

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-00983

BETWEEN

TREVOR BURNETT

Claimant

AND

GEORGE HADEED

First Defendant

JACOB HADEED

Second Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: November 20, 2018

Appearances:

Mr. Alfred Pierre instructed by Ms Cherry-Ann Pottinger for the Claimant

Ms. Reah Sookai for the Defendants

RULING ON CLAIMANT'S APPLICATION TO FILE REPLY

I. Procedural History

[1] On 22nd March, 2018, the Claimant, Trevor Burnett, filed a Claim Form and Statement of Case against the Defendants for the following relief:

- a. General damages for negligence

b. Special damages in the amount of \$8,658.00 as detailed below:

Reimbursement for medical bills:-

St. Augustine Radiology Service Ltd..... \$1,600.00

Caribbean Eye Institute..... \$ 718.00

Cheambio Medical Laboratory..... \$ 640.00

Reimbursement of sums paid to his paid help:-

From 23rd February 2017 to 8th April 2017, that is, 38 days (excluding Sundays and one public holiday) at \$150.00 per day..... \$5,700.00

c. Costs

d. Interest pursuant to section 25 of the Supreme Court of Judicature Act, Chap 4:01;

e. Such further or other relief as the Honourable Court may deem just.

[2] The Defendants entered their appearance on 4th April, 2018 and filed their Defence on 23rd April, 2018.

[3] On 26th April, 2018, a notice of assignment was issued assigning the matter to my docket and a hearing was set for 23rd May, 2018 for the Case Management Conference.

The Claimant at the first Case Management Conference expressed the desire to file a Reply to the Defence whereupon the Court made the following order:

- 1. Proposed application to file and serve a Reply to the Defendants' Defence filed on 23rd April, 2018, in particular paragraphs 5, 7, 8 and 9 thereof, to be filed and served with draft reply attached on or before 18th June, 2018**
- 2. The Court shall attempt to deal with such application without a hearing but with consultation with the Defendants' attorney via telephone.**
- 3. In the event there is any objection the Court shall then give directions for submissions without a hearing.**

4. The next Case Management Conference is adjourned to 24th July, 2018 at 10:30am in Courtroom POS24.

[4] The Defendants on 25th May, 2018 filed a Notice of Application for permission to amend their Defence which was filed on 23rd April, 2018 in terms of the draft amended Defence attached to the Notice of Application.

[5] By Notice of Application filed on 21st June, 2018, the Claimants requested an extension of time to comply with the directions made by this Court on the 23rd May, 2018 for the filing and serving of the Claimant's Draft Reply to the Defence from the 18th June, 2018 to 21st June, 2018. A draft Reply was annexed to this Application.

[6] Having read the Claimant's Application filed on the 21st June, 2018, attorney for the Defendants stated via email dated 25th June, 2018 that she was objecting to the Draft Reply as filed.

[7] Attorney for the Claimant via email dated 27th June, 2018 objected to the Defendants' Application filed on the 25th May, 2018 to amend their Defence.

[8] At the next Case Management Conference on 24th July, 2018, the Court made the following order:

- 1. Permission is granted to the Defendants to amend their Defence filed on 23rd April, 2018 in terms of the draft amended Defence attached to the Notice of Application filed on 25th May, 2018. The amended Defence filed on 25th May, 2018 to stand as the amended Defence.**
- 2. There be no order as to costs on this application.**
- 3. In relation to the Claimant's Notice of Application filed on 21st June, 2018 for permission to file and serve a reply to the Defendants' amended Defence,**

the Defendants' attorney to file and serve submissions with authorities on or before 18th September, 2018.

- 4. Response submissions with authorities to be filed and served by the Claimant's attorney on or before 18th October, 2018.**
- 5. The Application of 21st June, 2018 is adjourned to 20th November, 2018 at 2:00pm in Courtroom POS22, for decision.**

[9] The Defendants filed their submissions on their objection to the Claimant's Draft Reply on 11th September, 2018. To date the Claimant has failed to file any response submissions as directed or at all.

[10] Having considered the written submissions of the Defendants, the Court will now give 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 file a 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 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

¹ CV2007-002865

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). A Reply, therefore, ought not to be used as an opportunity to restate the claim. 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 3 paragraphs in response to paragraphs 5 and 7 of the Amended Defence. The Court notes that there are only three numbered paragraphs in the Claimant's Draft Reply. However, within each numbered paragraph, there were other paragraphs but they were not numbered.

Paragraph 2 of the Draft Reply

[14] Paragraph 2 of the Draft Reply is stated as being in response to paragraph 5 of the Defence. Paragraph 5 of the Defence denies paragraph 2 of the Statement of Case. The Defendants averred that the said property is registered in the name of Zabouca Limited and that the Defendants are Directors of that company.

² CV2013-04801

³ CV2015-03969

The Claimant in his reply denied that the said property was registered in the name of Zabouca Limited but instead contended that even if it was so registered, it was, at all material times, in the possession and ownership of the Defendants.

The Court is of the opinion that the facts pleaded as to the ownership of the said property in lines 1-4 beginning with “The Claimant is” to “ownership of the Defendants” is *not* a new issue, which warrants a reply. It is a bare denial of the Defence.

Accordingly, lines 1-4 of Paragraph 2 of the Draft Reply ought to be struck out.

[15] In lines 5-16 beginning with “the Defendant was” to “of the said property”, the Claimant stated that the Defendants were first written to by attorney-at-law acting on behalf of the Claimant by letter dated March 31, 2017 in which it was indicated that the First Defendant would have had further communications from the Claimant after certain medical procedures were completed. The Claimant exhibited a copy of that letter to his Draft Reply as **T.B.1**. The Claimants subsequently stated that the Defendant was then further written to by letter dated May 17th, 2017 after the completion of all medical procedures to which Attorneys at law Messrs L. Doodnath responded. The Claimant exhibited copies of both letters to his Reply as **T.B.2**. The Claimant further stated that thereafter the parties exchanged correspondence without any challenges to the Defendants’ ownership or them being not in possession of the said property.

The Court is of the view that these lines are an introduction of new facts in the Reply in an attempt to bolster the case against the Defendants. These facts ought to have been pleaded in the Statement of Case and ought not to be allowed in a Reply. They are, therefore, to 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 copies of letters as T.B.1 and T.B.2 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, exhibits

T.B.1 and **T.B.2** mentioned in and attached to the Draft Reply are not permissible and ought to be struck out.

Ruling: Accordingly, the entirety of paragraph 2 of the Draft Reply will not be allowed.

Paragraph 3 of the Draft Reply

[16] Paragraph 3 of the Draft Reply is stated as being in response to paragraph 7 of the Defence. Paragraph 7 of the Defence denies that the Defendants are responsible for the Claimant's alleged injuries and/or any circumstance which may have occasioned those injuries. The Defendants averred that on the date of the Claimant's alleged injuries, an independent contractor and his workers were on the Defendants' premises carrying out work for the Defendants.

The Defendants further averred that the Claimant did not immediately report his alleged injuries or the incident to any of the Defendants' employees or the independent contractor or the independent contractor's workers present on the premises at the time. The Defendants stated that the Claimant failed to report the incident or his injuries to the First Defendant who is known to the Claimant. The Defendants contended that the Claimant's first report of the alleged incident and injuries was in or around 17th May, 2017, approximately 3 months after the alleged incident. A letter dated 17th May, 2017 was sent to the Defendants by the Claimant requesting payment for alleged injuries. The Defendants through their then attorney at law requested, via correspondences, further particulars of the accident, which were provided via letter dated 13th July, 2017.

The Claimant in his Draft Reply stated that on the day in question, he reported the matter to workers on the site and one of whom was abusive to him. He was told that the Defendants were absent. The Claimant stated that he reported the matter to the Arima Police Station where he was given a receipt for the report; he attached a copy of the receipt to the Draft Reply as **T.B.3**. The Claimant also attached to his Draft Reply as **T.B.4** copies of photographs subsequently taken by him of the work in progress on the building showing that there were no precautionary signs; the area was not cordoned off; nor were there warning signs to pedestrians.

The Court is of the opinion that there is *no* issue in Paragraph 7 of the Defence which warrants a reply. The Court is of the view that this is an introduction of new facts in an attempt to bolster the case against the Defendants. These are facts which ought to have been pleaded in the Statement of Case and are therefore not permissible.

Additionally, the documentary evidence attached to the Draft Reply at T.B.3 and T.B.4 are not permissible. The Claimant is attempting to buttress or expand the case against the Defendants in doing so. This is an introduction of new facts which ought to have been pleaded in the Statement of Case.

Ruling: Accordingly, paragraph 3 of the Reply ought to be struck out in its entirety.

IV. Disposition

[17] Having considered the pleadings, the Draft Reply and the submissions of the Defendants, the Court orders as follows:

ORDER:

- 1. Permission to the Claimant to file and serve a Reply to the Defendants' Amended Defence in terms of the Draft Reply attached to the Notice of Application filed on the 21st June, 2018 be and is hereby refused.**
- 2. Accordingly, the said Draft Reply is hereby struck out in its entirety.**
- 3. Costs occasioned by this application to be paid by the Claimant to the Defendants to be assessed in accordance with Part 67.11 CPR 1998.**

Robin N. Mohammed
Judge