THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA No. CV2016-02959

BETWEEN

KENNY WHISKEY

Claimant

AND

YVONNE CLARKE

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Ms. Laura Bailey for the Claimant

Mr Dexter Bailey instructed by Ms Arnella V. Laloo for the Defendant

---

JUDGMENT

I. Background:

[1] By Application filed on the 8th December, 2016, the Claimant applied for Summary Judgment against the Defendant pursuant to **Part 68.7 of the CPR 1998** on the grounds that the Defendant has failed to give a credible defence to the claim.

[2] The matter was initiated by Fixed Date Claim and Statement of Case filed on the 30th August, 2016 which sought an Order for summary possession of property situate in Pleasantville, San Fernando (the "Property") and in which the Defendant is in current and actual possession. However, at the first hearing of the 25th October, 2016, this Court ordered that, pursuant to **Part 68.3 of the CPR**, the proper supporting document to the Fixed Date Claim was an **affidavit** instead of a Statement of Case. As a result, the first hearing of the fixed date claim was adjourned to the 13th December, 2016 in order to allow the Claimant to file his appropriate affidavit in support, the Defendant to file her affidavit(s) in response and the Claimant to file any affidavit in reply, if necessary.

[3] The Claimant's affidavit in support of the Fixed Date Claim was eventually filed on the 28th October, 2016. In it, the Claimant deposed the following:

i. That the Claimant became the registered lessee of the Property by Deed of Assent dated the 13th April, 2016;

ii. That upon the death of his father's wife, Ms Everita Whiskey and/or the Claimant's step mother, on the 7th November, 2007, the Claimant employed the Defendant by way of an oral agreement, to be his father's full-time caregiver. Pursuant to this oral agreement, the Defendant was permitted to live rent-free on the Property until the death of the Claimant's father, Bennett Whiskey;

iii. That it was further agreed that upon Bennett Whiskey's death, the Defendant would vacate the Property within two months;

iv. That Bennett Whiskey died on the 23rd May, 2012 leaving the Claimant as the sole executor and beneficiary under the Will, which was probated at the High Court on the 31st March, 2016;

v. The Defendant, however, has failed to vacate the premises since Mr Bennett's death despite not being a tenant and despite numerous requests to do so.

[4] An extension of time to serve the Defendant's affidavit in response was sought and granted by Order dated the 9th November, 2016 and as such, the affidavit was filed on the 30th November, 2016.

[5] In this response affidavit, the Defendant admitted that the Claimant was the registered lessee of the Property. However, she deposed as follows with respect to the other allegations of the Claimant:

i. That she, the Defendant, was married to the Claimant's step brother, George Clarke, who eventually died.

ii. That prior to the said Everita's death, Everita told the Defendant's son and step son, Bernard De Peiza, that she wanted to hire a caregiver for Bennett Whiskey;

As a result, the Defendant and Bernard entered into an oral agreement where the Defendant would be employed as the live-in caregiver of Bennett. Therefore, the Defendant was not hired by the Claimant;

iii. That Bennett Whiskey was mentally ill as evidenced by a medical report of Dr Ramcharan and, therefore, his Will is questionable for want of testamentary capacity;

iv. That the said Bernard De Peiza is the owner of the Property under the Will of Everita Whiskey and had advised the Defendant that she could continue to live in the Property.

[6] Based on this defence, the Claimant sought the aforementioned Application for summary judgment on the basis that the Defendant has failed to defend the important issue of possession. In particular, the Claimant drew the Court's attention to the following facts[1]:

i. That the Defendant claims that she is in possession of the Property despite not being a lessee;

[1] Affidavit in support of summary judgment application filed on the 8th December, 2016

ii. That the Defendant has provided no documentary evidence that her step son, Bernard De Peiza, is the owner of the Property; and

iii. That the Defendant continues to pay the bills for the Property even though the said bills are not in her name.

[7] At the next hearing of the 13th December, 2016, this Court gave permission for the Claimant to file a supplemental affidavit in support of its summary judgment application and therefore, the hearing date for the fixed date claim was again adjourned to the 14th March, 2017.

[8] This supplemental affidavit was filed on the 27th January, 2017 and deposed that the Defendant's reliance on Everita's ownership of the Property was misconceived as she was never the owner. The result being that the Defendant was a mere live-in employee until Bennett's death and was only permitted to remain for two months thereafter to facilitate her seeking new accommodation. Further, the Claimant deposed that he had intentions of assigning the Property to his daughter who currently pays rent for a two-bedroom apartment elsewhere.

[9] The parties convened before this Court at the hearing of the Fixed Date Claim on the 14th March, 2017, where this Court gave an order for the filing of written submissions with authorities on the said application for summary judgment.

[10] Pursuant to this Order, the parties filed and exchanged their submissions on the 24th April, 2017.

II. Submissions:

[11] This matter concerns a very narrow issue and as such, the parties' submissions were expectedly short. The counsel for the Claimant relied on one authority along with the provision in **Part 68.7 of the CPR** to outline the requirements for a summary judgment application. Counsel then proceeded to reference the material paragraphs of the affidavits to make the submission that the Defendant's claim has no realistic prospect of success. Counsel's principal argument in support was that the Defendant's entitlement to occupancy of the Property is based on an alleged permission given by Everita Whiskey

and/or her step son, Bernard De Peiza. However, neither Everita Whiskey nor Bernard De Peiza had any ownership in the Property to give such permission.

[12] Alternatively, the Defendant, after confirming the test for summary judgment, set out the following facts in rebuttal of the Claimant's claim of entitlement to the Property: (i) the failure to adduce the last Will of Bennet Whiskey, which is the material document on which the Claimant wishes to establish its entitlement to the Property; (ii) the failure to address the allegation that Bennet Whiskey may not have had the testamentary capacity to make the Will at the time that he did; and (iii) the Will of Everita Whiskey which clearly shows that Bernard De Peiza is the devisee of the Property.

III. Law & Analysis:

[13] It is trite law that when determining the entitlement to property between two parties where one is in actual possession, the onus lies with the Claimant to show a good root of title to push the Defendant as occupier out. As stated in **Bullen and Leake**[2]**:**

> *"**It was a rule of the common law that anyone who was out of possession must recover the land by the strength of his own title, and not by reason of any defect in the title of the person in possession. Even when it was clear that the person in possession had no right to be there, still the claimant in ejectment could not turn him out unless he could show in himself a title which was – prima facie, at all events – good against all the world**".*

[14] This principle has been consistently applied with approval in this jurisdiction. See **Rudolph Sydney v Nicole Hyacinth Joseph Marshal and Stephen Marshal**[3]. In **Murray v Biggart**[4], Smith J (as he then was) stated that-

> *"Unless a Defendant is in possession of land with the consent of a Plaintiff (e.g. a tenant), a Plaintiff who seeks possession of land from a Defendant must prove his title to the land strictly. He must set out all the links in his*

[2] Bullen and Leake, Precedents of Pleadings 12th edition, page 67
[3] CV201–01729 per Boodoosingh J
[4] H.C.A. No. T101 of 1998 at para 7

title, showing a good root of title and establishing that he is the owner of the land. In a claim for possession, a Plaintiff succeeds on the strength of his own title and not on the weakness of the Defendant's title."

[15] The Claimant has purported to prove the strength of his title by the following evidence:

(i) The Deed attached at "G" of his affidavit by which his father, Bennet Whiskey, became seised and possessed of the Property by way of a 30 year term lease from the President; and

(ii) The Deed of Assent dated the 13th April, 2016 made pursuant to the Will of Bennet Whiskey. It states that the Claimant, as legal personal representative of Bennett Whiskey, devised the leasehold interest to himself as beneficiary for the residue of the 30 year term.

[16] However, as submitted by the Defendant, the grant of probate from the High Court attached at "C" however, does not include the Will of Bennett Whiskey. In fact, the Claimant has failed to adduce the Will of Bennett Whiskey into evidence at all.

[17] In the absence of the Will, the issue therefore becomes ***whether a Deed of Assent by itself, can be considered a good root of title***.

[18] **Halsbury's Laws of England**[5] states that a root of title is a document purporting to deal with the entire legal estate in the property and not depending upon any previous instrument for its validity and containing nothing to throw any suspicion on the title of the disposing parties. The best examples of a root of title are conveyances on sale or freehold mortgages. A specific devise in a Will followed by the relevant Deed of Assent can be a good root of title but not so a general devise in a Will.

[19] In ***Murray*** supra, Smith J found that a Deed of Assent by itself without the Will to which it was made does not constitute a good root of title[6]:

"The second Deed of Assent (No. 17633 of 1975), purports to be prepared pursuant to a grant of Executorship, and to the Will of Maurice Murray,

[5] 4th Ed Vol. 42 para 148
[6] At para 10 of his judgment

but significantly, it does not recite that it was made pursuant to a specific devise in such a Will, ***nor was the Will brought into evidence to prove that the grant to the Plaintiff was pursuant to any specific devise in a Will****. As such, the Second Deed of Assent, by itself, is not a good root of title."*

[20] This Court is persuaded and agrees that such a finding by Smith J represents the law on the point. It therefore follows that the Deed of Assent in the case at bar, absent the Will to prove that the grant of the Property to the Claimant was pursuant to any specific devise in the Will, does not constitute a good root of title.

[21] Having failed to establish good title to the property so as to remove the Defendant as occupier, the question of whether the defence has a realistic prospect of success seems a forgone conclusion.

[22] **Part 68.7** stipulates the powers of the Court at the first hearing. It requires that the Court give judgment *"…unless there is a defendant who attends and satisfies the court that he has a defence with a realistic prospect of success".* As to the constitution of a 'realistic prospect of success' the Defendant's reliance on the dicta from the Court of Appeal in **Credit Union Co-operative Society Ltd v Ammon**[7] is useful:

(i) "The Court must consider whether the defendant has a realistic as opposed to fanciful prospect of success: Swain v Hillman 2001 2 All ER 91;

(ii) A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel 2003 E.W.C.A. Civ 472 at 8;

(iii) In reaching its conclusion the court must not conduct a mini trial: Swain v Hillman;

(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says is in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

[7] Civ App No 103 of 2006 [3] per judgment of Kangaloo JA

particularly if contradicted by contemporaneous documents: ED & F Man supra at 10;

(v) However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond No. 5 2001 E.W.C.A Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd 2007 F.S.R. 63."

[23] In applying these principles, the Court bears in mind that in a case such as this, where the onus lies on the Claimant to establish good title, simply denying the Claimant's ownership is all that is required by the Defendant to amount to a good Defence. This is confirmed by Warner, Permanand and Hamel-Smith JJA in the Court of Appeal decision of **Josephine Jordan v Phillip Lucas**[8]:

> *"The plaintiff/respondent in the present case ought therefore to have set out in his pleading the 1969 Deed of Conveyance to his father Martin Lucas.* ***The appellant/defendant, on the other hand, because she was in possession, did not offend the rules of pleading by simply denying the plaintiff/respondent's title.****"*

[24] It therefore follows that the Defendant's denial of the Claimant's entitlement to the Property by its evidence that (i) the Claimant has omitted to attach the Will of Bennett Whiskey to show that the leasehold interest was devised to the Claimant; and (ii) Bennet Whiskey may have lacked testamentary capacity as evidenced by the report of Dr

[8] Civ App. No. 59 of 2001 at the bottom of page 8

Ramcharan on the 28th November, 2008 and attached at Y.C 1, suffices to amount to a realistic prospect of success.

IV. Disposition:

[23] Accordingly, having considered the parties' affidavits and submissions, the Court shall dismiss the Claimant's Notice of Application for summary judgment filed on the 8th December, 2016.

[24] On the question of costs of the said application, the general rule on the award of costs is that the court must order the unsuccessful party to pay the costs of the successful party: the general principle that costs shall follow the event (CPR Part 66.6(1) and CPR Part 67.11(2)). Although this general rule is now considered to be the starting point and that the Court must take into account all the circumstances including the factors set out in CPR Part 66.6(5) before deciding where costs should be allocated, this Court can find no justification for departing from the general rule. Accordingly, the Court considers that the Claimant should bear the costs of the application to be assessed in default of agreement.

[25] In light of the foregoing the Order of the Court is as follows:

ORDER:

1. **The Claimant's Notice of Application for summary judgment filed on the 8th December, 2016 be and is hereby dismissed.**
2. **Costs of the said Application to be paid by the Claimant to the Defendant to be assessed pursuant to CPR Part 67.11, in default of agreement.**
3. **In the event that there is no agreement on costs by the 29th September, 2017 the Defendant to file and serve a Statement of Costs on or before the 31st October, 2017 for assessment**

4. **The Claimant to file and serve Objections, if any, on or before the 21st November, 2017.**

5. **The Fixed Date Claim filed on the 30th August, 2016 is adjourned to the 30th November, 2017 in courtroom POS 04 for a Case Management Conference.**

Dated this 24th day of August, 2017

_____

Robin N. Mohammed
Judge