

10-04-08

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO. 17 OF 2007

(GCt216/04)

BETWEEN:

GOLDIE PANTON
PRENTICE PANTON
STANLEY PANTON
DANNY SOTO
SHERRYLYN SANTO



Appellants

AND

JOE'S DOWNTOWN LTD.

Respondent

JOELLE McCRAE

Respondent/Third Party

Before: The Right Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Mr. Justice Mottley, Justice of Appeal

Heard: 27th & 31st March, 2008. Judgment delivered 10th April, 2008.
Reasons released: 14th August, 2008.

Appearances: Norman Hill, QC instructed by Miss Keva Reid of McKinney Reid & Co for the Appellants and Stephen Hall-Jones instructed by Diamond Law Associates for the Respondent and Respondent/Third Party.

MOTTLEY, J.A.

[1] On 31 July 2007, Henderson J held that Joe's Downtown Ltd. (the company), was a co-tenant and, as such, it had standing to bring this action for unlawful eviction and unlawful distraint. The judge subsequently entered judgment for the company and Joelle McCrae (Mr. McCrae) the third party on the issue of liability. Judgment was awarded for Goldie Panton, Prentice Panton, Stanley Panton, Danny Soto and Sherrylyn Soto (the owners) on the counter-claim which

they brought against the company for unpaid rent in the sum of \$34,550.00 plus interest. The judge further ordered that this sum is to be set off against any damages which may be awarded to the company. The enforcement of the judgment on the counter-claim was stayed by the judge, until the assessment of the claim by the company for damages had been heard, on condition that the company moved expeditiously to have the assessment set down for hearing.

[2] It is against this judgment on the issue of liability that the owners have launched this appeal. The issues that arise for the determination of this Court are; (i) who was the tenant and what kind of tenancy was it, (ii) was the tenancy properly determined, and (iii) did the owners have any power to distrain after the determination of the lease. In respect of the first issue, who was the tenant, this involved the issue whether the company was the proper party to bring this action. For the reasons set out below, we determined that the issue of who was indeed the tenant of the premises was dispositive of the appeal.

[3] The owners owned a property situate at Mary Street (the premises). The company commenced proceedings against the owners by way of filing a Writ of Summons on 3 May 2004. In the Statement of Claim the company alleged that, at all material times, it was the tenant of the premises situate at Mary Street, George Town ("the premises") where it ran a restaurant known as Joe's Downtown. The

company further alleged that the owners purported to terminate the tenancy on 31 December 2003 by unlawfully taking possession of the premises. They changed the locks and security codes of the premises and thereafter refused to allow representatives of the company to enter the premises. Consequently, the company alleged that the owner took possession of all the goods and chattels on the premises and refused to allow the company to collect any or all of these items. In so doing, the owners wrongfully converted the goods and chattels to their own use and benefit. In respect of these allegations, the company claimed damages for unlawful forfeiture and termination of the tenancy. The company also alleged that the conduct of the owners constituted an illegal distress in as much as the owners had wrongfully terminated the company's tenancy and, accordingly, the owners lost any right which they may have had to exercise the remedy of distress on the goods and chattels of the company. In addition, the company also claimed damages for the wrongful detention of its property.

[4] The Writ of Summons originally had the name "JOELLE McCRAE" as a plaintiff. However, a line had been drawn through his name indicating that he was removed from the proceedings as a plaintiff.

[5] On 4 March 2005 the owners filed an Amended Defence and Counterclaim. The owners alleged that, in October 2002, they entered an oral agreement with

Mr. McCrae to lease the premises to him. The terms of the lease included, *inter alia*, that the premises would be used as a restaurant, and that the tenancy would have commenced on 1 November 2002 at a monthly rent of CI\$6,000.00. The owners specifically denied that the company was the tenant and alleged instead that the tenant was Mr. McCrae. The owners also denied that the company was entitled to the relief claimed in their Statement of Claim. Further they alleged that any goods and chattels, which were on the premises on 1 January 2004 after the lease had been determined, were liable to distress by the owners for unpaid rent. In their Counter-claim, the owners alleged that, should the company be held to be the tenant of the premises and therefore the correct plaintiff, then they were counterclaiming against the company for the sum of \$34,550.00 as arrears of rent plus interest thereon.

[6] On 26 May 2004, the owners issued a Third Party Notice to Mr. McCrae claiming *inter alia* a determination whether the tenancy was between the owners and Mr. McCrae, and the amount of rent due to the owners by Mr. McCrae. The owners were also seeking a determination whether the company was entitled to claim damages for excessive and or irregular distress and whether, in those circumstances, that Mr. McCrae is liable to indemnify the owners in respect of the company's claims for damages in respect of the goods and chattels which were left in the restaurant.

[7] On 26 May 2005 Diamond Law Associates, whom it appeared was also appearing for the company, filed its' Defence to the Third Party Notice. Mr. McCrae specifically denied that he was the tenant. Alternatively, Mr. McCrae asserted that, if he was the tenant of the premises as alleged in the Amended Defence and Counterclaim, he adopted the Statement of Claim and Amended Reply to the Counterclaim as though all references to the "plaintiff" (Joe's Downtown Ltd.) were expressly set out in the Defence and Statement of Claim.

[8] On 27 May 2005, the company filed its Amended Reply and Amended Defence to the Defendants' Counterclaim in which it denied that it owed the rent alleged in the Counterclaim and stated that the owners were obliged to follow the procedures set out in sections 55 to 57 of the Registered Land Law (1994 Revision) and as a result were not entitled, as a matter of law, to enter upon the premises except with an Order from the Court.

[9] At the hearing on 23 July 2007, Henderson J treated the question of who was the correct tenant of the premises under the oral agreement as a preliminary issue. The owners contended that the tenant was Joelle McCrae in his personal capacity.

[10] After hearing evidence from Mr. McCrae, and Mr. Soto for the owners, the judge stated:

“10. I must determine who the tenant was at the time the agreement was entered into in October 2002. There can only be one answer to that. The tenant was Joelle McCrae personally. The company had not been incorporated by that point, so it had no capacity to enter into a contract. In addition, I doubt that the defendants would have agreed to enter into a lease of this sort with a corporate entity without at least insisting on a personal guarantee from the person owning and operating the company.”

“11. That, however, is not the end of the matter. Clearly, it was always Mr. McCrae’s intention to incorporate a company and to have that company operate the restaurant. He intended that the company would take the benefit and assume the liabilities under the lease to the extent possible. There was no assignment of the lease and no permission for the assignment was ever requested of the landlords.”

“12. After the incorporation of the company and after the company began to pay the rent, the company became co-tenant, together with Joelle McCrae personally. From July 2003 onwards

there were two tenants: Mr. McCrae and his Company. It follows that corporate entity, Joe's Downtown Limited, does have standing to advance a claim for unlawful distraint and eviction.”

[11] In our view, the judge was correct in holding that Joelle McCrae was the tenant and not the company. Throughout its pleadings, the company alleged that it was the tenant. Nowhere in its pleadings did the company allege that a co-tenancy existed between the company and Mr. McCrae on the one hand and the owners on the other hand. The evidence clearly showed that there was an oral agreement for the rental of the premises between the owners and Mr. McCrae. No legal basis, in the opinion of the Court, existed for the conclusion reached by the judge that the company was co-tenant with Mr. McCrae. As the judge correctly found, the company was not in existence when the oral agreement was made. Nor, as the judge found, was there any assignment of the lease. While it may have been Mr. McCrae's intention to incorporate a company and have that company operate the restaurant, there is no evidence that this was brought to the attention of the owners at the time the parties entered into the oral agreement for the lease.

[12] Even after the judge made his ruling on 24 July 2007, the plaintiff did not amend its pleading to substitute Mr. McCrae as plaintiff in place of the company.

[13] In his ruling on 31 July 2007, Henderson J. held that the company and its sole owner and operator Mr. McCrae entered into a rental agreement with the owners. This subsequent finding is inconsistent with his earlier finding which is set out in paragraph 10 above. He referred to his previous ruling in which he held that the Plaintiff and Mr. McCrae in his personal capacity were co-tenants under the agreement. The judge then proceeded to determine the case on the basis that a co-tenancy existed between the company and Mr. McCrae. In all his material findings, the judge referred to "co-tenants".

[14] In their grounds of appeal, the owners alleged, *inter alia*, that the judge erred in finding that the company was a co-tenant of the premises. Counsel for the owners submitted that a finding by the judge that the company and Mr. McCrae were co-tenants of the premises was inconsistent with the pleaded case of the company. Further they contended that the evidence showed that the company was not incorporated at the time when the owners and Mr. McCrae entered into the agreement in respect of the rental of the premises and that there was no assignment of the lease. The owners in their Defence and Amended Defence had always contended that in October 2002 they entered into an oral agreement to lease the premises to Mr. McCrae on the terms set out in their pleading.

[15] In his written submission, counsel for the company and Mr. McCrae submitted that the owners' contention on whether the trial judge was right to hold that there was a joint or co-tenancy was "both sterile and academic". Counsel argued that even if the owners were right in their submissions, it did not resolve the appeal and certainly did not mean that the appeal ought to be dismissed.

[16] Counsel further contended that Mr. McCrae was a party to the action by virtue of the Third Party Notice and, as such, the questions whether the company and/or Mr. McCrae were co-tenants were questions to be determined by the Grand Court. Reference was made to the Defence of the Third Party where Mr. McCrae expressly denied that he was the tenant or the putative tenant as alleged in the Amended Defence and Counter Claim. In addition, counsel pointed out that Mr. McCrae also pleaded that, if it was found that he was the tenant, then he adopted, "the Statement of Claim and the Amended Reply and Defence to the Counter Claim of the Plaintiff as though all references to the Plaintiff were references to," Mr. McCrae herein. It is not clear from this pleading whether Mr. McCrae was in fact saying that Mr. McCrae should be substituted as the plaintiff in place of the company. In the written submissions, counsel for the respondent further contended that this pleading meant that if Mr. McCrae was held to be the tenant of the premises he is to be joined as a plaintiff or co-plaintiff in the action. The respondents also argued that if the judge held that only

Mr. McCrae was the tenant, the company would have made an application for leave to join Mr. McCrae as a plaintiff pursuant to Order 15 Rule 6 of the Grand Court Rules 1955.

[17] As stated earlier, the judge, in response to the submission of the owners that the company was not the tenant, ruled that Mr. McCrae was the tenant. In holding that the company was the co-tenant, the judge completely recast the plaintiff's case as pleaded. Nowhere in the pleadings is it alleged that the company and Mr. McCrae were co-tenants. There was no pleading of co-tenancy.

[18] Order 15 Rule 6(1)(2) of the Grand Court Rules provides as follows:

“6 (1) No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of a party; and the Court may in any cause or matter determine the issues or questions so far as they affect the rights and interest of the persons who are parties to the cause or matter.”

“(2) Subject to the provision of this rule at any stage of the proceedings in any cause or matter the Court may on such terms as it think just and either on its own motion or application -

(a) order any person who has been improperly or unnecessarily made a party or who had for any reason ceased to be a proper or necessary party to cease to be a party;

(b) order any of the following persons to be added as a party, namely:

(1) any person who ought to have been joined as a party whose presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon;”.

[19] Rules 6(1) and (2) give the judge power to order that any person who ought to have been before the Court be added as a party to the action. Having made the ruling that Mr. McCrae was the tenant of the owners, it was open to counsel for the company to make the necessary application to substitute Mr. McCrae as the plaintiff in place of the company. No such application was made. Nor did the Court on its own motion order that Mr. McCrae be substituted as the plaintiff. The company was content to advance its case based on the ruling of the judge that Mr. McCrae and the company were co-tenants.

[20] Before this Court, the respondents sought to invoke the provision of Rule 6 and applied to add Mr. McCrae as a plaintiff to the action. The company had pleaded in the Statement of Claim that it was the tenant of the owners. The owners in their Defence pleaded that they entered an agreement with Mr. McCrae. It was abundantly clear that it was a fundamental issue on the pleading that the company was not the tenant and consequently the company was not the correct plaintiff. Even in the face of the judge's ruling on the 24 July 2007 that Mr. McCrae was the tenant, the appellants did not apply to have Mr. McCrae substituted as the plaintiff but were content to develop their case on the basis of the finding of the judge that the company and Mr. McCrae were co-tenants. In these circumstances, we are of the view that it would not serve the interest of justice to allow Mr. McCrae to be added as a plaintiff on the basis of co-tenants. This was not the case as pleaded.

[21] It was for these reasons that we agreed that the company was not the tenant and therefore not entitled to institute this action as the plaintiff. For the reason also set out we agreed that the request to amend the pleading be refused. In the circumstances the judgment entered on the claim is set aside. In addition, the judgment in the Counterclaim against the company is also set aside.

[22] Costs were awarded to the owners to be taxed if not agreed.

Zacca, P.

Forte, J.A.

Mottley, J.A.

