

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 3198 OF 2002

BETWEEN

VISHAM BOODOOSINGH

PLAINTIFF

AND

RICHARD RAMNARACE
MITRA RAMNARACE
NATIONAL INSURANCE BOARD
SUPER INDUSTRIAL SERVICE LIMITED
PHOENIX WELDING AND FABRICATING LIMITED
S. M. JALEEL LIMITED

DEFENDANTS

Before the Honourable Mr. Justice Gregory Smith

Appearances:

Dr. C. Seepersad for the Plaintiff
Mr. V. Kokaram for the Third Defendant
Mr. B. Sharma for the Sixth Defendant

JUDGMENT

INTRODUCTION

1. In this action the Plaintiff seeks to set aside a judgment of Bereaux J. on the ground that the same was obtained by the fraud and/or fraudulent concealment of the first three Defendants. The Plaintiff also seeks discovery and

preservation of evidence as against the Third, Fourth, Fifth and Sixth Defendants.

2. The Third and Sixth Defendants have each brought applications to dismiss this action against them under the provisions of Order 18 Rule 19. On the hearing of the applications of the Third and Sixth Defendants the grounds pursued were that the Plaintiff's claim ought to be dismissed because (i) it disclosed no reasonable cause of action against them and (ii) it was an abuse of the process of court.

Both applications were heard together and I dismissed the Plaintiff's claim against the Third and Sixth Defendants and ordered him to pay their costs certified fit for Counsel.

My reasons for doing so were that:

- (i) On the facts of the present matter, the action for discovery and/or preservation of evidence as against the Third and Sixth Defendants was shown to be an abuse of the process of the Court especially since the documents requested had already been made available to the Plaintiff.
- (ii) The pleading of fraud and/or fraudulent concealment against the Third Defendant was so defective that it failed to reveal a reasonable cause of action against the Third Defendant.

I will now set out the reasons for my findings in detail.

The Action for Discovery against the Third and Sixth Defendants

A. The Law:-

4. There are two opposing principles on the issue of a cause of action for discovery alone.

Firstly, there is the “mere witness rule”, which is to the effect that an action for discovery alone does not lie against a person who is a mere witness or spectator to a wrong. It is succinctly stated in the Supreme Court Practice 1997 at paragraph 24/1/4 that “An action for discovery alone does not lie against a defendant who is not himself a wrongdoer and has no connection with the wrong doing. An action for discovery will therefore not lie against a person who knows the identity of the alleged tortfeasor, but who himself has neither committed nor facilitated the committal of the tort (Ricci v Chow [1987] 3 All ER 534 C.A.).”

Secondly, there is a rule derived from the Norwich Pharmacal case that if “a defendant through no fault of his own (and whether voluntarily or not) has got mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers” (per Lord Reid in Norwich Pharmacal Co v Commissioners Of Customs and Excise [1974] A.C. 133” (See the 1997 Supreme Court Practice at 24/1/4).

In a case of this nature an action for discovery alone can be brought against a defendant.

5. The rule in the Norwich Pharmacal case has been expanded beyond the mere jurisdiction to allow an action for discovery for the purpose of identifying wrongdoers. In CHC Software Care v Hopkins and Wood (1993) FSR 241, an action for discovery was held to be properly made out against solicitors to reveal the names of third parties to whom letters were sent even though such third parties may not even have been wrongdoers; in that case, Mummery J. stated that discovery was being ordered to allow the Plaintiff “to take reasonable steps to protect itself against the damaging consequences of the alleged tortious document (the letter) disseminated by the defendants (see page 250) (my emphasis). In P v T Ltd. [1994] 4 All E.R.199 the court allowed an action for discovery and granted disclosure against a defendant to enable the Plaintiff to use the fruits of that disclosure to ascertain whether a third party had committed a tort against the Plaintiff. In the judgment, Sir Richard Scott V. C. spoke of ordering discovery and disclosure “to enable justice to be done.” See pages 207-208).

6. In spite of this broadening of the scope of an action for discovery, it must be remembered that the “mere witness” rule is still good law today. It was expressly referred to with approval in P v T Ltd. Further, even in the CHC Software Care case Mummery J. recognized that there were limits to the expanded rule in the Norwich Pharmacal case and he justified the application for discovery in that case because the Plaintiff was not seeking to use the process of

discovery for some “extraneous or improper purpose” or seeking the use of documents for a purpose which was an “abuse of the process of discovery.” (See page 250).

B. The Facts:-

7. In the present matter the Plaintiff alleges that the Third and Sixth Defendants have information which would show that the court was misled by the First, Second and Third Defendants at the trial before Bereaux J. Such information consists of employment records and National Insurance Contribution Statements.

Further, the Plaintiff himself has expressly stated in affidavits (which were annexed to that filed on behalf of the Sixth Defendant) that he visited the offices of the Third and Sixth Defendants and was provided with copies of these records and statements, which records and statements were also annexed to the affidavit of the Sixth Defendant.

8. Counsel for the Plaintiff even admitted in argument that while he has the documents in his possession he is really seeking formal discovery and preservation of documents for trial.

9. The fact that the Plaintiff already has the documents he desires in his possession is a distinguishing feature of this case from all the others cited. In those other cases cited, the Plaintiff did not have the information or

documentation that was needed and the Defendant did not want to release such essential information and/or documents to the Plaintiff. No case is made out that the issue of a subpoena duces tecum on the Third and Sixth Defendants would not serve the purpose of having the documents, already in the possession of the Plaintiff available for use at the trial.

In my view the present action for discovery is a pre-emptive strike against the Third and Sixth Defendants to co-erce them to come to court to give the evidence which they have already provided to the Plaintiff in a case where a subpoena duces tecum would be just as effective against them. It is a fit case for the application of the "mere witness" rule, for if this type of action is allowed, it would encourage a litigant to join all potential witnesses as parties to an action thus unnecessarily escalating the time and costs of litigation.

In the circumstances, I found that the action for discovery against the Third and Sixth Defendants, was being used for oppressive purposes and as such, it was an abuse of the process of the Court and should be dismissed.

The action for the fraud/fraudulent concealment of the Third Defendant.

10. Fraud is a very serious allegation and must be distinctly pleaded and proved (see generally Wallingford v Mutual Society (1880) 5 App @ 685 cited in Petrolam Trinidad Ltd. v National Gas G. of T & T H.C.A. 1476 of 2000 at page 13).

There is a succinct statement of the necessary requisites in a case where it is sought to set aside a judgment of a local court for fraud in The Doctrine of Res Judicata by Spencer Bower, Turner and Handley 3rd ed page 204:-

“The proper method of impeaching a judgment on the ground of fraud is by action, in which precise particulars of the fraud must be given and established by strict proof. The Plaintiff must plead that since the judgment he has discovered fresh facts which alone, or in combination with previously known facts, raise a serious question to be tried.” (my emphasis) (See also Halsbury’s Laws of England 4th ed Vol. 26 paragraph 460 and also 1999 Cumulative Supplement paragraph 560 26/42 and 26/43).

(In the case of impeaching a foreign judgment it is not necessary to show that there were fresh facts discovered since that foreign judgment (see generally the 1999 Supreme Court Practice 71/9/2 and Syal v Heyward 1948 64 T.C.R. 476 and Abouloff v Oppenheimer (1982) 10 Q.B.D. 295)

(i) The Particulars of Fraud as pleaded against the Third Defendant.

11. In the present matter the “fraud” of the Third Defendant is pleaded in paragraphs 13 and 14 of the Statement of Claim which paragraphs are set out below:

“13. The witness Chandroutie Ramsroop, an employee of the Third named Defendant on the 8th of May 2001 misled the Honourable Court with the following evidence:

From my records the first time he made contributions was 24th of November, 1997 until 2nd August, 1998. No he did not make any contribution after that date.

14. In fact, contrary to the evidence stated by the agent or Servant of the Third named Defendant in the foregoing paragraph according to National Insurance Board records Ramnarace first made contributions in 1994 and made further contributions to the NIS scheme well beyond those particularized in Ramsaroop’s evidence referred to above. The Plaintiff would rely on the NIB records bearing reference o7 108 5860 concerning Richard Ramnarace.

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Phoenix Welding and Fabricating Ltd 4 weeks”

12. In Bullen and Leake and Jacob’s Precedents of Pleading 12th ed (one of the most widely used and accepted authorities on Pleadings), it is stated at page 450 that:

“In order to sustain the common law action of deceit, the following facts must be established, i.e. they must be pleaded and proved, namely:

(1) there must be a representation of fact made by words or by conduct, and mere silence is not enough;

(2) the representation must be made with knowledge that it is false, i.e. it must be wilfully false

or at least made in the absence of any genuine belief that it is true;

(3) the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class or persons which will include the plaintiff, in the manner which resulted in damage to him;

(4) it must be proved that the plaintiff acted upon the false statement; and

(5) it must be proved that the plaintiff has sustained damage by so doing (see *Bradford Third Equitable Benefit Building Society v. Borders* [1941] 2 All E.R. 205, *per* Viscount Maugham at 211).”

13. In the pleading of fraud against the Third Defendant which was set out in paragraph 11 above there is no allegation that the witness Chandroutie Ramsaroop gave the evidence with the knowledge that the same was false (see (2) at paragraph 12 above) nor that the statement was made with the intention to mislead the Honourable Court (see (3) at paragraph 12 above). In fact it is quite open to infer from the pleading that Chandroutie Ramsaroop was mistaken, careless, or in-attentive to detail when she gave evidence and not necessarily acting with the fraudulent intent which is a key element in the allegation of fraud.

Also, it is not specifically alleged that Bereaux J. acted upon the allegedly untrue statements (see (4) at paragraph 12 above) nor that it was as a result of these statements that the Plaintiff sustained damage or that any findings of Bereaux J. which were adverse to the Plaintiff, were somehow caused by the untrue statements of this Defendant (see No. (5) at paragraph 11 above).

14. In addition to the above, while it is alleged that Chandroutie Ramsaroop misled the Court there is no allegation that the Third Defendant colluded with, encouraged or otherwise was a party to the alleged wrongdoing of Ms. Ramsaroop so as necessarily to make them responsible for her acts.

15. The lack of particularity in the pleading of fraud against the Third Defendant caused the action in fraud to be seriously defective.

(ii) Pleading the discovery of fresh facts since the judgment:-

16. Paragraphs 13 and 14 of the Statement of Claim (cited above in paragraph 11) do not indicate that the alleged fraud or fresh facts showing fraud were only discovered after the judgment of Bereaux J. The only part of the pleading that deals with the circumstances surrounding the statements of Chandroutie Ramsaroop are set out in paragraphs 15 and 18 of the Statement of Claim, the relevant parts of which are set out verbatim:-

“15. The Plaintiff herein case was infected by inadequate preparation and/or mistake before trial and that affected the presentation of the case at the trial on the part of Attorney at Law for the Plaintiff herein.

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(iii) There was no trial conference preparations between the Plaintiff herein and his Attorney-at-Law. The Plaintiff herein was merely asked by his Attorney at Law to read his statement on file in his Attorney's office before the trial.

(iii) Prior to the evidence being taken of the agent or servant of the Third named Defendant from Ms. Ramsaroop's the Plaintiff herein was never informed by his Attorney-at-Law who had, subpoena the third name Defendant as to what was all the available evidence that the National Insurance Records had in its possession and to request his investigations.

(iv) The Plaintiff was never advised as to what were the issues of facts and law before the Honourable Mr. Justice Bereau."

"18. The Plaintiff herein was never provided the opportunity by His Attorney-at-Law in civil action 503/99 to give full instructions on the allegations of facts as they were being developed by Richard Ramnarace at the trial and/or the further allegations of facts contained in the amended statement of claim which was permitted during the trial. Nor did the Plaintiff herein provided by his Attorney-at-Law any degree of guidance or useful communication on the live issues before the Court to enable the Plaintiff herein to investigate the allegations."

These paragraphs only allege that the Plaintiff's Counsel at the trial performed in an incompetent manner even with respect to the handling of the Plaintiff's own witnesses, and they do not state or even allege that the information which the Plaintiff now seeks to put before a court at a new trial was not available to him or his Counsel/legal advisers at the trial before Bereaux J.

For this reason also, the pleading was defective and failed to reveal a reasonable cause of action as against the Third Defendant.

ORDER

17. In all the circumstances, the claims against the Third and Sixth Defendants were struck out and the Plaintiff was ordered to pay the costs of the Third and Sixth Defendants certified fit for Counsel.

Dated this 17th day of September 2003

**Justice Gregory Smith
JUDGE**