Case No: QB-2021-004688
Neutral Citation Number: [2023] EWHC 3560 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

MASTER EASTMAN

BETWEEN:

MISS LOWENTHAL

CLAIMANT

- and -

NHS RESOLUTION

DEFENDANT

Known Legal Representation
Mr Adam Porte on behalf of the Defendant

Other Parties Present and their status
None known

Judgment

Judgment date: 27 July 2023
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

Number of folios in transcript 27
Number of words in transcript 1,901

Master Eastman:

1. This is an extempore judgement in an application by the Defendant, NHS Resolution, to strike out Miss Lowenthal's claim which was issued back in December of 2021 in respect of her assertion that, effectively, the Defendants were overpaid by a dint of monies they took out of the proceeds of sale of a property in respect of an obligation she had to them in respect of some costs. Her case essentially is that she reached an agreement that although the Costs Order against her in the proceedings about which this all relates was in the sum of ultimately £50,000-odd, her case is that she had a deal and she reached a deal, she says, with a Mr Hennings in respect of a compromise to that whereby the Defendant would take £27,500 in full and final settlement.

2. As I say, this is an application to strike out that claim or indeed to give summary judgment pursuant to CPR 3.4 or 24.2 respectively.

3. In the course of her arguments, Miss Lowenthal has made reference to the fact that she is a vulnerable person and therefore the Court should make allowances for her.

4. This application has a very extensive history. It was first listed to be heard in October of 2022, having been issued in the May before. On the day of that hearing, Miss Lowenthal contacted the court and said she was unable to attend. I therefore granted her an adjournment. The matter was relisted for 27 March this year. The Claimant again emailed the court on the morning of that hearing indicating she had instructed a barrister to represent her, but he was unavailable on that day. I adjourned the matter to give her a chance to be represented. The matter was relisted for 16 June.

5. On that occasion, Miss Lowenthal attended herself, and I remember it well, and asked for a further adjournment. In part, at that stage, I remember citing the fact that the barrister concerned was out of the country but was expected to be back in a few weeks. That is why, in part, we adjourned the matter until today. There is no sign of the barrister being here and Miss Lowenthal has done her best, and a very competent best if I may say so, to advance her case herself today.

6. I am satisfied that, given the amount of time Miss Lowenthal has had to prepare herself for this hearing today in spite of her medical difficulties, which I fully accept exist, she has been given sufficient chance, as a vulnerable person, to prepare herself and to present her case, and therefore I see no further problem in dealing with it today.

7. I have further been provided by her with a skeleton argument which, albeit that it came late, and I make no criticism of her for her lateness, I know she has been labouring under difficulties, I have had the chance to read it and an extensive witness statement from her which I have also had a chance to read. I further had a skeleton argument prepared by Mr Port, who represents the Defendants, on their behalf, which is dated a week ago and which has been in Miss Lowenthal's possession for some considerable time. A week is, in my judgment quite ample.

8. The heart of the case, as I have already indicated, is the simple question, was there or was there not a concluded agreement between Miss Lowenthal, on her side, and a Mr Henning, on behalf of the Defendants, to reduce the sum due in respect of these costs to £27,500, and therefore the Defendant, having got a great deal more of that by way

of charges, should she be entitled to a refund of the monies? The case is, in those circumstances, ultimately, in my judgment, a very simple one. I am asked to strike it out on the grounds that it has no realistic prospects of success or that it ought to be struck out, as I have indicated, under the two possible provisions of the CPR. I am satisfied that it is appropriate for me to deal with the matter today. I am not satisfied that, bearing in mind the case's history, I shall grant any further adjournment, not that Miss Lowenthal has actually asked for further adjournment, but I am not satisfied that I should adjourn it any further. This particular application has gone on long enough.

9. The law which I have to apply is fairly straightforward and well known to the court. I can strike out and should strike out if I am satisfied, pursuant to part 3.4(2), that the statement of case discloses no reasonable grounds for bringing or defending the case or that the statement of case is an abuse of the court process, or otherwise likely to obstruct the just disposal of proceedings. Taking into account how I should approach that test, CPR 3.4(2) says statements of case which are suitable for striking out on ground A include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the Respondent and would waste resources on both sides. A claim or defence may be struck out as not being a valid claim or defence as a matter of law.

10. Similarly the summary judgment test is CPR 24.2:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if –
>
> (a) it considers that –
>
> (i) the claimant has no real prospect of succeeding of the claim; or
>
> (ii) that defendant has no real prospect of successfully defending the claim; and
>
> (b) there is no other compelling reason why the case should be disposed of at a trial."

11. The principles are straightforward under which I should approach both of these tests. Firstly, I have to consider whether or not the Claimant in this case has a realistic and not a fanciful prospect of success. A realistic prospect is one that is more than merely arguable. I am not required to conduct, and I should not conduct, a mini trial, and I am reminded by Lewison J in *A C Ward & Sons* [2009] that that does not mean the Court must take at face value and without analysis everything that a Claimant says in his statements before the Court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. The factual assertion here from the Claimant is that there was a concluded deal in respect of £27,500 being acceptable in place of the judgment sum.

12. In support of that, at the heart of her evidence, is her reliance on emails and (inaudible - gap in audio) took place on 9 December 2014. An email of 11.12 in the morning to Mr Scott Henning reads:

> **"Please can you call me? I have an urgent medical appointment from**

12 to 1 but I'm free before and after. The situation is quite critical as regards this. If we can get confirmation over the charge, we'll be discharged in a matter of days as a full and final settlement as discussed. The alternative is too grim to discuss now."

That's 11.12.

Mr Henning replies by an email at page 24 of my bundle saying:

"Hi. I have now received confirmation that the following options will be acceptable to us to enable us to remove the charge to you on your property.

1) a one-off payment of £27,500.

2) payment over three years of £32,500.

Please confirm the option preferable to you."

The email chain ends there.

13. Miss Lowenthal contends that that reflects a concluded agreement between the parties. I regret to say I cannot agree with her. Firstly, there was no email evidence that she accepted either of the two options which were being proposed by Mr Henney. They may have been reminders of what had been discussed between them before, I know not, but there is nothing from her saying which she was going to accept. She says it was agreed orally. That, in my judgment, is mere assertion. I am far from satisfied that actually that represents the true state of affairs because if that had been correct, I find it difficult to understand why Matthew *Trinder,* just less than a month later, writes to her on 7 January 2015 at 3.11 in the afternoon on behalf of the Defendant saying:

"Dear Elizabeth, following your telephone call before Christmas, I've now been instructed to reopen my file and discuss your proposals for a payment plan in exchange for removing the charging order on one of your properties. As we discussed last year, this will not be the first time we've had a payment plan and the charging order will just be removed immediately. You were going to think about paying a significant lump sum in order to show good faith, followed by regular monthly instalments. Let me know what figures you came to. In the meantime, I will calculate the current amount of the judgment debt, including interest."

That, in my judgment, is clear evidence that nothing had been concluded in December.

14. Miss Lowenthal argues that because of difficulties with iPhones and other things, if given time further emails would emerge which would support her case, something will turn up if time is given. I regret to say that, bearing in mind the history of this case, that is just not good enough.

15. In my judgment this case has no realistic prospect of success and for those reasons it should be struck out and it will be.
