

IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 222 OF 2015

BETWEEN:

SECOND TIME LIMITED

Claimant

AND

**KISS THIS LIMITED (dba
"Tackle Box Bar and Grill")**

Defendant

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

July 27, 28 & 31, 2015.

Appearances: Mr. Estevan Perera for the Claimant.
Mrs. Shaae-Ann Keddo-Ebanks for the Defendant.

RULING

[1] Before the Court is a Notice of Application by the Defendant seeking an order that the Claim be struck out pursuant to Rule 26.3(1)(b) and (c) of the Supreme Court (Civil Procedure) Rules 2005. The said Rule so far as relevant reads:-

26.3(1) In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the court –

(a) ...

- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (c) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim; ...”

The grounds upon which the Defendant seeks to have the claim struck out are threefold:

- (i) That the Claimant had previously commenced Claim No. 680 of 2012 (“the previous claim”) on December 11, 2012 in relation to the rental of the same pier, hence the present claim is a duplication and the Claimant has failed to exhaust its liberty to apply under the agreement;
- (ii) The Claim was incorrectly commenced by a Fixed Date Claim in breach of Rule 8.1(5); and
- (iii) The Claimant has no standing to bring the Claim because the Pier License granted by the Ministry of Natural Resources has expired.

BACKGROUND TO THE CLAIM

[2] On April 17, 2015, the Claim brought proceedings by way of a Fixed Date Claim Form seeking the following relief:

- (1) Permanent injunction restraining the Defendant whether by itself, its servants or agents from operating the business known as Tackle Box Bar and Grill or any business whatsoever in the rental property.
- (2) An order requiring the Defendant, whether by itself, its servants or agents to remove with immediate effect the furniture located in the

business known as Tackle Box Bar and Grill and to vacate the said premises.

- (3) Possession of the said premises.
- (4) Mesne rent (sic) up to the date the said premises is delivered to the Claimant.
- (5) Interest on mesne profits.
- (6) Costs.
- (7) Any other relief that this Honourable Court deems fit.

[3] The premises of which the Claimant seeks to recover possession comprises a restaurant called “Tackle Box Bar and Grill” which is situated on a portion of a pier in San Pedro Town, Ambergris Caye, Belize. The restaurant is operated by the Defendant.

[4] The Claimant commenced the previous claim by Claim Form and the orders sought in those proceedings were as follows:

- “1. Declaration that the Defendant is unlawfully and without the consent of the Claimant carrying on the business known as Tackle Box Bar and Grill on the portion of the Claimant’s property, a pier which is situate at geographic bearings 398079E, 1981195N in San Pedro Town, Ambergris Caye, Belize (the pier).
2. Permanent injunction restraining the Defendant whether by itself, its servants or agents from operating the business known as Tackle Box Bar and Grill and any business whatsoever on the portion of the pier without the Claimant’s consent.
3. An order requiring the Defendant, whether by itself, its servants or agents to remove with immediate effect the business known as

Tackle Box Bar and Grill and all things whatsoever associated with the operation of the business known as Tackle Box Bar and Grill.

4. Rent as a result of the Defendant's unlawful occupation of a portion of the pier for the period June 2012 until the determination of this Claim.
5. Interest.
6. Costs.
7. Any other relief that this Honourable Court deems just."

[5] The matter was referred to mediation and the parties arrived at an agreement which was made an order of Court. The proceedings were stayed with each party being given the right to apply to the Court to enforce the agreement. The agreement is as follows:

- "1. Claimant accepts the sum of BZE \$2,500 (twenty five hundred Belizean dollars) by way of monthly rental w.e.f. January 01, 2014 and continuing thereafter on a monthly basis.
2. Said \$2500.00 shall be payable on the first day of each month.
3. Claimant accepts \$1,500.00 (fifteen hundred Belizean dollars) for each month beginning on June 01, 2012 and ending on December 31, 2013.
4. Defendant agrees to pay the \$2500.00 (twenty five hundred) and the \$1500 (fifteen hundred) for the period and on the dates hereinbefore given to the Claimant.
5. The accumulation of rental retroactively to June 01, 2012 totals \$28,500 (twenty eight thousand, five hundred dollars) shall be

payable in cash within fifteen calendar dates of the date given above.”

The agreement was signed by both parties and is dated January 27, 2014.

[6] The present Claim alleges the following: that the Defendant began paying the monthly rent of \$2,500.00 from January 2014 and did so for three months; that thereafter, rent was not paid from the period April to September 2014; that the Claimant then served the Defendant with a notice to vacate and the outstanding rent was paid; that the Defendant again failed to pay rent for the ensuing months in a timely manner; and that the Claimant served notice dated January 6, 2015 requiring the Defendant to vacate the property on March 1, 2015.

[7] The Defendant has filed a Defence disputing the Claimant’s entitlement to the relief sought. The Defence asserts the Defendant’s ownership of the Tackle Box and that Claimant’s pier licence has expired. The Claimant’s averments as to non-payment of rent are denied and it is pleaded that the Claimant has refused to accept rent since serving the notices to vacate although the Defendant nevertheless paid rent up to January 2015.

[8] In an affidavit in response to the application to strike out the Claim, it was stated that the mediation agreement brought an end to the previous claim in that the rent was paid retroactively and the Defendant continued paying rent as a monthly tenant. It was explained that the Defendant began making late payments and, as a result, the Claimant now seeks to recover rent under the agreement and to recover possession of the premises. The Claimant’s representative sworn that the Claimant does hold a valid pier licence and there was exhibited a pier licence issued on July 16, 2015 valid for three years.

SUBMISSIONS RE: RULE 26.3(1)(b) AND (c)

[9] The Defendant submitted that the present claim is a duplication of the previous claim and ought to be struck out as an abuse of process or as disclosing no reasonable grounds for bringing same. It was further urged that the Claimant ought to have sought

liberty to apply under the order of court in the previous claim. The Defendant relied on the Overriding Objective contained in Rule 1.1(1)(2)(b) and (2) and 1.2(a) of the Rules. It was stated that further expenses and legal fees would be incurred by the Defendant and that the Court had already allotted considerable resources to the previous claim. In support of the submissions reference was made to the cases of **Baltazar Campos v Nellie Briceno** – Action No. 20 of 2014 and **Marie Cunningham v Intel Ireland Ltd 2013 IEHC 207**. In these two cases, the court struck out later proceedings as being an abuse of process as the same matters arose as in the earlier proceedings. In the case of **Miller v Experience Hendrix ELC [4015] EWHC 288**, Snowden, J held that an application to set aside a judgment obtained by fraud was *res judicata* or barred by issue estoppel hence it was struck out as an abuse of process.

[10] Learned Counsel for the Defendant argued that the matter having gone to mediation and an agreement incorporated as an order of court, the Claimant was now seeking to rely on the same facts as evidence to litigate the same issues between the same parties. It was said that the Claimant ought to have sought to enforce the order under the previous claim.

[11] In his response, the Claimant's Attorney-at-Law enjoined that the previous claim had come to an end and the present claim is to recover possession of the premises under a new cause of action based on non-payment of rent. Thus, the facts being relied upon were different as the rent claimed up to 2013 under the previous claim had been paid.

[12] There exists at common law the power of the court prevent abuse of its process and more specifically, as is alleged in the present application, the power to prevent duplication of proceedings. This power is embodied in the Overriding Objective and in Rule 26.3(1)(b) and (c). In this regard, the court seeks to resolve disputes with finality and for this purpose, the parties are required to put their whole case and not litigate on a piece-meal basis as the court would not allow re-litigation of questions previously laid before the court (see: Blackstone's Civil Practice 2005 Para. 4.2).

[13] In the previous claim, the Claimant brought proceedings against the same Defendant seeking declaration that the Defendant was operating its business without the Claimant's consent, an injunction restraining the Defendant from operating on the pier without the Claimant's consent, an order for the Defendant to remove its business from the pier and rent up to the determination of the Claim. The mediation agreement operated to render the Defendant a monthly tenant of the Claimant and agreement was reached as to the rent to be paid as a tenant at the rate of \$2,500.00 per month. This has, by and large, been complied with, until a dispute arose as to non-payment and irregular payment of rent by the Defendant.

[14] It seems to me that the previous Claim essentially sought possession of the premises and the recovery of rent. The issue of possession was not pursued and the Defendant was deemed a tenant and agreed to pay certain rent. It means that the original cause of action was merged into the judgment as embodied in the mediation agreement and no further proceedings can be brought by the Claimant for possession and recovery of rent based on the facts alleged in the previous claim. It is to be emphasized that the rent payable up to the determination of that Claim has been admittedly paid. Of that, there is no demur.

[15] The Claimant now alleges that the conduct of the Defendant in not paying the rent on a regular basis has given rise to a fresh cause of action and it now seeks to recover possession on that basis. Put another way, there are new facts and a remedy is being sought on those facts.

[16] Whilst it is true that the parties are the same, it cannot be said as the Defendant asserts, that the facts and evidence would be the same as in the previous claim. The Court can and is obliged to investigate the conduct of the parties which arose after the judgment in the previous claim. These are new facts which give rise to a fresh cause of action. The matter is put thus in Blackstone (at para 4.3):

“Merger does not apply to successive causes of action, so that judgment for specific instalment of debt or rent will not bar a claim for further instalments.”

The mediation agreement merely set the rate of rent payable monthly and the Claimant is entitled to bring suit for monthly rent not paid in the future. The present claim, though expressed in almost identical terms, is not based on the same facts and will be liable to proof based upon new evidence clearly not available when the previous claim was afoot. In the premises, it cannot be said that there is a duplication of the previous claim and that the Claimant is seeking to re-litigate the same issues. Therefore, the application cannot be entertained on the basis of Rule 26.3(1)(b) and (c).

ABSENCE OF A PIER LICENCE

[17] The Defendant contended that the Claimant at the time it brought the present claim did not have a pier licence as the pier licence had expired. The Claimant has exhibited a new licence. The net effect of the old and new licences is that: the previous licence was valid for three years from April 29, 2012 and therefore expired on April 28, 2015; and the present licence is dated July 16, 2015 and is valid for three years. It means that, the Claimant was in possession of a valid licence when the claim was brought on April 17, 2015. However, there is a period while the present claim remains pending when there was no licence issued for that intervening period.

[18] The short answer to that issue is that the mediation agreement rendered the Defendant a tenant of the Claimant and that relationship still subsists. Such relationship though it may have been the basis for the creation of the tenancy, does not cease upon the expiration of the pier licence unless the landlord ceases to have physical possession of the premises, which is not the case. In any event, the position has now been regularized.

[19] In the premises, the point is without merit. It cannot operate to prevent the Claimant from pursuing its Claim and I so rule for the reason ascribed.

FAILURE TO COMPLY WITH RULE 8.1(5)

[20] The Defendant says that the Claim ought not to have been brought by fixed date claim form as it does not qualify as a claim for possession of land under Rule 8.1(5)(a). The Claimant did not seek to address this matter.

[21] The facts asserted state that the Defendant's restaurant is situated on a portion of the Claimant's property which is a pier for which co-ordinates were provided. By its very pleading, the premises in issue do not amount to land. Accordingly, the Defendant's contention is well-founded.

[22] However, this flaw is not fatal to the Claim and the Court will exercise its power under the Overriding Objective to allow the matter to proceed to a case management conference as a regular claim form.

[23] The Claimant shall be entitled to the costs of this application which shall be in the cause.

KENNETH A. BENJAMIN
Chief Justice