



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 143

BETWEEN:

JAMES WATLINGTON

Plaintiff

- and -

SHAWN THOMAS

Defendant

RULING

Date of Hearing: 25 October 2023

Date of Ruling: 25 October 2023

Appearances: Paul Harshaw, Canterbury Law Limited, for Plaintiff

Marc Daniels, Marc Geoffrey Ltd, for Defendant

RULING of Mussenden J

1. There are 2 applications before me:
 - a. A summons to set aside judgment dated 26 October 2022.
 - b. A summons to vary judgment to the sum of \$32,730 dated 17 May 2023.

2. Mr. Daniels withdrew the summons to set aside judgment. This was foreshadowed by the Order dated 30 March 2023. I grant costs to the Plaintiff for the withdrawn summons on a standard basis.
3. In respect of the summons to vary, Mr. Daniels has applied to amend the summons to a new figure of \$38,147.73. This is based on total payments by Mr. Thomas of \$33,062.88, a sum which Mr. Harshaw agreed was not in dispute. The new amount of \$38,147.73 is based on the affidavit of Chartered Accountant Ms. Nesbitt who had opined that Mr. Thomas had calculated his figure incorrectly. Mr. Harshaw opposes the last-minute application to amend. In my view, I should allow the amendment as (i) it is based on the accountant's calculation; (ii) she has explained how Mr. Thomas calculated his figures incorrectly; and (iii) the corrected amount is for more than the amount on the summons, thus it is to the advantage of the Plaintiff, if I subsequently allow the application to vary the judgment.
4. I note that allowing the amendment to the summons results in the Nesbitt affidavit and the summons to be consistent; and the Thomas affidavit in respect of the payments paid to be consistent with the accountant's calculations. It is not challenged.
5. Mr. Daniels submitted that the judgment sum should be varied based on the accountant's calculations and the documented proof of the 7 payments made to the Plaintiff. In essence, he urges the Court to accept the new amount based on those payments.
6. Mr. Harshaw submitted that the second affidavit of Mr. Thomas admits the Promissory Note, and admits that repayments were made. However, Mr. Harshaw complains of the credibility of Mr. Thomas in that he is acting for an ulterior motive. Thus, the Court should take this into consideration. He referred to the original denials of the Promissory Note and signatures. He also referred to allegations of fraud and dishonesty in counsel's correspondence, which have not been pleaded, and he referred to exhibited documents in respect of a formal complaint, such complaints which are private and confidential.
7. The Court has a discretion to vary a judgment pursuant to Order 13 rule 9.

8. Mr. Harshaw submitted that Mr. Thomas should have accepted the undertaking offered by the Plaintiff, but he ignored it. That undertaking, offered several times, said that the Plaintiff would not seek to enforce the judgment for more than is properly due. He complains that Mr. Thomas completely ignored the undertaking. In my view, the undertaking does not give an assurance that the corrected sum has been taken into account, that is, either Mr. Thomas' figure or Ms. Nesbitt's figure. Thus, I do not find any merit in considering the undertaking.
9. In my view, I should exercise my discretion to allow the variation because I find that there is merit in the application in that the unchallenged evidence of the Chartered Accountant is highly significant and thus, I accept it, as well as her reasons of how Mr. Thomas made a miscalculation. The Court should not allow a judgment to stand when faced with the evidence of agreed payments and a chartered accountant's opinion of a correct amount due to the Plaintiff. In my view, the credibility of Mr. Thomas should not affect the proper amount being entered.
10. I have considered the evidence of Mr. Thomas and the nature of how this litigation has been conducted. Mr. Thomas' allegations are serious as well as his exhibiting the details of a private and confidential complaint. In any event, he has resiled from the original defences or assertions and has accepted the legitimacy of the Promissory Note and thus made payments. In my view, his conduct as respect the original denials and the allegations of dishonesty in this matter has fallen below an acceptable standard which could be met in costs. Therefore, I will hear the party on costs of the application to vary the judgment, to be listed in a Chambers hearing on a date to be agreed by counsel (a 30-minute time slot at noon).

[2023] SC (Bda) 85 Civ. (25 October 2023)

11. In conclusion, I allow the application to vary the judgment to \$38,147.33.

Dated 25 October 2023



**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**