

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2019-04527

PRIMILLA DIAL-SEEPAUL

Claimant/

First Defendant to Counterclaim

AND

GUARDIAN LIFE OF THE CARIBBEAN LIMITED

Defendant/

Claimant to Counterclaim

PGM FINANCIAL SERVICES LIMITED

Second Defendant to Counterclaim

SERVUS LIMITED

Third Defendant to Counterclaim

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 19 October 2021

APPEARANCES

Ms Rekha P. Ramjit and Ms Nera Narine instructed by Ms Gina Ramjohn

Attorneys at law for the Claimant/ First Defendant to Counterclaim.

Mr Martin Daly SC and Ms Sonnel David-Longe instructed by Ms Lisa Theodore

Attorneys at laws for the Defendant/ Claimant to Counterclaim.

RULING

1. The Defendant/Claimant to Counterclaim (“Guardian Life”) has applied¹ (“the Application”) to obtain: judgment on admission of its Counterclaim based on

¹ Notice of Application filed 4 May 2021

the Claimant/First Defendant to Counterclaim's ("Ms Seepaul") admission, pursuant to Rule 18.12 (2) (a) of the Civil Proceedings Rules 1998 as amended ("CPR"); an order that Ms Seepaul's claim as against Guardian Life be struck out and the latter be removed as a party to Ms Seepaul's claim; and an order for Ms Seepaul to bear the costs of the Application. In support of the Application were two affidavits of Lisa Theodore², the first of which set out the procedural history, the nature of the pleadings and the reasons for Guardian Life seeking the orders and the second of which confirmed that the Application was served on the Attorney at Law for Ms Seepaul on 6 May 2021. There was no affidavit in response filed on behalf of Ms Seepaul.

2. In order for Guardian Life to obtain the orders sought in the Application the following three issues must be determined in its favour, namely:
 - (a) Whether Ms Seepaul's Re-Amended Claim and Re-Amended Statement of Case are properly before the Court;
 - (b) If not, is the Court entitled to now entertain the contents of the Re-Amended Claim and Re-Amended Statement of Case?; and
 - (c) What is the effect of Ms Seepaul's failure to file a Defence to Guardian Life's Counterclaim?

Whether Ms Seepaul's Re-Amended Claim and Statement of Case are properly before the Court

3. This issue has only arisen due to the procedural history of this matter which is not in dispute. Ms Seepaul filed her claim against Guardian Life on 5 November 2019. The Claim Form and Statement of Case were served on Guardian Life on 8 November 2019. Ms Seepaul's Amended Claim Form and Amended Statement of Case were filed on 3 August 2020.

² Filed 4 May 2021; and Filed 12 August 2021

4. In the amended Claim Form and Statement of Case, Ms Seepaul has claimed general damages for personal injuries caused by the negligence/breach of statutory duty/occupier's liability of Guardian Life, its servants and/or agents. She has also claimed special damages in the sum of \$1,320,597.09, interest and costs. Ms Seepaul alleged that she was a consultant employed with Guardian Life and that on 9 September 2017, during the course of her employment she was in the Guardian Life building situated at 92-94 St Vincent Street, Port of Spain ("the premises"), where she slipped on a wet floor and hit her face and head. She alleged that the fall and her injuries were due to the negligence and breach of statutory duty of Guardian Life, its servants and/or agents, as it owed her a duty of care to ensure her health, safety and welfare as the occupier and entity in control of the premises.
5. Ms Seepaul set out in detail the particulars of negligence, the breach of statutory duty and/or occupier's liability. She pleaded that she has been on sick leave since the fall. She also particularized her injuries, the preliminary medical examinations she underwent, the contents of the medical reports she received, her loss and damages and her claim for special damages. Ms Seepaul alleged that her quality of life has been affected since her fall, it may worsen and that she has mental distress and challenges in finding alternative work and fears the loss/ reduction of her health coverage. She set out the extent of the medical coverage she receives from Guardian Life and that she received the sum of \$633,912.34 as Workmen's Compensation ("the Workmen's Compensation payment") from Guardian Life for her loss of earnings. Ms Seepaul also made allegations against Guardian Life concerning numerous lost opportunities, an investigation that is ongoing into the vesting of her portfolio, the assessment of her permanent partial disability and a meeting concerning matters related to her fall and injuries.
6. Guardian Life's Defence and Counterclaim were filed on 23 September 2020. Guardian Life made Ms Seepaul the First Defendant to the Counterclaim and added PGM Financial Services Limited ("PGM") and Servus Limited ("Servus"),

new parties, as the Second and Third Defendants respectively to the Counterclaim.

7. Ms Seepaul was served the Defence and Counterclaim via email dated 25 September 2020 and the acceptance of service was confirmed on 28 September 2020. Guardian Life filed affidavits of service on 8 January 2021 as proof of service of the Defence and Counterclaim, together with copies of the Amended Claim Form and Statement of Case on PGM and Servus.
8. Guardian Life's position on Ms Seepaul's claim as articulated in the Defence and Counterclaim is as follows. It denied that Ms Seepaul was its employee. Instead it asserted that Ms Seepaul was an employee of PGM and that any duties owed to Ms Seepaul was by PGM, which was the occupier of the Floor where Ms Seepaul fell. It also asserted that Ms Seepaul had a duty to take reasonable care to ensure her own safety and that it had discharged all of its duties by hiring Servus, which is liable to indemnify Guardian Life. Guardian Life therefore denied all the particulars of negligence and any duties under the Occupational Safety and Health Act ("the OSH Act") and asserted that it took all reasonable steps as required.
9. Guardian Life denied Ms Seepaul's particulars of injuries and put her to strict proof of the manner in which she fell and the injuries she sustained. It also denied the truth and accuracy of Ms Seepaul's medical reports as its position was that her injuries were exaggerated and called upon her to prove the allegations on her preliminary medical examinations and the contents of the medical reports.
10. With respect to Ms Seepaul's claims that her injuries have affected the quality of her life, she is fearful that it may worsen, she has challenges finding alternative work and her pleaded particulars of loss and damages, Guardian Life asserted that in addition to its other assertions, Ms Seepaul's allegations are speculative and she failed to mitigate her loss. Guardian Life admitted that

Ms Seepaul has been on sick leave since she fell and that it has met all her reasonable medical expenses.

11. Guardian Life asserted that Ms Seepaul wrongfully received the sum of \$633,912.34 as the Workmen's Compensation payment, as she was not one of its employees and it has counterclaimed for the reimbursement of the Workmen's Compensation payment from Ms Seepaul. Guardian Life has also sought indemnities against the Defendants to the Counterclaim, namely Ms Seepaul, PGM and Servus. In addition to the other matters set out aforesaid, Guardian Life pleaded in its Counterclaim that PGM is liable for any loss/injury/ damages to Ms Seepaul in the course of her employment, as she was PGM's employee and as such PGM is liable to indemnify Guardian Life in respect of any related judgment in this matter. Guardian Life further pleaded that Servus breached its duty as facilities manager, including its contractual duties with Guardian Life and that it is liable to Guardian Life in respect of any related judgment.
12. On 18 January 2021, shortly before the commencement of the first case management conference ("CMC"), the Attorneys-at-Law for Guardian Life informed Ms Seepaul's Attorneys at law of its position that the sanction under Rule 18.12(2)(a) of the CPR had taken effect. No further action was taken by the Attorneys for Ms Seepaul before the commencement of the first CMC on 18 January 2021.
13. At the first CMC on 18 January, 2021, the Attorney-at-Law for Guardian Life indicated that the effect of the non-filing of a Defence to Counterclaim meant that it was entitled to judgment on admissions and to strike out Ms Seepaul's Claim. Counsel for Ms Seepaul indicated that he believed that no Defence to Counterclaim had been filed because the Counterclaim was based solely on a claim for indemnity and that, in any event, the issue of contributory negligence was still alive notwithstanding the failure of Ms Seepaul to file a Defence to the Counterclaim.

14. I then indicated that the first CMC had not come to an end, and thereafter proceeded to adjourn the first CMC to allow for any settlement discussions to take place, in light of Guardian Life's indication that it was seeking judgment on admissions with respect to the Counterclaim, because of Ms Seepaul's failure to file a Defence or any application for an extension of time.
15. The Application was filed on 4 May 2021 and the first CMC continued on 12 July 2021. During the course of that hearing of the first CMC, Guardian Life for the first time became aware that Ms Seepaul had filed a Re-Amended Claim Form and Re-Amended Statement of Case on 5 July 2021. The Re-Amended Claim Form and Re-Amended Statement of Case were served on Guardian Life during the course of the CMC hearing on 12 July 2021.
16. There are five matters which were asserted in the Defence and Counterclaim which Ms Seepaul did not file any defence to, but which she has attempted to address in the Re-Amended Claim and Re-Amended Statement of Case. Ms Seepaul added that she was an agent/sales consultant of Guardian Life and that she was the Managing Director of PGM. Guardian Life asserted in the Defence and Counterclaim that despite Ms Seepaul being a party to the Service Contract between Guardian Life and PGM, it was in her capacity as an employee of PGM and she therefore could not claim any contractual duty or obligations flowing from it. In response, Ms Seepaul asserted that the Service Contract extended to her and not just PGM.
17. Guardian Life pleaded that Ms Seepaul was not its employee and had no authority to bind it. Ms Seepaul's changed position was that she was under the authority of Guardian Life and had no independent authority. Further, in response to Guardian Life's assertion that PGM was responsible for the staffing and accommodation of Ms Seepaul who was its employee, Ms Seepaul's new position was that Guardian Life had ultimate authority with respect to her staffing and accommodation via PGM.

18. Upon receipt of the Re-Amended Claim Form and Re-Amended Statement of Case, the Attorney for Guardian Life requested an opportunity to fully consider the effect of the Re-Amended documents. The Attorney at law for Guardian Life also indicated to the Court that she would be objecting to the Re-Amended Claim Form and Re-Amended Statement of Case, as they were filed without permission of the court and after the sanction under Rule 18.12(2)(a) of the CPR had already taken effect and in the circumstances it constituted an abuse of process.
19. I then directed that the parties file written submissions in respect of the Application taking into account the effect, if any, of the Re-Amended Claim and Statement of Case.
20. Ms Seepaul did not file any Defence to Guardian Life's Counterclaim and PGM and Servus also did not file any defence to Guardian's Counterclaim.
21. It was submitted on behalf of Guardian Life that Ms Seepaul was not entitled to file the Re-Amended Claim Form and Re-Amended Statement of Case, as she had no permission to file same and the provisions of Rule 18.12(2)(a) of the CPR also precluded her from doing so.
22. Counsel for Ms Seepaul took the position that the filing of the Re-Amended Claim and Re-Amended Statement of Case were outside the scope of the order directing the parties to file submissions on the Application. However, she did not address the issue of whether the Re-Amended Claim and Statement of Case were properly before the Court.
23. The position articulated on behalf of Ms Seepaul is puzzling, as a review of the transcript of the hearing on 12 July 2021 clearly indicated that I directed the parties to address in their submissions the effect, if any, of the Re-Amended Claim Form and Re-Amended Statement of Case upon the Application. I took this position as the Re-Amended Claim Form and Statement of Case sought to introduce matters which could be construed as a "defence" to Guardian Life's

Counterclaim after the prescribed time for filing and there was no application for an extension of time to file a defence to the Counterclaim.

24. In my opinion, the Re-Amended Claim and Re-Amended Statement of Case are not properly before the Court and the contents cannot be considered in determining the Application, as Ms Seepaul did not obtain permission from the Court before filing them. Rule 20.1 (3) CPR is clear that a pleading can only be amended without permission of the Court before the first CMC. The first CMC started on 18 January 2021 and it continued on 12 July 2021. The Re-Amended Claim Form and Re-Amended Statement of Case were filed during the course of the first CMC on 5 July 2021 and not prior to the first CMC. There can be no doubt with the position which I have adopted, as the Court of Appeal in **Estate Management and Business Development Company Limited v Saiscon Limited**³ stated at paragraph 22 the following on the interpretation of Rule 20.1 of the CPR:

“22. The rule has been interpreted to require a party to obtain permission from the Judge to change its statement of case **during or after** the first case management conference. If the application for permission is made after the first case management conference then the applicant must satisfy the judge that there is a good explanation for the change and that the application was made promptly.” (Emphasis added)

If not, is the Court entitled to now entertain the contents of the Re-Amended pleadings

25. It was submitted on behalf of Guardian Life that the re-amended pleadings were filed after the Application and for the Court to entertain any re-amendment to the Amended Claim Form and Statement of Case at this stage would amount to an abuse of process. It was also submitted that the

³ Civ Appeal S 104 of 2016

furtherance of the overriding objective militates against the grant of permission for the filing of re-amended pleadings as the factors set out in Rule 20.1(3) and (3A) of the CPR, do not support the grant of permission to re-amend.

26. In my opinion, I have no basis to consider at this stage of the proceedings, if I should grant Ms Seepaul any permission to Re-Amend the Claim and Statement of Case as there is no evidence for me to consider the matters set out at Rule 20.1(3) (a) and (b) CPR and Rule 20.1 (3A) CPR. For these reasons, I agree with the Attorney at law for Guardian Life that the failure by Ms Seepaul to obtain the permission of the Court before filing the Re-Amended Claim Form and Statement of Case is an abuse of process.
27. In any event, the conjoint reading of Rules 18.9 and Rule 18.12 (2) (a) prohibits me from considering any re-amendment to the Amended Claim Form and Amended Statement of Case subsequent to the time limited for the filing of the defence to the ancillary claim as there is an expressed sanction. Under the CPR a counterclaim is treated as an ancillary claim (Rule 18.1(1) (a)). Rule 18.9 (2) states that the period for a party against whom an ancillary claim was served to file a defence, is 28 days after the date of the service of the ancillary claim. In the instant case, the ancillary claim was served on 25 September 2020, therefore the time limited for the filing of the defence by Ms Seepaul to this claim was 23 October 2020. In the absence of any application for an extension of time being filed prior to that date or any application for relief from sanction being filed after that date, the sanctions in rule 18.12 (2) (a) apply.

What is the effect of Ms Seepaul's failure to file a Defence to Guardian Life's Counterclaim?

28. Ms Seepaul's Attorney at law submitted that in deciding whether or not to grant a judgment on admissions under Rule 18.12(2) (a), the Court should consider the said rule together with Rule 18.12 (6) (ii), wherein the Court can

set aside or vary a judgment entered under 18.12(2) where the ancillary defendant has a realistic chance of success.

29. It was submitted on behalf of Guardian Life that Ms Seepaul's submission is irrelevant, as there is no judgment in the main claim or the ancillary claim for the Court to set aside and that Ms Seepaul's forecasting of her intention to rely on Rule 18.12(6) CPR is a further indication of her willingness to abuse the process of the Court.
30. It was also submitted on behalf of Guardian Life that by failing to file a Defence to Counterclaim, Ms Seepaul has admitted the contents of the Counterclaim and as such Guardian Life is entitled to judgment on the Counterclaim; there is no remaining issue of contribution between Ms Seepaul and Guardian Life, as they are not the only two parties to the claim where the issue of contribution is raised; and the exit of Guardian Life at this stage from the adjudication of Ms Seepaul's claims which lie against PGM and Servus is justifiable and places no injustice on Ms Seepaul by way of obstruction to her claims against the other Defendants to the Counterclaim. Guardian Life contended that this course is consistent with the overriding objective.
31. It is not in dispute that Ms Seepaul did not file any Defence to Guardian Life's Counterclaim. Rule 18.12 CPR provides:

“Special provisions relating to judgment on failure to file defence to ancillary claim

18.12 (1) This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

(Rule 18.9 (2) deals with the time for filing a defence to an ancillary claim)

(2) The party against whom the ancillary claim is made—

- (a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and
 - (b) subject to paragraph (4) if judgment under Part 12 is given against the ancillary claimant, he may enter judgment in respect of the ancillary claim.
- (3) However, paragraph (2) does not apply in ancillary proceedings against the State unless the court gives permission.
- (4) An ancillary claimant may not enter judgment under paragraph (2)(b) if he wishes to obtain judgment for any remedy other than a contribution or indemnity for a sum not exceeding that for which judgment has been entered against him.
- (5) An application for the court's permission under paragraph (3) may be made without notice unless the court directs otherwise. (6) The court may at any time set aside or vary a judgment entered under paragraph (2) if it is satisfied that—
- (i) the ancillary defendant applied to set aside or vary the judgment promptly; and
 - (ii) the ancillary defendant has a defence to the ancillary claim which has a realistic chance of success.”

32. Both parties relied on the learning in the Court of Appeal decision of **Satnarine Maharaj v GNIC and Margaret Garaway Fenton**⁴. In **Satnarine Maharaj**, the issue before the Court was whether the Case Management Judge was correct

⁴ Civ Appeal No P 198 of 2015

to strike out the claim, in view of the failure of the appellant to file a defence to the counterclaim of the second respondent and enter judgment on the counterclaim. The Court found that on the facts of that case, the Case Management Judge was wrong to strike out the claim as there was a plea of contributory negligence which was wrapped up with the claim.

33. The Court set out at paragraphs 22 to 24 of its judgment, the approach to be taken to determine the effect of deemed admissions as:

“22. When faced with an application such as the respondents’ in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim.

23. There of course need be no connection between the claim and the counterclaim (see rule 18.5(2)). In such a case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim. The appellant’s position was that the claim should not have been struck out by the Judge. The appellant, however, conceded that in an appropriate case the admissions deemed to arise from

the failure to defend the counterclaim can result in the dismissal of the claim. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. The respondents submitted that that was this case.”

34. The Court further explained its position at paragraph 27 as:

“27. The appellant therefore can no longer contend that the accident was caused when the second respondent vehicle came into his lane. But is that necessarily the end of the matter in this case? We think not as there is the admission that the collision occurred wholly or in part as a consequence of the second respondent’s negligence. So there is therefore an admission in the counterclaim that the collision was caused wholly or in part by the negligence of the second respondent, who is the claimant on the counterclaim. The question is what does that mean for the purposes of the claim. In our judgment it leaves the question still to be decided whether the damage resulting from the accident was the result partly of the appellant’s fault and partly from the second respondent’s fault and raises the issue of contributory negligence. Notwithstanding the deemed admissions by the failure to file a defence to the counterclaim, that remains a live issue on the claim as there is no clear admission that the accident was not in any way the fault of the second respondent.”

35. At paragraph 21 of **Satnarine Maharaj**, the Court accepted that from the plain wording of Rule 18.12(2)(a) CPR, a claimant who has failed to file a defence to a counterclaim is deemed to have admitted the counterclaim. In the instant

case, as it was not in dispute that Ms Seepaul has not filed any defence to Guardian Life's Counterclaim, it follows that she is deemed to have admitted the counterclaim.

36. In my opinion, the matters which Ms Seepaul is deemed to have admitted are that: (a) Guardian Life is not liable for any of her loss, damage or injury which she pleaded in the Amended Statement of Case; (b) she contributed to her own alleged loss, damage or injury, and therefore she is liable to indemnify Guardian Life to the extent that such liability is found on her part; (c) she is liable to pay to Guardian Life the sum of \$633,912.34 which was wrongfully paid to her as the Workmen's Compensation payment; (d) PGM is liable for any loss, damage or injury claimed by her which arises from her employment and/or employer's liability and/or breach of common law duty of care and/or breach of statutory duty; and (f) any liability for negligence arising from her claim is attributable to Servus.
37. The question in light of the aforesaid admissions, is whether there is any live issue remaining on the claim? In the Defence and Counterclaim, Guardian Life joined issue with Ms Seepaul on the issue of negligence as it pleaded that her injuries were caused by her. To this extent, there is a plea of contributory negligence by Guardian Life. However, in light of the effect of the admissions by Ms Seepaul, the issue is whether she still has any claim against Guardian Life.
38. Ms Seepaul has grounded her claim in negligence against Guardian Life on the basis that she is an employee of Guardian Life. In light of the deemed admission that she is an employee of PGM this is no longer a basis for her to pursue any claim against Guardian Life. Ms Seepaul also grounded her claim against Guardian Life on breach of statutory duty. Again, in light of the deemed admission that PGM is liable for the breach of statutory duty to Ms Seepaul, this is also no longer a basis for pursuing her claim against Guardian Life.

39. Further, having examined the Amended Claim and Statement of Case, Ms Seepaul has not pleaded any other basis for alleging that Guardian Life owed her a duty of care. Although Guardian Life may have joined issue with Ms Seepaul on contributory negligence, there are no other pleaded facts where Ms Seepaul has averred any other duty of care owed to her by Guardian Life. In this regard, Ms Seepaul has no claim to pursue against Guardian Life and on this basis her claim against Guardian Life is struck out.

ORDER

40. The Claimant/First Defendant to Counterclaim not having filed a Defence to the Counterclaim filed by the Defendant/Claimant to Counterclaim on 23 September 2020 is deemed to admit the Counterclaim pursuant to Rule 18.12(2)(a) CPR.
41. Judgment on admission to the Defendant/Claimant to Counterclaim on its Counterclaim based on the Claimant/First Defendant to Counterclaim's admission pursuant to Rule 18.12(2)(a) CPR. The Claimant/First Defendant to Counterclaim to repay and/or reimburse to the Defendant/Claimant to Counterclaim the sum of \$633,912.00 wrongly received as the Workmen's Compensation payments.
42. The Claimant/First Defendant's claim against the Defendant/Claimant to Counterclaim is struck out and the Defendant/Claimant to Counterclaim is removed as a party to the Claimant/First Defendant's claim.
43. The Claimant/First Defendant to Counterclaim to bear the costs of the notice of application filed 4 May 2021 to be assessed by a Registrar in default of agreement.

44. The Court will hear the parties on any other issue of costs on 14 April 2022 at 10:00 am by a virtual hearing.

/S/Margaret Y. Mohammed

Judge