardboard box with a handle or not? Is it a plastic bag? Is the bar code only on one location? Where was the bar code located on this "pack of laundry detergent"? If a "pack" is a box, then the bar code could be located on any one of six possible sides. Assuming that the bar code was on the bottom of the "pack" why did the claimant choose to lift it with one hand instead of asking the customer to remove it, or assist in lifting it, or call a supervisor or other worker? Why didn't she use two hands? The language used to describe this forensically important event is noticeably sparse. In considering whether the claimant can discharge the high standard of proof of success at the trial I also considered the relative strengths or weaknesses of the defendants' case. Unlike many applications for interim payments, liability in this matter is zealously contested. The assessment of whether the claimant is bound to win at the trial cannot be considered in a vacuum; neither, in my view, should there be an exhaustive mini-trial. We are dealing here with *prima facie* evidence or proof. This is not a case of a blameless passenger injured in an automobile accident, nor of a flower pot falling injuriously from a window-sill. I am not certain that the claimant is bound to win. Her evidence is not sufficiently clear-cut and compelling.

19. Secondly, in giving my oral decision, I expressed concerns about the possibility of a *novus actus interveniens*, namely the effect on her left wrist of the fall during the course of her post-operative physiotherapy. Putting aside the question as to why Dr. Araujo, having presumably received the physiotherapist's note in July 2010 (which was addressed to him) did not refer to it in his medical report of 19 February 2011, I am left in doubt as to the medical effect of the fall. I say so because of Dr. Coombs' report. Moreover, an X-ray taken on 6 July 2010 (eight days before she fell) resulted in a report that confirmed: "Left wrist: no abnormality demonstrated". After Dr. Coombs wrote his report and it was attached to the amended defence, the claimant's attorney

gave it to Dr. Araujo and sought another opinion. In this further report Dr. Araujo attempts to refute Dr. Coombs professional opinion. Dr. Araujo's further report was not attached to any supplemental affidavit filed in support of the application, but to the reply to the defence. In any event, the conflict of medical opinion and the ensuing medical debate or argument (which appears unseemly) only led me to the conclusion that there is a real medical dispute or conflict of opinions. It seems to me that whether the fall had any causative or intervening effect can only be properly resolved at a trial, and one in which, as I informed both parties, an independent and disconnected medical expert would be appointed under Part 33. A CMC has not yet been held and no permission has yet been given to either party to appoint any Part 33 experts.

20. Thirdly, in giving my oral decision, I expressed reservations about whether the claimant had satisfied the court of the likely amount to be recovered at the trial, and whether the sum of $57,980 was a reasonable proportion of it. This is a Part 17.4 (4) obligation and also expressed as one of the requirements of an application by the authors of *Civil Litigation, 12th edition*. There is no opinion expressed in support of the application that states or demonstrates the likely amount expected to be won at the trial. The affidavit in support refers to and attaches a pre-action letter but its contents are not described under oath as being a fair estimate of the amount she will win nor does the claimant swear that she has been advised by her attorneys and believes that she is bound or even likely to win the sums claimed in the pre-action letter. In that letter, the claimant's attorney claims entitlement to $482,013.80, a not insubstantial sum. Of course, when one is writing a letter to a potential defendant one can put almost any figure on the paper. A supporting affidavit in an application for an interim payment is a different matter. In this case, for example, a claim is made in the pre-action letter for loss of future earnings. It is said that "the claimant's injury is permanent and she has been determined medically unfit to return to her job as a cashier and is disadvantaged on the labour market" and will therefore need her annual salary at a multiplier of 16, discounted by 25%, a sum of $354,549.96. Nothing by way of substantiation is provided in the letter or in the affidavit. Nothing by way of mitigation of damages is mentioned, for example, alternative employment. The quantification of the sum that will be won must be built on the foundation of a medical, and not a legal opinion. However, the medical opinions do not support a finding that the claimant's injury is permanent. In fact, nowhere in any of Dr. Araujo's reports (whether one looks at the report of 19 February 2010, which is properly before me, or the report of 7 November 2011, which is not) is it suggested that the claimant is disadvantaged and permanently incapacitated. In addition, I found it hard to completely ignore the inherent clash of evidence in Dr. Coombs' report that 27 months of sick leave for this wrist injury is excessive, and his other conflicting opinions.

21. For these three reasons, and in light of the law as I have stated it here, I refused the application and instead short-listed the matter for a March CMC to give early trial directions. The CMC was listed for yesterday, 21 March. Two days were located and reserved in June 2012 for an early trial. In light of the appeal, the 21 March CMC and the June trial dates have been lost.

James Christopher Aboud
Judge