

IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO.: 730 OF 2019

BETWEEN

(ISSAC F. DUECK

1st CLAIMANT

(RALPH DUECK

2nd CLAIMANT

(ALLEN F. REIMER FRIESEN

3rd CLAIMANT

(d.b.a. “COUNTRY FOODS”

(AND

(

(AGRIPINO CARILLO

(d.b.a “A. CARILLO FRESH FRUITS & VEG” DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Decision

17th March, 2021

Appearances:

Ms. Misty Marin, Counsel for the Claimants.

Mr. Kevin Arthurs, Counsel for the Defendant.

KEYWORDS: Civil Procedure - Counterclaim - No Defence Filed - Deemed to Admit Counterclaim - Effect on Claim

DECISION

1. The Claimant in this matter claimed against the Defendant for sums due in the amount of \$43,999.42 for eggs and other supplies sold to the Defendant between the period 2017 and 2018. In his Defence, the Defendant pleaded that on a proper calculation all sums due had been paid. He asked that the

Claim be dismissed with costs. By way of a Counterclaim, he claimed the sum of \$8,000.00 for reimbursement for spoilt eggs which had been delivered.

2. That Counterclaim repeated the Defence in its entirety. The Claimant failed to file a Defence to the Counterclaim within 28 days and was deemed to have admitted the counterclaim pursuant to **Rule 18.12(2)**:

“18.12 (1) This rule applies if the party against whom an ancillary claim is made fails to file a defense in respect of the ancillary claim within the permitted time

(2) the party against whom the ancillary claim is made –

(a) is deemed to admit the ancillary claim and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim”

3. Their subsequent application for extension of time in which to file a Reply and Defence was denied with costs to the Respondent. The Defendant applied for judgment on the Counterclaim and the Court ordered payment of \$7,040.00) with interest and costs which it found the Counter Claimant to be entitled to on the Counterclaim.
4. As to the effect the failure to file a Defence to the Counterclaim would have on the Claim, the Court sought submissions. Both parties presented written and brief oral submissions and the Court, in an oral decision, ruled that there would be no effect beyond, at best, enabling a set off if the Defendant was found liable. It certainly did not allow for the striking out of the Claim. Counsel for the Counterclaimant has asked for a written decision. This is it.

The Counterclaimant's Submissions:

5. Counsel for the Counterclaimant relied on this Court's own decision in **Marva Rochez v Clifford Williams Claim No.179 of 2009** and quoted from paragraphs 9 and 10:

"A Counter Defendant has 28 days after service of the counter claim in which to file a defence – Rule 18.9(2). From the Supreme Court (Civil Procedure) Rules it is clear that a defence to a counterclaim is somewhat different to a defence to an ordinary claim form. The most glaring difference being that when no defence is filed to an ordinary claim, the claimant is entitled to apply for default judgment and if he does not, there is no sanction for filing that defence out of time..."

On the other hand, where no defence has been filed within 28 days after service of the counterclaim, the Counter Defendant is deemed to have admitted the counterclaim in accordance with Rule 18.12 (2). Part 12 (Default Judgement) does not apply – Rule 18.9 (3). The Counter Defendant is then bound by any judgement or decision in the main proceedings in so far as it is relevant to any issues arising in the counterclaim. All this occurs through application of the rule and without any action from the counterclaimant. It is triggered simply by the expiration of those 28 days.

A Counter Defendant simply does not have the same freedom enjoyed by an ordinary defendant. By way of comparison, neither does a defendant to a fixed date claim. A Claimant on a fixed date claim is precluded from applying for a default judgement by Rule 12.2 (a). However, Rule 27.2 (3) allows for the first hearing of the fixed date claim to be treated as a trial of the claim, if it is not defended. This is done through operation of the rule and not through any act of the Claimant."

6. Counsel continued by noting this Court's own limited approval of the Trinidadian Court of Appeal case of **Satnarine Maharaj v The Great Northern Insurance Company Ltd et al Civil appeal No.198 of 2015** in **Miguel Angel Mestizo et al v Robert Gabourel et al Claim No. 198 of 2015** at paragraph 20 and 21:

"20. The Trinidadian Court of Appeal case of Satnarine Maharaj v The Great Northern Insurance Company Ltd et al Civil Appeal No. P198 of 2015 offers excellent guidance

on the application of Sub-Rule 2 (a). In that case a judgment had accordingly been entered for the Counter-Claimant and the claim was struck out thereafter as being unsustainable. The Appeal Court grappled with similar issues as those now before this court. Whether a special judgment could or should be issued on a counterclaim and what effect the deemed admission has on the entire case. They considered, in particular, whether the Counter-Claimant was only entitled to rely on the deemed admissions in the main claim and nothing more.

21. The court found that on a plain reading of their rule 18.12 (2) (a) (which is identical to Belize's Rule) the defaulting Counter-Defendant is deemed to admit both the allegations and reliefs claimed in the Counter-Claim. This court holds a somewhat different view. A party may admit factual allegations and those issues are removed. However, the court must determine whether what has been admitted is sufficient to establish the claim for relief, some other relief or no relief at all. Hence, the giving of relief as the court considered the party is entitled to.``

7. Counsel then went on to discuss the test laid down in **Satnarine Maharaj (ibid)** at paragraphs 22 and 24:

“22. When faced with an application such as the respondents’ in this case, the approach of the Court must be to determine the effect of the deemed admissions on the claim. It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admissions the court must assess how that impacts on the claim.

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim. The appellant’s position was that the claim should not have been struck out by the Judge. The appellant, however, conceded that in an appropriate case the admissions deemed to arise from the failure to defend the counterclaim can result in the dismissal of the claim. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process. The respondents submitted that that was this case.”

8. Counsel concluded that in the case at bar the allegations in the Counterclaim *“are identical to those in the defence and as the counter Defendant is deemed to have admitted them and has settled the factual issue which is the totality of the claim and statement of Claim.”* Therefore, the Claim ought to be struck out. He felt that to continue with the Claim under those circumstances would be to allow a continued dispute of allegations already admitted, at *“the risk of having an inconsistent ruling pregnant to an abuse of process”*

The Respondent’s Submissions:

9. The Respondent also relied on paragraph 10 of **Marva Rochez (ibid)** and agreed that the failure to file a Defence to a Counterclaim amounted to a deemed admission of the Counterclaim, which could be enforced by way of an application for judgment on the counterclaim.
10. She then referred the Court to paragraph 21 of the **Miguel Angel Mestizo case (ibid)** and found that the Court was to determine what precisely had been admitted in the Counterclaim. She relied on the test outlined in **Satnarine Maharaj case (ibid)** at paragraph 22 to 24, as was quoted at paragraph 22 of the **Miguel Angel Mestizo case (ibid)** which save for paragraph 23 was already reproduced above in and from the Counterclaimant’s submissions. The Court will, however, state paragraph 23 here as it bears much importance to this discussion and is a position with which this Court entirely agrees:

“23. There of course need be no connection between the claim and the counterclaim (see rule 18.5 (2)). In such a case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.”

11. Counsel explained that in the **Satnarine Maharaj case (ibid)**, the allegations contained in the Counterclaim were identical to those contained in the Defence therefore the admission of the allegations in the Counterclaim resulted in an admission of the Defence. However, on the facts in the present case, the allegation in the Counterclaim, that the Defendant is entitled to a reimbursement of eight thousand dollars for spoilt eggs delivered, is separate and apart from the allegations in the Defence that, inter alia, there was a revolving credit system or that all sums due for eggs delivered, during the material period, were paid.
12. She opined that there could be no contradictory outcome on the Claim if it were allowed to continue. The breach of contract alleged in the Counterclaim arose out of a specific factual circumstance which if admitted would not affect the claim. The allegations admitted are that the Defendant is entitled to a reimbursement of funds for spoilt eggs. No other factual or legal allegations pleaded by the Defendant in his Defence actually relate to the Counterclaim.
13. The Defendant was, therefore, not entitled to have the Claim struck out or dismissed.

The Court's Consideration:

14. Let's begin with the precise wording of the Counterclaim. It states:
"The Defendant repeats and relies on paragraphs 1 to 21 herein AND the Defendant counterclaims:
 - i. The sum of \$8,000 as damages for breach of contract for the spoilt eggs*
 - ii. General Damages*
 - iii. Interest pursuant to Section 166 of the Supreme Court of Judicature Act.*
 - iv. Costs*
 - v. Such further or other relief as the Court sees fit."*

15. Paragraphs 1 to 21, which were repeated, comprised the entire Defence. On reading that Defence, however, it is realised that not all of its contents relate to the Counterclaim.
16. It must be remembered that a Counterclaim is a Claim on its own. It could be heard with the original Claim where it is expedient to do so. But the Court has a power under **Rule 18.10** to deal with the Claim separately from the Counterclaim. In making this determination, the Court must consider inter alia the connection between the two claims and whether the facts in the ancillary Claimant are substantially the same, or closely connected with, the facts in the Claim.
17. What are the facts in a case? The facts in a case are not all that have been pleaded, they are all that have been pleaded that are relevant to the Claim and the remedies sought. Where a case has been badly pleaded, all that is pleaded does not suddenly become facts on which a party can rely.
18. The Counterclaim under consideration related, as rightly pointed out by the Claimant, to a separate contract for the delivery of eggs at a price of \$8,000.00. Whether or not there was money outstanding under some separate contract between the parties had absolutely nothing to do with this particular contract and pleading such matters does not make it so. In fact, it is only paragraphs 14 to 17 which actually relate to this claim in any way.
19. The Court reminds that the object of pleadings is to define with clarity the issues which are to be determined at trial. So the party pleading is to plead

the facts on which he relies. It is those allegations of fact which to my mind impact the admissions which will be deemed made by a Counter Defendant where he fails to file a Defence. Anything else would be a travesty of justice.

20. In this case, the Court finds that the admissions deemed made on the Counterclaim are not so intimately wrapped up in the Defence that the Claim is affected beyond a possible set off if the Defendant is found liable.
21. This Court can therefore find no reason to strike out or dismiss the Claim herein.

Determination:

1. The application for dismissal of or to strike out the Claim is dismissed.
2. Cost shall be in the cause.
3. The matter is adjourned to the 29th March, 2021 for Pre-trial Review.

SONYA YOUNG
SUPREME COURT JUDGE