THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2018-02475

Between

CORINNE HERAUD

Claimant

And

TRINBAGO COMMERCIAL DEVELOPMENT LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: April 10, 2019

Appearances:

Claimant: Mr. R. Montano

Defendant: Mr. S. Bidaisee instructed by Ms. R. Jaggernauth

Reasons

1. On the April 2, 2019 the court made the following order on an application by the Defendant to strike out certain parts of the Reply filed by the claimant;

   i) The following paragraphs and/or words of the Reply filed on the 16th November 2018 are struck out;

   a. Paragraph 9 together with Attachment II.

   b. Paragraphs 13, 15, 17, 19, 22, 25, 26, 29 and 34 in their entirety.

   c. Paragraph 21, from line two, the words "*that prior to going abroad she did not know that she had a fracture. All she knew was that she was in pain."*

   d. Paragraph 23 the words appearing at the first and second lines namely; *"she did not know that she had fractured a vertebrae until".*

   e. Paragraph 28 the words appearing at the first four lines namely, *"says that at the material time of booking and renting the car she did not know that she had a fractured vertebrae and had not been advised by any doctor that she would have had to lie down flat on her back for three weeks".*

   f. Paragraph 40, the words *"as the Defendant and its insurance company well knows."*

   ii) The application to strike out other parts of the Reply is dismissed.

   iii) The costs of the application shall be costs in the cause.

2. These are the written reasons for the decision.

Claim and defence in brief as pleaded

3. The claimant's claim is one for negligence against the defendants who are the owners and/or occupier of the Movietowne Complex at Invaders Bay, she having slipped and fallen on a concrete walkway on the premises which she alleges was wet from rain. It is her pleaded case that there were no caution signs located at or in the vicinity of the fall. She sustained a fracture injury to the T12 vertebrae of her spine. Subsequently she was advised by a doctor attached to a local hospital that she could travel on her pre-arranged trip to France but that she would be in a lot of pain. She proceeded on her trip where she sought and obtained further medical attention. She has claimed damages under several heads including but not limited to the increased cost of travel.

4. The claimant also averred that in an accident report form signed on behalf of the defendant on the 11th June 2016, the date of the incident, the defendant admitted that there were no warning signs that the sidewalk was slippery and hazardous when wet. The claimant attached no documents to her statement of case.

5. The defendant has denied negligence and has averred that when the rain began, in keeping with its usual practice as is reasonably required and practicable, it's janitorial staff immediately placed several caution signs and warning cones at several places along the sidewalk and they remained so placed at the time the claimant sustained the fall as the rain was continuous. It has specifically pleaded at paragraph 3 d of its defence that there were six (6) standing yellow plastic Caution signs/ cones in the immediate vicinity of where the claimant fell.

6. The defendant averred that although its employee Nikita Cameron signed the said form, she did so only as proof of receipt of the form from the wife of the claimant and that there was therefore no admission of the contents of the form.

7. Amongst other matters, the defendant also took issue with the claimant's decision to travel with the knowledge of a fractured spine and the attendant consequences. This would of course be relevant both to the issue of causation, it having been admitted that the claimant had a pre-existing condition and also the issue of quantum of damages should there be a finding of liability on the part of the defendant.

8. It is in that broad context that the defendant applied to strike the several lines or words contained in particular paragraphs set out in the Reply and in some cases the entire paragraph.

Not struck out/Application dismissed in relation to specific lines, words or entire paragraphs of the following.

<u>Paragraphs 1, 2, 3, 4, and 6</u>

9. The objections to these paragraphs were all dismissed on the same basis. The objection was to the annexure for the first time of pictures showing the place where the claimant allegedly fell taken at the time of the incident. The pictures appear to show the claimant lying on the walkway and no signs present as averred to by the defendant. The court accepted that a claimant has a duty to attach all documents upon which it relies to its statement of case. The purpose of so doing is several. Firstly, it gives the other side full information in respect of which it is to file its defence. Secondly, it provides an opportunity for the parties to use that full information to enter into settlement discussions depending on the nature

of the information so that the matter may be settled at an early stage. Thirdly it may negate the need for standard disclosure to be made later on. It does not however mean that a party having failed to comply, may not do so subsequently. There are several opportunities to so do, including at the standard disclosure stage or upon an order of specific disclosure or where it is otherwise just so to do.

10. The present case fell within the latter category as disclosure of the photographs was made pursuant to a Reply having validly been made in relation to the issue of both the place of the fall and the fact of the absence or presence of warning signs. The claimant averred that there were no signs where she fell. The defendant averred that there were signs. For the first time, the issue is being raised in the defence that there were in fact signs in specific areas as set out at paragraph 3d of the defence, namely at the Box Office, Knowledge Zone and Subway. In those circumstances the claimant was in the court's view entitled to rely on the photographs in answer to the specific allegation made by the defendant. The fact that they were not attached to the statement of case is not on its own reason to deprive the claimant of the ability to answer the averment of the defendant. It may have had the collateral effect of embarrassing the defendant in that the photographs appear to clearly demonstrate the absence of signs but that is the risk that the defendant took in pleading its case.

11. In any event the photographs could have nonetheless been attached to a list of disclosure yet to be ordered by the court if it thinks fit.

12. In relation specifically to lines one and two of paragraph three of the Reply, the objection was dismissed as the defendant raised the issue of the claimant having stated in a statement made previously that she fell outside

of Hong Kong City restaurant as opposed to her averment in the statement of case that she was walking just outside the box office. The defence then attaches a copy of the accident report form. The statement of case does in fact aver that the claimant was walking outside the box office but it does not specifically state that the claimant fell outside of the box office. In those circumstances the claimant was entitled to reply in relation to whether she in fact made a statement that she fell outside the box office.

Paragraphs 7 and 8

13. Quite simply, the claimant has replied by saying that the signature of the employee of the defendant on the report must be taken to be agreement of the contents. This was in direct answer to the defence which admitted the signature but averred that it di not represent agreement as to contents. This in the court's view is non objectionable.

Paragraph 10

14. The defence averred for the first time that pedestrians are expected to use the alternative covered walkway when it rained. This issue may go to negligence or contribution on the part of the claimant. The claimant was therefore entitled to reply on the issue. She replied that the area in which she fell was partially covered but was nonetheless wet. She went on to aver that there is no difference between the two. This was permissible in the court's view.

Paragraph 12

15. The defendant averred at paragraph 3(i) of the defence that there was the obvious risk and there were signs present so that there was reasonable notice to visitors of the risk. The claimant is therefore entitled to answer

as the issue treats with possible negligence on her part (which is also claimed by the defendant). She therefore answered in her reply that she took what she mistakenly believed to be a safe route to go to her car as there were no warning signs. She was in the court's view entitled so to answer the issue of risk having been raised by the defendant.

Paragraph 14

16. At paragraph 3(l) of the defence the defendant avers that risk was also to be measured by the claimant's weight and girth (which the defence presumes). The claimant therefore correctly answered the issue raised for the first time by the defendant when she set out at paragraph 14 of her reply that she was always physically active and had excellent balance. She has also set out that it was offensive for the defendant to raise that issue. The reply was not objectionable in that regard as in the absence of particulars, the defence was clearly based on either speculation or insult. On a collateral issue, the court considered that the claim was still at an early stage and that it may well be that the defendant will lead evidence to support its averment as to the weight and girth of the claimant so that paragraph 3(l) was not struck out by the court of its own motion at this stage.

Paragraph 18

17. This paragraph of the Reply contained an admission by the claimant that it erred in its statement of case in relation to the name of the employee of the defendant who attended the scene and accepted the averment of the defendant that it was Ms. Cameron and not Ms. Noriega as originally pleaded. There is absolutely nothing objectionable in such an admission as same removes the factual dispute of the identity of the employee as an issue.

Paragraph 24

18. The reply of the claimant was in direct answer to paragraph 6c of the defence in which the defendant averred that the trip to France was a personal vacation and a discretionary one. It avers that the claimant made the trip despite advice from the local doctor that she would be in pain and that she had a sustained a fracture. The claimant answered by admitting that the trip was personal and alleging that she followed the best advice at the time. This paragraph had nothing to do with whether or not the claimant had in fact averred in her statement of case that she knew she had sustained a fracture (the paragraphs relating to that issue were struck out of the Reply). Therefore in the court's view the claimant was entitled to answer the issue was it related directly to risk, mitigation and pre-existing condition.

Paragraph 27

19. The defendant objection to the inclusion of the copies of receipts in the Reply. The court noted that the inclusion of the receipts would cause no prejudice to the defendant as the amounts allegedly spent (as contained in the receipts) were set out in detail in the statement of case and in any event copies of the receipts would have been disclosable had the court ordered standard disclosure.

Paragraphs 30, 31, 32 and 33

20. The objection to paragraph 30 was to the last sentence. However the answer in the reply goes to the root of one of the main issues of quantum, namely the appropriateness or reasonableness of staying over in Miami on her way back to Trinidad and the reason therefore raised specifically by the defence at paragraph 6 g. The claimant was therefore entitled to reply

on that issue. In relation to paragraph 31, it answers the particulars set out at paragraph 7 of the defence in relation to contributory negligence without traversing each answer specifically. It cannot be that the claimant was not entitled to specifically answer paragraph 7 of the defence on such a material issue and the court so found.

21. In relation to paragraph 8 of the Reply, it is the defendant who set out at paragraph 8 of the defence that it could not deny or accept the injuries as no medical reports were attached to the statement of case. In the court's view therefore the claimant was entitled to answer by saying that she had in fact provided the insurers of the defendant with copies of all the medical reports so that the documents are in their possession contrary to their assertion. Further for the same reasons set out above in relation to the other documents, the annexure of the reports in the reply was not objectionable in the court's view.

22. In relation to paragraph 33 of the reply, the defendant admits that its insurers did not settle the claim. It gives for the first time specific reasons for so not doing, namely that it felt that the defendant was not liable for all the reasons set out therein. In the court's view, this could not be left unanswered especially in light of what the claimant refers to as a hostile and belligerent attitude applied to her by the insurer in the context of (according to her) the clear weight of the evidence in her favour. So that the claimant is saying that the insurers chose not to settle the claim for some other purpose. For the claimant to raise this issue at trial she would have to have pleaded it. In this case she did do so in direct response to a reason for non-settlement given by the defendant in the defence. There is nothing objectionable in that regard in the court's view.

Paragraphs 35, 36, 37, 38 and 39

23. By paragraph 13 (b) of the defence, the defendant set out that the wife of the claimant is not to be considered a dependent for the purpose of an allowance at the claimant's place of employment. Moreso, the defendant proceeded to raise for the first time and aver that the wife of the claimant was self employed. In that case, it was clearly permissible that the claimant be permitted to reply in relation to the averment which she did by paragraph 35 of her Reply. The same rationale is applicable to paragraphs 36, 37, 38 and 39 of the Reply which all treat with the issue of quantum and the specifics of the employment of the claimant in answer to paragraphs 13 c, 13 d, 13 e and 13 f of the defence specifically.

Struck out-specific lines, words or entire paragraph

24. The specific lines, words or entire paragraphs struck out were struck out by the court, it having agreed with the arguments and submissions made by the defendant in relation to those matters.

Ricky Rahim

Judge