IN THE SUPREME COURT OF BELIZE A.D. 2007

CLAIM NO. 409 OF 2004

	(CYNTHIA DAY	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(RAFAEL MARIN	**DEFENDANTS**
	(DORITA MARIN	

Coram: Hon. Justice Sir John Muria

21 December 2007

***Ms. Cynthia Pitts* for Claimant**
***Mr. Kevin Arthurs* for the Defendants**

JUDGMENT

MURIA, J.: By their notice of application dated 28 September 2007 and filed on 2 October 2007, the defendants, through their Attorney-at Law, applied pursuant to Rule 26.3 CPR, for an order to strike out the claimant's claim in this case. Two grounds are relied upon, namely, that the claim does not establish a sustainable claim in law, and secondly that the remedy claimed is frivolous and vexatious.

In support of the application Mr. Kevin Arthurs of Counsel for the Defendants/Applicants relied on the affidavit of the first defendant sworn to on 28

September 2007 and filed with the application on 2 October 2007. In summary, the affidavit of Rafael Marin stated that the claimant was an employee of the Cayo Institute of Cosmetology, the partners of which are Gaspar Alberto Aguilar, Stanley David Gibson and Rafael Marin who are all of Belize nationality. The claimant has never been a partner in the Cayo Institute of Cosmetology and therefore has no legal basis for claiming partnership right in business.

Ms. Cynthia Pitts of Counsel for the Claimant/Respondent in response to the application submitted that the central issue in this case is whether the claimant is a partner or not in Cayo Institute of Cosmetology. Hence, the question: who are the partners? The Court must decide that question, but it can only do so at the trial when all the evidence is placed before the Court. Thus submitted Counsel, there is a cause of action in this case justifying the claimant's entitlement to seek remedies in this Court.

Striking Out Claim

The defendants rely on Rule 26.3 CPR in seeking to strike out the claimant's case and enter summary judgment against the claimant. It should be pointed out that Rule 26.3 gives additional power to the Court to strike out statement of case

where it is an abuse of process f the Court or discloses no reasonable grounds for bringing the claim or defending it.

Rule 26.3 provides as follows:

> ***"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 –***
>
> ***……...***
>
> ***(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 grounds for bringing or defending a claim;***

This power is additional to any other powers which the Rules confer on the Court. The power to strike out a claim and give summary judgment. That can be found in Rule 15.2 CPR which requires the defendants to show that the claimant has no "*real prospect of succeeding*" on her claim against the defendants.

Test of "Real Prospect of Success"

To my mind, the real issue in this application is whether the claimant has a real prospect of success on her claim for declaration as to her right as a partner in the defendants' business, Cayo Institute of Cosmetology. The test is that of "*real prospect of success*" and the burden is on the defendants to satisfy the judge that the claimant has no realistic chance of success in her claim. : ***John Diaz -v- Ivo Tzankov and Others*** (2007) Supreme Court, Claim No. 186/2007.

Should the Case be Struck Out?

The original claim by the claimant was for:

1. A declaration that a Partnership exists between herself and the two named Defendants;
2. An account of the Partnership dealings between herself and the Defendants under the implied Partnership Agreement;
3. Dissolution of the Partnership;
4. Sharing of the assets between herself and the Defendants; and
5. Costs.

The claim had been amended three times and the final amendment now claims:

1. A declaration that a Partnership exists between herself and the two named Defendants.
2. Dissolution of the Partnership.
3. Costs.

The real prospect of success in the claim can only be ascertained on the facts as pleaded before the Court together with the law as applied to those facts. In the present case, the facts contained in the Statement of Case and the Witness Statements show that the claimant is a qualified cosmetologist and operated a cosmetology School in July 1997 in San Ignacio, Cayo District, Belize. The claimant operated the school under the name Cayo Institute of Cosmetology. She was the sole proprietor of Cayo Institute of Cosmetology then. The Cayo Institute of Cosmetology graduated a number of students in 1998, following which the claimant temporarily closed the school in April, the same year.

The claimant met the first and second defendants in or about May 1998 and discussed the possibility of operating the cosmetology school again. Following the discussions between the claimant and the defendants, the claimant opened the cosmetology school again in August 1998 under the name Cayo Institute of

Cosmetology. The defendants provided the expertise. In fact she was the director and head instructor at the school.

The claimant teamed up with the defendants and brought with her cosmetology expertise as well as the name "Cayo Institute of Cosmetology" into the new business, she being the director/instructor of the school.

On 7 August 1998, the Cayo Institute of Cosmetology was registered under the business Names Act (Cap. 204) as shown in the Application Form and Certificate of Registration, the partners are Gaspar Alberto Aguilar, Stanley David Gibson and Rafael Marin. The claimant is not one of the partners.

The defendants' case is that the claimant was only an employee, not a partner. The Certificate of Registration confirms that the claimant's name is not included as a partner in Cayo Institute of Cosmetology. Despite that Certificate of Registration, the claimant insists that she reopened her Cosmetology Business in Cayo Institute f Cosmetology in August 1998, with the defendants on the basis of partnership and not as a salaried employee.

On those factual circumstances, can it be said that the claimant's claim for a determination as to her rights as a partner in Cayo Institute of Cosmetology is frivolous and vexatious? Can it be also said that her claim is not one recognized in law?

With respect, I have agree with Counsel for Claimant that on the evidence before the Court, there is a material issue to be determined here, namely whether the claimant is a partner in Cayo Institute of Cosmetology or not. Quite apart from the question of whether the claimant stands a realistic chance of success or not in her claim that she is a partner, the circumstances of the case do demonstrate that she has shown a *prima facie* case to be put to the Court at the trial for the Court's determination. From the materials before the Court, there are clearly evidence to be given on the material issue raised in the claimant's claim. As such, it would not be right to stop the case at this stage. The case of ***Stekel –v- Elliee*** [1973]1WLR 191, cited by Counsel for the defendants is helpful in this regard.

Conclusion and Order

In the light of the materials before the Court, the claimant has demonstrated a scintilla of evidence to support her claim or the inference thereof, sufficient for the

Court to hear and determine it at the trial. For the above reasons, the application by the defendants to strike out the claimant's claim is refused with costs.

(Sir John Muria)