THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2016-03491

BETWEEN

GAIL AUSTIN-PINDER

Claimant

AND

MASSY STORES (TRINIDAD)

(A Division of Massy Integrated Retail LTD)

Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Appearances:

Ms. Cheryll Pierre for the Claimant

Mr. Ravindra Nanga instructed by Ms. Alana Bissessar for the Defendant

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DECISION ON CLAIMANT'S APPLICATION TO FILE REPLY

I. Procedural History

[1] On 17th October, 2016, the Claimant, Gail Austin-Pinder, filed a Claim Form and Statement of Case against the Defendant for the following relief:

a. Damages for negligence and breach of duty of care on the part of the Defendant, its servants and/or agents;
b. Special damages;
c. General damages;
d. Interest on such damages at such rate and for such period as the Court shall deem just in the circumstances;
e. Costs; and
f. Such further and/or other relief as the Court may seem just.

[2] The Defendant entered its appearance on 21st October, 2016 and, with the consent of the Claimant for an extension of time, filed its defence on 13th January 2017.

[3] On 23rd January, 2017, a notice of assignment was issued assigning the matter to my docket and setting a hearing on 7th March, 2017 for the Case Management Conference.

The Claimant at the first Case Management Conference on 7th March, 2017, expressed the desire to file a Reply whereupon the Court made the following order:

1. **Proposed application to file and serve a Reply to the Defendant's Defence to be filed and served on or before 24th April 2017 with the draft Reply attached.**
2. **The Court shall attempt to deal with such Application without a hearing after consultation with the Defendant's attorney.**
3. **The Case Management Conference is adjourned to 9th May, 2017 at 10:15 am for 15 minutes in Courtroom POS 04.**

[4] The Claimant filed her Notice of Application on 19th April, 2017 for permission to file and serve a Reply to the Defendant's Defence. A draft Reply was annexed to this Application. Having read the Claimant's Application filed on the 19th April, 2017, attorney for the Defendant stated via email dated 8th May, 2017 that they were unable to consent to same and wished to be heard in opposition to the Application.

[8] At the next Case Management Conference on 7th March, 2018, the Court made the following order:

1. **In relation to the Notice of Application filed on 19th April, 2017 and the draft Reply attached thereto, the Defendant's Attorney to file and serve written submissions on the Defendant's objections to the reply on or before 20th April, 2018.**
2. **Response submissions, if any, to be filed and served by the Claimant's attorney on or before 29th May, 2018.**
3. **The Case Management Conference and the Decision in relation to the proposed Reply are adjourned to 4th July, 2018 at 10:45am in Courtroom POS 22, Hall of Justice, Knox Street, Port of Spain.**

[9] The Defendant filed its submissions on its objection to the Reply on 20th April, 2018 and the Claimant filed her response to the submissions on 28th May, 2018.

[10] Having considered the written submissions of both parties, the Court gives its decision on the Claimant's Application.

II. Law

[11] **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited**[1] is the locus classicus in local common law in relation to the test for considering an application for permission to reply. The test is set out at paragraph 18 of the judgment of Pemberton J as follows:

> *"What must a reply contain? I wish to associate myself with **BLACKSTONE'S** statement of the learning on this matter:*
>
> *'... a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not*

[1] CV2007-002865

properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence. … Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to a defence'."

[12] An application for permission to put in a Reply cannot therefore succeed if the proposed Reply responds to matters which should have been dealt with in the particulars of claim (i.e. in the statement of case). It should deal with **"new" matters** that are raised by the defence and should not be drafted as a **"defence to a defence"**: **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited (supra)**, **Raymatie Mungroo v Andy Seerattan and Ors**[2], and **Rohit Seekumar (trading as "Copying Express" v McEnearney Business Machines Limited**[3].

III. Analysis

[13] The draft Reply as attached to the Claimant's Application contains 15 paragraphs. The parties have attempted to agree to the appropriate parameters of the Reply but have been unsuccessful.

The Defendant has objected to 13 paragraphs of the Reply as follows: **paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.**

[14] **Paragraph 2 of the Reply** is stated as being in response to paragraphs 3 and 4 of the Defence. Paragraph 3 of the Defence stated that on the day of the incident, the Claimant did not complain of pain to her right back nor hip but only to her left knee, a bruised right shinbone and an abrasion to her left leg in the area of the shin. Paragraph 4 of the Defence averred that the Defendant does not admit that the alleged injuries reflected in the MRI

[2] CV2007-002865
[3] CV2015-03969

exhibited as "A" to the Statement of Case were as a result of the Claimant's fall on 21st November, 2012 as the injuries were discovered some 2 years after the incident.

The Claimant in her reply stated that there was no break in the chain of causation between the Claimant's fall and the injuries she sustained as a direct consequence of tripping on the empty displaced base, which was left unattended on the floor of the Defendant's supermarket.

The Court finds that the issue of the link between the Claimant's fall and the injuries, which she sustained, is a *not* new issue raised by the Defence, which warrants a reply.

The Court is also of the view that the words "*left unattended on the floor"* is an introduction of new facts in the Reply, which ought to have been pleaded in the Statement of Case. Though this fact was introduced by the Defendant in its Defence in its exhibited Investigation Report; this fact goes to support the Claimant's case and can be dealt with during cross-examination.

Further, the last 2 lines beginning with "thus, causing" to "Claimant's Statement of Case" amount to a restatement of the Statement of Case and thus, should be struck out.

Ruling: Accordingly, paragraph 2 of the Reply ought to be struck out.

[15] **Paragraph 3 of the Reply** is stated as being in response to paragraphs 3 and 4 of the Defence where the Claimant was put to strict proof that the injuries reflected in the MRI were attributable to the incident on 21st November, 2012.

The Claimant in her reply sought to describe the injuries that she sustained as a result of her fall at the Defendant's supermarket and stated that she reported the said injuries to Mr Francis Inniss.

The Court is of the opinion that there are *no* new issues in these paragraphs, which warrant a reply.

The Court agrees with the Defendant that lines 1-5 beginning with "she immediately complained" to "lower leg" have already been pleaded at paragraphs 4 and 5 of the Statement of Case and are therefore repetitive and should be struck out.

The Court also agrees with the Defendant that lines 5-6 beginning with "injuries which were" to "Arima Hi-Lo Stores" have already been pleaded at paragraph 7 of the Statement of Case and are repetitive and therefore should be struck out.

The Court is of the opinion that the remainder of the paragraph beginning with "Further, as stated" to "to fall thereafter" is drafted as a defence to the Defence and should to be struck out.

Ruling: Accordingly, Paragraph 3 of the Reply ought to be struck out.

[16] **Paragraph 4 of the Reply** is in response to the last 2 lines of paragraph 4 of the Defence, where the Defendant averred that the injuries were discovered some 2 years after the incident.

Paragraph 4 of the Reply attempts to deny this averment of the Defence by stating there is clear evidence not only in the subsequent medical reports of Dr Steve Mahadeo, Dr. Rasheed Adam and Dr. Richard Spann but also sales receipt from the Accident and Emergency Department of the Arima Diagnostic Clinic, an X-Ray L/S Spine which was carried out on 4th April, 2013 together with a receipt dated 5th June, 2013 for 4 physical therapy sessions received at Dr. Brian Phelps Spinal and Extremity Chiropractic Clinic in Arima.

The Court finds that lines 1-4 beginning with "her injuries" to "Dr. Richard Spann" are a restatement of the Statement of Case where it has already been pleaded that there is

evidence from Dr Steve Mahadeo, Dr Rasheed Adam and Dr. Richard Spann at paragraphs 9 and 10 of the Statement of Case.

The Court is also of the opinion that lines 5-9 beginning with "shown in the Claimant's" to "the said back injuries" are an introduction of new facts which ought to have been pleaded in the Statement of Case and therefore should be struck out.

The Court notes that the introduction of documentary evidence through a Reply is frowned upon as it gives the Claimant an opportunity to buttress or expand the claim before the Court: **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited (supra).** This is what the Claimant seeks to do by exhibiting the X-Rays of Lumbar Spine as GAP1 to the Reply. As stated above, this is an introduction of new facts which ought to have been pleaded in the Statement of Case. Therefore, the exhibit GAP1 to the Reply is not permissible.

Ruling: Accordingly, paragraph 4 of the Reply ought to be struck out.

[17] **Paragraph 5 of the Reply** is in response to paragraph 5 of the Defence where the Defendant denied that the Claimant reported the injuries to the General Manager of the store in January 2013 and September 2014 and she was put to strict proof. In paragraph 5 of the Defence, the Defendant averred that it has an established system for reporting of accidents: its Public Liability Claims Procedure.

The Claimant in her reply sought to highlight the instances when she spoke to Mr Francis Inniss and Miss Isidora Vickles of the Arima supermarket. The Claimant in her reply further described her interaction with Miss Isidora Vickles.

The Court agrees with the Defendant that lines 1-3 beginning with "after her fall" to "Mr Francis (Inniss)" constitute a restatement of the Statement of Case and are therefore repetitive and should be struck out.

The Court agrees with the Claimant that the Defendant's Public Liability Claims Procedure is a new issue raised in this paragraph which warrants a reply by the Claimant. The Claimant in this instance is permitted to respond to such issue in order to set out her case on this point.

However, the Court is of the view that lines 3-14 beginning with "Miss Isidora Vickles" to "with her letter of the 30th December 2012" are facts, which should have been pleaded in the Statement of Case and therefore, should be struck out.

Ruling: Accordingly, paragraph 5 of the Reply ought to be struck out.

[18] **Paragraph 6 of the Reply** is also in response to paragraph 5 of the Defence where the Defendant averred that the only report received from the Claimant was on the day of the incident (21st November 2012) and the written statement made by the Claimant on the 30th November, 2012.

The Claimant in her reply sought to further describe her interactions with Mr Francis Inniss as it related to her fall in the supermarket and the injuries that she received.

The Court agrees with the Defendant that lines 1-3 beginning with "in January 2013" to "not yet received a response" are a restatement of the Statement of Case at paragraph 7 and should be struck out.

The Court agrees with the Defendant that lines 4 to 12 beginning with "the Claimant" to "give her at that time" are an introduction of new facts in an attempt to bolster the case against the Defendant. These facts should have been pleaded in the Statement of Case and are therefore struck out.

Ruling: Accordingly, paragraph 6 of the Reply ought to be struck out.

[19] **Paragraph 7 of the Reply** is in response to paragraph 6 of the Defence where the Defendant averred that the treatment by a foreign medical practitioner was unreasonable

for such a complaint and that treatment for the Claimant's complaint was available locally.

The Claimant in her reply denies this averment by stating that she had a duty to mitigate her loss and that it was incumbent on her to seek a second opinion of her medical condition overseas from Dr. Anthony Webber.

The Court finds that lines 1-3 beginning with "The Claimant" to "available locally" amount to a bare denial and ought to be struck out.

Moreover, the Court is of the opinion that there is *no* new issue raised in paragraph 6 of the Defence which warrants a reply. The Court finds that lines 3 to 9 beginning with "the Claimant further" to "any form of activity" have already been pleaded in paragraph 8 of the Statement of Case; there is no need to repeat it with an embellishment in the Reply. Therefore, these lines ought to be struck out.

The Court is also of the view that lines 10 to 14 beginning with "it should be" to "in Trinidad" ought to be struck out. This evidence is not in answer to any new issue raised by the Defendant in paragraph 6 of its Defence.

Ruling: Accordingly, paragraph 7 of the Reply ought to be struck out.

[20] **Paragraph 8 of the Reply** is in response to paragraphs 6 and 7 of the Defence where the Defendant does not agree to the medical documents exhibited by the Claimant in her Statement of Case as it did not have the opportunity to see the originals and puts her to strict proof.

The Claimant in her reply stated that the documents can be easily verified via notice of inspection of the said originals.

The Court is of the view that there is no new issue raised in paragraphs 6 and 7 of the Defence which warrant a reply by the Claimant. The Claimant unnecessarily responds to paragraphs 6 and 7 of the Defence.

Ruling: Accordingly, paragraph 8 of the Reply ought to be struck out.

[21] **Paragraph 9 of the Reply** is in response to paragraph 13 of the Defence where the Defendant does not admit to the medical expenses, costs of X-Rays, MRI, physical therapy, transportation costs and domestic assistance as it did not have the opportunity to see the originals and that they are too remote. The Claimant was put to strict proof.

The Claimant in her reply stated that the documents can be easily verified via notice of inspection of the said originals and that the injuries were as a consequence of the Claimant's fall at the supermarket; thus it cannot be said to be too remote.

The Court is of the view that there is *no* new issue raised in paragraph 13 of the Defence which warrants a reply by the Claimant. The Claimant unnecessarily responds to paragraph 13 of the Defence.

Further, lines 6-9 beginning with "Further, the Special Damages" to "too remote in this matter" is a denial of the Defence and therefore ought to be struck out.

Ruling: Accordingly, paragraph 9 of the Reply ought to be struck out.

[22] **Paragraph 10 of the Reply** is in response to paragraph 8 of the Defence where the Defendant averred that it maintains a safe premises and that on the day in question, the baseboard tray was not unattended and that it did not make the premises unsafe or constitute a danger.

The Claimant in her reply repeated paragraph 13 of her Statement of Case. The Claimant further stated that the attendants of the Defendant's Arima store did not follow the

directions laid down by the Defendant and that the baseboard if left unattended would have created a potential danger zone to which the Claimant was at risk.

The first line of the paragraph from "The Claimant" to "the Defence" ought to be struck out as it amounts to a restatement of the Statement of the Case.

The Court agrees with the Claimant that the directions given to the attendants in the supermarket is a new issue, which the Claimant is permitted to respond to in order to define the issues between the parties.

However, the Court is of the opinion that the Claimant unnecessarily responds to paragraph 8 of the Defence in lines 2-12 beginning with "but also further avers" to "with nothing on it" as it is a bare denial of the Defence. The Claimant in these lines also sought to emphasise on the fact that the baseboard was left unattended; however, the Court is of the view that this fact ought to have been pleaded in the Statement of Case. Therefore, these lines should be struck out.

Lines 12-16 beginning with "the Claimant further avers" to "unsuspecting customer(s)" are an introduction of new facts which ought to have been pleaded in the Statement of Case. Therefore, these lines ought to be struck out.

Ruling: Accordingly, paragraph 10 of the Reply ought to be struck out.

[23] **Paragraph 11 of the Reply** is in response to paragraph 9 of the Defence where the Defendant averred that the Claimant's fall was caused either wholly or in part by her own negligence in failing to observe and/or watch where she was walking and walking without due care and attention.

The Claimant in her reply denied this averment by stating that neither the Perishable Manager nor the Store Manager of the Defendant's supermarket witnessed the sequence of events before the Claimant tripped over the vacant baseboard, which led to her fall.

The Claimant unnecessarily responds to paragraph 9 of the Defence in lines 1-6 beginning with "Further, the Claimant" to "witnesses to the matter" as it is bare denial of the Defence. Therefore, these lines should be struck out.

The Defendant in paragraph 9 of its Defence exhibited a photograph of the standard baseboard in its supermarket. The Claimant submitted that the Defendant has introduced for the first time new representations of a purported photograph of the baseboard, which was not a true representation of the exact scene on the date of the incident.

The Court finds that the Defendant in its pleading did not exhibit the photograph to depict the scene on the date of the incident but rather to rely on it during the trial in showing its size and visibility. Therefore, a reply from the Claimant is not warranted. In view of that, lines 6-13 beginning with "Additionally, the attached photograph" to "have been placed" are unnecessary and therefore ought to be struck out.

Ruling: Accordingly, paragraph 11 of the Reply ought to be struck out.

[24] **Paragraph 12 of the Reply** is in response to paragraph 10 of the Defence where the Defendant denied the extent of the injury and loss claimed by the Claimant. The Defendant further stated that disc dessication *(sic)*[4] changes in L4-L5 and L5-S1 are changes, which are over a long period of time and not attributable to a sudden fall or incident of trauma.

The Claimant in her reply is effectively denying this averment by stating that disc desiccation can occur directly from a sudden traumatic injury (a fall) and the effect of such a fall on the discs.

The Court agrees with the Claimant that the Defendant has raised a new issue, which warrants a reply by the Claimant. The new issue raised is that disc desiccation changes are a result of changes over a long period rather than being attributable to a sudden fall or

[4] Proper spelling is **"desiccation"**

incident of trauma. The Claimant is therefore permitted to respond to this new allegation which would assist in setting out her case on this point.

Lines 3-5 beginning with "the Claimant avers" to "L4-L5 and L5-S1" amounts to a restatement of the Statement of Case and is therefore repetitive and ought to be struck out.

The Claimant in the remainder of the paragraph from "disc desiccation" to "Defendant's supermarket" sought to respond to this new issue by describing how a fall can cause disc desiccation and the consequences of disc desiccation.

The Court is of view that although the Claimant is allowed to reply to the issue raised by the Defence, the Court, however, agrees with the Defendant that this response is a statement of medical opinion. Therefore, these lines should be struck out.

Ruling: Accordingly, paragraph 12 of the Reply ought to be struck out.

[25] **Paragraph 13 of the Reply** is in response to paragraph 11 of the Defence where the Claimant was put to strict proof that she will need to incur future expenses as set out in paragraph 12 of the Statement of Case and that the injuries, loss and damages were attributable to the incident.

The Court is of the opinion that the issue of future expenses is *not* a new issue raised in the Defence which warrants a reply.

The Court agrees with the Defendant that lines 2-7 beginning with "the Claimant repeats" to "option at this time" amount to a restatement of the Statement of Case as this has already been pleaded in paragraphs 9 and 12 of the Statement of Case. Therefore, these lines should be struck out.

The Court is of the view that lines 7-13 beginning with "In addition" to "increase back strength" are an introduction of new facts which ought to have been pleaded in the Statement of Case.

Ruling: Accordingly, paragraph 13 of the Reply ought to be struck out.

[26] **Paragraph 14 of the Reply** is in response to paragraph 16 of the Defence where the Defendant provides different rates of interest that would be available to the Claimant on special damages, general damages and the judgment.

The Claimant in reply averred that the rates given by the Defendant are unreasonable and provided her own rates of interest.

The Court finds that the rates of interest is a new issue raised by the Defence which warrants a Reply. The contents of paragraph 14 were not pleaded in the Statement of Case nor should they have been as the Claimant would not have been aware that the Defendant would be challenging the rates of interest to be awarded.

Accordingly, paragraph 14 of the Reply is permissible but not necessary.

[27] The Court notes that from the 13 of the 15 paragraphs objected to, I found that 12 of the paragraphs ought to be struck out and only one was permissible. Accordingly, the Claimant's Reply will be left with only three paragraphs – **paragraph 1, paragraph 14 and paragraph 15**.

In paragraphs 1 and 15 of the Claimant's reply, she joins issue with the Defendant on its defence and on the averment that there was loss and consequential liability for loss and damages respectively. These two paragraphs are by themselves unnecessary. Paragraph 14 of the Reply details the rates of interest to which the Claimant ought to be entitled. This is a question for the Court and in any event can be effectively dealt with in closing addresses or submissions.

It is this Court's view that the Reply, if allowed to stand, excluding the struck out paragraphs, is of no substance, especially in assisting in setting out the Claimant's case against the Defendant. Accordingly, permission is denied to the Claimant to file and serve a Reply to the Defence in terms of the draft Reply attached to the Notice of Application filed on the 19th April, 2017.

IV. Disposition

[28] **Having considered the pleadings, the draft Reply and the submissions of both parties, the Court orders as follows:**

ORDER:

1. **Permission to the Claimant to file and serve a Reply to the Defendant's Defence in terms of the draft Reply attached to the Notice of Application filed on the 19th April, 2017 be and is hereby refused. Accordingly, the said draft Reply is hereby struck out.**

2. **The Claimant shall pay to the Defendant costs of the Application assessed in the sum of $6,500.00 pursuant to CPR Part 67.11, to be paid on or before 29th March, 2019.**

Dated this 27th day of September, 2018

Robin N. Mohammed
Judge