[2024] JMSC Civ. 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV03730

BETWEEN	**KERRY-ANN AUSTIN**	**CLAIMANT**
A N D	**SHANIQUE MORRIS**	**1ST DEFENDANT**
A N D	**SHARON MORRIS**	**2ND DEFENDANT**
A N D	**PHILLIP MORRIS**	**3RD DEFENDANT**

IN CHAMBERS (VIA VIDEO-CONFERENCE)

Ms. Orneika Green instructed by Bignall Law for the Claimant/Applicant

Ms. Tashana Grant instructed by Samuda & Johnson for the 1st and 2nd Defendants/Respondents

HEARD: October 16, 2024

Civil Practice and Procedure – Application to Set Aside Default Judgment Entered on a Counterclaim – CPR Rule 13.3 – Whether or not the Claimant has a good explanation for failure to comply with the CPR to File a Defence to the Counterclaim – Whether or not the Claimant has made the appropriate application – Should they have applied for relief from sanction or whether it should have been an application to set aside default judgment – Whether or not the Claimant has a Defence with a Real Prospect of Success.

Whether or not the Claimant's Statement of Case should be struck out as a consequence of the entry of judgment in default on the counterclaim.

STAPLE J

BACKGROUND

[1] The Claimant has found herself in a tremendous pickle. She has somehow managed to get judgment in default entered against her on a counterclaim filed and served on her from as far back as 2018. How did it come to this?

[2] On the 26th September 2018, the instant claim was filed by the Claimant. An acknowledgment of service was filed by the Defendants by Samuda & Johnson on the 26th October 2018 (1st and 2nd Defendants) and the 14th November 2018 (the 3rd Defendant).

[3] The Claimant gave the Defendants time to file and serve a Defence out of time within 21 days of the 18th December 2018. That Consent to File Defence out of Time was filed on the 13th December 2018. The Defence of the Defendants was filed on the 13th December 2018 and there was a counterclaim included by the 1st and 2nd Defendants against the Claimant in that Counterclaim. This was served on the Claimant through her Attorneys-at-Law.

[4] The matter proceeded to mediation in 2022 but it was not settled and the matter fell into abeyance. The Court itself then summoned the parties to a Case Management Conference which was scheduled for the 6th May 2024.

[5] On the 6th May 2024, the Case Management Conference was conducted. The Claimant was not present personally, but she was represented there by Ms. Abigail Pinnock instructed by Bignall Law. During the Course of the Case Management Conference, it was revealed that there was no defence filed by the Claimant to the counterclaim of the 1st and 2nd Defendants.

[6] The Court then ordered, on the oral application of counsel for the Claimant (which was not resisted by the 1st and 2nd Defendants), an extension of time to the 21st May 2024 for the Claimant to file and serve her defence to the counterclaim failing which judgment in default would be entered against her. The case management conference was then adjourned to July 23, 2024.

[7] On July 23, 2024, there was no defence to the counterclaim filed by the Claimant and no explanation was forthcoming from her then Attorney-at-Law Ms. Pinnock. As such, on the Request for Entry of Judgment in Default filed on the same July 23, 2024 by the 1st and 2nd Defendants, judgment in default of Defence was entered on the Counterclaim.

[8] On the 29th July 2024, the Claimant filed the present application supported by the Affidavit of Mr. Vaughn Bignall. The Claimant has applied to set aside the default judgment entered and for the Defence to the Counterclaim filed out of time to stand.

ISSUES

[9] The issues to be resolved are as follows:

(i) Has the Claimant applied the correct procedure in filing **only** (emphasis mine) an application to set aside the Default Judgment?
(ii) Whether or not the Claimant has a defence with a real prospect of success;
(iii) Whether or not the Claimant has applied to the Court as soon as reasonably practicable after finding out that the judgment was entered;
(iv) Whether the Claimant has given a good explanation for the failure to file a defence.

[10] The Claimant has not challenged that she were validly served with the Defence and the Counterclaim. Accordingly, they are seeking to move the Court to exercise its discretion under rule 13.3 to set aside the Default Judgment.

[11] It is important to note that the key question to ask is whether or not the Claimant have a defence to the counterclaim with a real prospect of success. However, the Court must also consider, in accordance with rules 13.3(2)(a) and (b), whether or not the Claimant applied to set aside the judgment as soon as reasonably practicable after receiving notice of the entry of the judgment and whether or not the Claimant has given a good explanation for failing to file a defence (in this case) within the time allowed by the rules and the Order of the Court.

SHOULD THERE HAVE BEEN AN APPLICATION FOR RELIEF FROM SANCTION FILED AS WELL AS THE APPLICATION TO SET ASIDE THE DEFAULT JUDGMENT?

[12] In my view, as there was an unless order made, the Claimant ought properly to have included an application for relief from sanction as the first order in the application. This is because Rule 26.7(2) makes it that where an unless order is imposed, the order takes effect on default unless the defaulting party obtains relief.

[13] In this case, there was an unless order made on the 6th May 2024. The consequence of this is that if there was non-compliance with the order, then the judgment in default would be entered.

[14] In my view then, the Claimant would have to obtain relief from the sanction imposed pursuant to rule 26.8 before it could ask the Court to set aside the Default Judgment.

[15] But to save time and costs, the Court amended the application to include an application for relief from sanction as the first order sought. I did this pursuant to my general powers of rectification under rule 26.9(3). Mr. Johnson did not object to this course.

Was the Application for Relief from Sanction made promptly?

[16] In the unique circumstances of this case, the Court is prepared to say that the application was not made promptly. In my view, there was some effort to address the issue of the default judgment promptly, though it was quite clumsy to say the least. It should have been apparent to counsel for the Claimant that they ought to have applied for relief from sanction. The unless order was clear and so are the rules.

[17] The application was filed on the 29th July 2024. This was just 6 days after the judgment in default was entered, but it was 2 months after the unless order took effect. So in the round, that was not prompt given the fact that it was the

Counterclaimants that pointed out the non-filing of the defence on the 4th May 2024, were gracious enough to allow time to fix the error, sufficient time was given to address the defect and yet there was still non-compliance which non-compliance remained unexplained up to the time of the entry of the judgment on the 23rd July 2024.

[18] In my view, the application was not prompt and so there can be no relief from sanction granted. In the context of this case, they ought to have been more alacrity and thought into the application being made.

If I am Wrong on the Question of Whether Relief from Sanction was Required, Was the Application to Set Aside Made as Soon as Reasonably Practicable?

[19] I am satisfied that the Application to Set Aside the Default Judgment was filed as soon as reasonably practicable after it was brought to the attention of the Claimant that it was entered. The Judgment in Default was entered on the 23rd July 2024 and the Application was filed on the 29th July 2024.

Was there a Good Explanation for Failing to File the Defence?

[20] The Claimant has submitted that there was a good explanation provided for the failure to file her Defence to the Counterclaim. It is important to examine the application and affidavit in support of the application.

[21] Mr. Bignall, the head of the Firm representing the Claimant, was the sole deponent to any affidavit in this matter.

[22] There was no affidavit from the Claimant. Mr. Bignall's reason for not filing the Defence to the counterclaim had to do with the inadvertence of counsel previously assigned to the matter. He did not seek to distinguish between the period between December 13, 2018 to the 4th May 2024 (the first period) and the period between May 4, 2024 and May 21, 2024 (the 2nd period).

[23] He also alluded to the fact that they were relying on the insurers of the Claimant to appoint a representative.

[24] Neither of those reasons are satisfactory in my view. Even if inadvertence could be said for the 1st period (which the Court is not saying it is accepting), the failure to comply with the unless order in the 2nd period is not excusable. The fact of the default was brought to the attention of the Claimant on the 4th May 2024. They still did not file the document and no sensible explanation was given for this failure when they appeared on the 23rd July 2024.

[25] Nor does the Court accept as a good explanation the fact that they were waiting on the Claimant's insurer to appoint an attorney-at-law to handle the matter. The fact is that Bignall Law was served with the Defence and Counterclaim in a claim which they were handling on their clients behalf. It was incumbent upon Bignall Law to do their duty to their client and file a Defence and, at the same time, notify her insurer of their actions to protect her interests. If the insurer chose to take over the matter subsequent, then that it a matter for them. However, the duty that Bignall Law had to their client was to protect her interests by filing a Defence to the Counterclaim. Saying that you were waiting on the insurer is not a reasonable excuse for counsel.

[26] There have been instances where, even where the Defence is one with tremendous merit, the Court has still refused to set aside a regularly entered judgment in default on account of inexcusable explanations for lack of compliance with the rules.

[27] One ready case that comes to mind is ***Ameco Caribbean Inc v Seymour Ferguson***[1]*.* In that case the Respondent had filed a claim against the Appellant and obtained a regular judgment in default. Two years after being served with notice of the Judgment in Default, the Appellants unsuccessfully applied for the judgment in default to be set aside. They did not appeal from that ruling and the matter proceeded to an

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assessment of damages scheduled for May of 2017. However, the day before the assessment of damages, the Appellant filed a second application to set aside the judgment in default. On this second Application, Stamp J ruled that he would not exercise his discretion to set aside the judgment in default as, essentially, though there was a defence on the merits, the lengthy delay in filing the second application to set aside, the poor explanation for same as well as the fact that the Claimant's claim would now be statute barred, militated against him exercising his discretion in favour of the Appellant.

[28] On Appeal, the Court of Appeal agreed with the decision of Stamp J and refused to set aside the judgment in default, even in the face of a Defence with tremendous merit.

[29] Edwards JA, in delivering the opinion of the Court said as follows:

> *[78] It is clear, therefore, that on great authority, both pre and post CPR, delay is a significant factor to be weighed in the balance in the circumstances of a particular case. The statement by Phillips JA in* ***Rohan Smith*** *(at paragraph [39]) that delay was merely a factor to be borne in mind and ought not by itself to be determinative of the application, on which the appellant relies, is a correct statement of the principled approach the court should take in determining the application to set aside. It is true that delay by itself, is not a determinative factor. It is a factor to be considered and weighed in the balance with all the other relevant factors in the case. Reliance on this, however, does not assist this particular appellant in the circumstances of this case.*
>
> *[79] In the instant case, the inordinate delay, which has boldly and frankly been conceded to by counsel for the appellant, the lack of explanations, and the consequent risk of prejudice to the respondent, are circumstances which would necessarily have "featured prominently" in the learned trial judge's consideration of whether to set aside the judgment. The weight to be accorded to that delay and the concomitant prejudice caused to the respondent therefrom, had to be balanced against the weight to be accorded to the merits of the defence.*
>
> *[80] The learned judge correctly identified and considered the relevant factors and in so doing took the correct approach. Having done a thorough analysis of the authorities submitted by both parties, he rightly considered the authorities which demonstrated that rule*

> *13.3 must be interpreted and applied in keeping with the overriding objective. He recognised the paramountcy of a good defence with a real prospect of success and weighed that against the possible prejudice to the respondent.*
>
> *[81] Having taken that approach, the learned judge's finding that "where grave and irremediable harm may be done to a claimant if a judgment is set aside, any inordinate delay without good and satisfactory explanation is a material factor to be considered in the exercise of the discretion to set aside, even if the proposed defence may seem impregnable on paper" (see paragraph [33]), cannot be faulted. This is a necessary conclusion that arises from a proper application of the overriding objective to rule 13.3. In that regard, the learned judge did not say, as asserted in the grounds of appeal, that delay is only excusable if supported by a good explanation, but rather, that the particular circumstances of the case before him called for one. Furthermore, the only way the court could be placed in a position to assess whether an applicant had applied "as soon as reasonably practicable" in the circumstances of the case, is if the applicant provides an explanation as to the circumstances it faced at the material time that may or may not have prevented it from applying sooner.*

[30] In that case, the delay in question had to do with the delay in applying to set aside the Judgment in Default. In this case, the delay has to do with the delay in filing the defence.

[31] The dilatory conduct on behalf of their client, the Claimant, has exposed their client to a judgment. Which judgment I am not minded to set aside.

[32] The overriding objective requires that in interpreting and exercising my discretion under these rules I should seek to deal justly with the case. Dealing justly with the case includes, among other things, ensuring that the case is dealt with expeditiously and fairly. The Claimant has failed to demonstrate that she has dealt with the prosecution of this matter expeditiously.

[33] I also bear in mind that we are now in a new era of criminal and civil litigation in the Courts of Jamaica. We now have an agreed time standard in the Supreme Court of 2 years from filing to completion. This means that we have agreed that 2 years is a sufficient allocation of resources to each case, **properly prepared (emphasis mine)**,

for it to be disposed. Conduct of litigants or counsel or both which causes or is likely to cause a case to fall outside of that time standard should not be countenanced unless the justice of the case requires it. I recognise that there are exceptions to every rule, but it cannot be that the exception becomes the rule. In my view the overriding objective in Rule 1 must be interpreted and applied in light of the time standards set by the policy of the Judiciary.

IS THERE A DEFENCE WITH A REAL PROSPECT OF SUCCESS

[34] There is no affidavit of merit filed. Mr. Bignall's affidavit merely alludes to the contents of the particulars of claim, but this, in my view, is not sufficient as an affidavit of merit. Pleadings are not evidence. There needed to have been some evidence from the Claimant to address the Counterclaim to show why she should be allowed to defend the counterclaim.

DISPOSITION

1 The Claimant's application to set aside judgment is amended to include an application for relief from sanction.

2 The Claimant's Application for Relief from Sanction is refused.

3 If the Court is in error in treating with the Application for Relief from Sanction, the Application to Set Aside Default judgment is refused with costs to the 1st and 2nd Defendants to be taxed if not agreed.

4 As a consequence of the entry of judgment against the Claimant on the counterclaim, judgment is entered on the Claimant's claim for the Defendants with costs to the Defendants to be taxed if not agreed.

5 The Claimant may file and serve a form 8A if so advised on or before the 31st October 2024 by 4:00 pm.

6 There shall be a case management conference for assessment of damages of the counterclaim of the 1st and 2nd Defendants on the 14th January 2025 at 10:30 am for 30 minutes before the judicial officer assigned to docket 2.

7 Any applications that are to be made shall be filed and served within time to be heard at the case management conference set above.

8 Defendants' Attorneys-at-Law are to prepare, file and serve this Order on or before the 25th October 2024 by 4:00 pm.

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Dale Staple
Puisne Judge (Ag)