

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

CLAIM NO. 222 OF 2015

BETWEEN:

SECOND TIME LIMITED

Claimant/Respondent

AND

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

Defendant/Applicant

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

January 19 & 26, 2016.

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

RULING

[1] The present proceedings came on for pre-trial review. At the hearing, the Court heard an application by the Defendant for an order for specific disclosure. The following orders were sought:

- "1. An Order pursuant to Rules 28.5 and 28.6 of the Supreme Court (Civil Procedure) Rules 2005 that the Claimant/Respondent give specific disclosure of all the documents whatsoever concerning any purported sale of the Tackle Box Bar and Grill ("Tackle Box") and the Pier whether

by or involving the Claimant/Respondent, any of its employees, directors, managers, servants or agents;

2. An Order that upon being given seven (7) days notice, the Claimant/Respondent shall permit the Defendant/Applicant's Attorney-at-Law to inspect and take copies of the documents disclosed;
3. An Order that the Claimant/Respondent shall pay the Defendant's/Applicant's Costs of this application;
4. Such further or other relief or order as the Court sees just."

[2] The Notice of Application stated that the application was being made pursuant to Rules 28.5 and 28.6 of the Supreme Court (Civil Procedure) Rules 2005. The said Rules provide so far as relevant:

- 28.5(1) An order for specific disclosure is an order that the party must do one or more of the following things –
- (a) disclosure documents or classes or documents specified in the order
 - (b) ...
 - (c) ...
- (2) An order for specific disclosure may be made with or without an application.
- (3) ...
- (4) An application for specific disclosure may identify documents –
- (a) by describing the class to which they belong; or

- (b) in any other manner.
- (5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.
- 28.6(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
 - (2) The Court must have regard to –
 - (a) the likely benefits of specific disclosure;
 - (b) the likely costs of specific disclosure; and
 - (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
 - (3) Where, having regard to paragraph (2)(c) the court would otherwise refuse to make the order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other's costs of such disclosure in any event.
 - (4) Where the court makes an order under paragraph (3) it must assess the costs to be paid in accordance with Rule 64.11.
 - (5) The party in whose favour such order for costs is made may apply to vary the amount for costs as assessed.

[3] The Application was supported by the affidavit of Joseph Moore, a director of the Defendant/Applicant. The deponent repeated what was set out in the Notice of Application to wit, that the Applicant was seeking “copies of all documents concerning the purported sale of the Tackle Box and the Pier”. It was said that no such documents had been disclosed. The rationale given for the documents being sought was that the documents are likely to show that the Respondent has no standing to bring the Claim having divested itself of its interest in the pier. Further, it was asserted that the Claim was an abuse of the process of the court since the Claimant had sold the Tackle Box while the issue of ownership was before the Court for determination.

[4] In paragraph 11 of the affidavit, Mr. Moore swore that the application was made on his belief that on or about December 4, 2014, it came to his attention from a third party that there had been a purported sale of the Tackle Box and the Pier.

[5] The Claimant opposed the application. In an affidavit responding to the averments in the affidavit in support of the application, Bruce Badolato, the Director of the Claimant, deposed that the pier licence cannot be transferred by the Claimant as the owner of the said licence and that the Claimant had not purported to nor did it intend to transfer the same. In addition, it was said that the Claimant cannot sell the Tackle Box Bar and Grill as it is a restaurant business name or trademark owned by the Defendant. The affidavit went on to address the transfer of shares in the Claimant company, which is an issue not germane to this application.

[6] The Claimant’s position was summarized in paragraph 17 of the affidavit in the following terms:

“... this request is unfounded since the Claimant has not entered into any agreement to transfer the pier license to any third party or to sell the business operation known as the Tackle Box Bar and Grill which is a mere business name owned by the Defendant.”

[7] In the substantive claim, the Claimant seeks an order for possession of the premises occupied by the Defendant comprising of a restaurant doing business as

“Tackle Box Bar and Grill” and which is located on a portion of a pier in San Pedro Town, Ambergris Caye, Belize. The basis of the Claim is non-payment of rent by the Defendant. The Claim also seeks an injunction restraining the Defendant from operating the restaurant business known as the Tackle Box Bar and Grill and an order that the Defendant remove the furniture from the said premises.

[8] At the case management conference, it was plain that the Court would be required at trial to resolve the issue as to ownership of that portion of the pier occupied by the Defendant, in addition to the main claim for possession. The Claimant, by the very wording of its claim, holds the position that the actual premises are part of the pier and belong to the Claimant. The Defendant disputes this position and asserts ownership of the actual premises on which its restaurant business is located. Accordingly, learned Counsel for the Defendant argued that it would be useless to embark upon the issue of the ownership of the premises on which the Tackle Box is located if the same has already been sold.

[9] At the outset in his response, learned Counsel for the Claimant contended that the application ought to fail as the affidavit evidence did not disclose the source of the information upon which the Defendant was relying in support of the request for specific disclosure. In this regard, Rule 30.3 is apt and it reads:

“30.3(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge.

(2) However an affidavit may contain statements of information and belief –

(a) where any of these Rules so allow; and

(b) where it is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application:

Provided that the affidavit indicates –

- (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
- (ii) the source of any matters of information and belief.”

While the Defendant's director indicated that the statement as to the purported sale of the Tackle Box and the Pier were based on information and belief, paragraph 11 does not name the source of such information and belief. Upon this omission being brought to the attention of learned Counsel for the Defendant, she at first stated that her client was reluctant to name his source. Subsequently, she attempted to state the source, which of course was not properly receivable in evidence.

[10] The proviso to Rule 30.3(2) operates to allow for the admission of hearsay evidence upon affidavit in interlocutory or procedural proceedings where the Rules so allow. As Counsel for the Defendant tacitly accepted, the Defendant has not complied with the said provision. Accordingly, the evidential basis of the request for specific disclosure is non-existent and the application must fail.

[11] While the determination based on lack of evidence ought properly to result in the dismissal of the application, it behoves me to address the issue of whether the documents being sought ought to be the subject of an order for specific disclosure, assuming the existence of supporting evidence. As was recognized by the very language of the main order sought and the affidavit of Joseph Moore, until the Court makes a final determination as to the ownership of the premises upon which the Tackle Box Bar and Grill operates, any sale can only be inchoate. This is a logical result of the issue of ownership remaining live and upon which the Court must rule. Whether or not the Claimant has entered into an agreement to sell the Tackle Box and the Pier would not assist the Court in resolving the issue.

[12] In response to the Court in the course of argument, it was stated by learned Counsel for the Defendant that the information relating to the sale could be used to discredit the Claimant. With respect, this may be so, but the Defendant is not precluded from exploring this issue for the purposes of credibility at trial in the course of cross-examination. Rule 28.5(2) states that only such documents that are directly relevant to an issue before the Court can be made the subject of an order for specific performance. The documents sought by the Defendant would not assist the Court in resolving any of the issues at the trial of the substantive claim.

[13] For the foregoing reasons, the application is dismissed. The Claimant shall be entitled to its costs in the cause.

KENNETH A. BENJAMIN
Chief Justice