



[2023] JMSC CIV103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV02760

BETWEEN NICOLE-ANN FULLERTON-CLARKE RESPONDENT/CLAIMANT
AND WESTERN REGIONAL HEALTH APPLICANT/DEFENDANT
AUTHORITY

IN CHAMBERS

Ms. Catherine Minto instructed by Nunes Scholefield Deleon & Co for the Respondent/Claimant

Ms. Faith Hall instructed by the DSP for the Defendant

CIVIL PROCEDURE: Application for Relief from Sanctions

Heard: May 25, 2023, and June 9, 2023

O. SMITH., J., AG

INTRODUCTION

[1] This matter concerns a Notice of Application for Relief from Sanctions. The application was filed by the 2nd Defendant on behalf of both defendants on May 8, 2023. The application seeks the following orders:

1. The Defendants be granted relief from sanctions for failing to file and serve the witness statements on or before April 7, 2023.
2. The Defendants be granted an extension of time to file their witness statements within seven days of the date of this order.

3. Costs of this application to be cost in the claimõ +

BACKGROUND

- [2] The Claimant is Nicole Ann Fullerton-Clarke and the Defendants are the Western Regional Health Authority (Board of Management of Cornwall Regional Hospital), 1st Defendant and the Attorney General of Jamaica, 2nd Defendant. On the 20th of July 2018 a Claim Form and Particulars of Claim were filed on behalf of the Claimant by her attorneys at law. The claim is one in negligence which arose from what the Claimant described as negligent medical advice given and negligent medical treatment administered to her by the medical staff at the Cornwall Regional Hospital in October 2015 and continuing. It is her claim that as a result of the advice given and the medical treatment administered, she sustained severe personal and permanent injuries, pain suffering, loss of amenities and has incurred expense and financial loss.
- [3] On the 31st of July 2018 the second Defendant filed an Acknowledgment of Service of Claim Form and Particulars in which they indicated that they also accepted service on behalf of the first defendant. They also confirmed that they were served with the relevant documents on the 23rd of July 2018. Having been served on the 23rd of July 2018 the Defendants did nothing else until January 16, 2019, when they filed an Application for an Extension of Time to file Defence. This application was heard on the 1st of March 2019. On the 11th of April 2019 the court granted the Defendants application. The court ordered that they were to file and serve their defence on or before April 23, 2019, failing which the Claimant is permitted to enter judgment against the Defendants.+
- [4] The Defence was filed on April 23, 2019, and the Parties were referred to Mediation. Mediation was unsuccessful.
- [5] Case Management Conference was held on the 12th of December 2022 and the court gave the usual case management orders. There is value in listing some of them now as the orders will be of importance later.

1. *Trial is fixed for two days July 17 and 18 2023 before judge alone in open court.*
2. *Ordinary witnesses are limited to two for each party.*
3. *Pretrial Review scheduled for Friday May 5, 2023, at 10:00 AM for half an hour.*
4. *Standard Disclosure to be completed on or before January 20, 2023*
5. *Inspection of documents is to be completed on or before February 3, 2023.*
6. *Witness statements are to be filed and exchanged on or before April 7/2023.*
7. *Listing Questionnaire to be filed and exchanged on or before April 14, 2023.*
8. *Pretrial Memorandum to be filed and exchanged on or before April 14, 2023.*

[6] The Defendants did not comply with the Case Management Conference Orders, particularly as it relates to the filing and exchanging of the witness statements and the Listing Questionnaire. Up to May 5, 2023, no application for Relief from sanctions had been made. On May 5, 2023, the court ordered the Defendants to file and serve an application for Relief from Sanctions on or before May 8, 2023. An order was also made permitting the Claimant to file an Affidavit in Response on or before May 15, 2023. The matter was fixed for hearing on May 25, 2023. The application was filed on May 8, 2023, however, the Defendants were not served until May 19, 2023. The time having passed to file an Affidavit in Response, the Claimants filed a Notice of Intention to rely on the Affidavit of Nicole Fullerton Clarke filed on November 23, 2022.

[7] It is in those circumstances that the Claimants Attorney filed submissions opposing the Defendants Application.

THE LAW AND ANALYSIS

[8] Rule 29.11(1) of the CPR provides that:

"Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits."

[9] The Applicants relied on Rule 26.7 and 26.8 of the Civil Procedure Rules. Rule 26.8 is more pertinent to the application at hand. It sets out the requirements which must be satisfied before a court can exercise its discretion to grant an application for relief from sanctions. It states:

26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -

(a) Made promptly; and

(b) Supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that -

(a) The failure to comply was not intentional;

(b) There is a good explanation for the failure; and

(c) The party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to -

(a) The interests of the administration of justice;

(b) Whether the failure to comply was due to the party or that party's attorney-at-law;

(c) Whether the failure to comply has been or can be remedied within a reasonable time;

(d) Whether the trial date or any likely trial date can still be met if relief is granted; and

(e) The effect which the granting of relief or not would have on each party.

[10] Case law has sought to interpret the application of Rule 26.8 of the CPR. In this jurisdiction the case of **H.B. Ramsay and Associates Limited and Another v Jamaica Development Foundation Inc. and Another** [2013] JMCA Civ. 1 is one such case. Both parties relied on it for its interpretation and application of rule 26.8 of the CPR. I see no reason to depart from that authority and I agree with the principles adumbrated therein. The case confirmed that in applications of this nature the court should consider whether:

(a) The application was made promptly,

(b) There was a good explanation for the failure and

(c) The appellants had generally complied with other rules, orders and directions.

[11] Counsel for the claimant submitted that the Court of Appeal has held that the requirements under Rule 26.8 (1) and (2) are mandatory and should be applied cumulatively. In **Jamaica Public Service Co. Ltd v Charles Francis & Anor** [2017] JMCA Civ 2, it was held that all the requirements of Rule 26.8 (2) must be satisfied before the court can consider exercising its discretion favourably in an application for Relief from Sanction. If the requirements under rule 26.8 (2) have been met, it is only then that the court can go on to consider the requirements under rule 26.8 (3)

Was the Application made promptly?

[12] The cases concerning applications for Relief from Sanction and for applications for extension of time all indicate that in assessing whether an application is made promptly the court should have regard to the circumstances of the case. The Applicant relied on the case of **Garbage Disposal & Sanitations Systems v Noel Green et al** [2017] JMCA App 2 where the Court had before it an application for leave to appeal the decision of Campbell J in the lower court not to grant an application for Relief from Sanctions. Frank Williams JA had to consider whether

a period of 62 days was inordinate. He found that having regard to the particular circumstances of the case the period did not amount to an inordinate delay. He ultimately granted the appeal, however, this turned on his view that a critical consideration which faced Campbell J was whether or not the failure to comply was intentional. He found that the absence of a finding on this issue could mean that there was a real prospect of success in the appeal. In addition, the court found issue with the period of the delay for which the judge considered, which was the period between the filing of the documents and the filing of the application. The court also examined what the lower court considered to be general non-compliance with the rules, i.e. that the affidavit in support of the application did not conform with Rules 30.2(e)(i) and 30.4(1)(d) of the CPR and found that a noncompliance with those rules did not fit within the meaning of general non-compliance.

[13] In **Garbage Disposal v Green** relief was sought for failure to file the witness statement and Listing Questionnaire. At paragraph 50 the learned judge found:

“The failure to file the witness statement and listing questionnaire in time, although not to be condoned, in the absence of any other egregious failures, leads to the conclusion that other less-draconian and more appropriate sanctions could have been imposed, if the learned judge had thought it fit in the circumstances.”

[14] The Defendants ran afoul of the Case Management Conference Orders on January 1, 2023, when they failed to file their list of documents. However, it is its failure to file and exchange its witness statements on or before April 7, 2023, and the failure to file and exchange the Listing Questionnaire on or before April 14, 2023 which necessitated an application for Relief from Sanctions and from which the count starts. The application having been filed on May 8, 2023, means that there was a period of 31 days delay. Whether or not the application was made promptly should be considered based on the circumstances of each case. Case Management Conference was held on December 12, 2022. The court recognized that the matter was one that needed a speedy trial date. The timeline for compliance was therefore tight as trial was fixed for July 17 and 18, 2023. April 7,

2023, came and went. From all indications the Defendant was aware from February 15, 2023, that they would not be able to comply with the order however no attempt was made to file the application. The date for Pretrial Review came on May 5, 2023, yet still no application was filed. It took a judge to order the defendants to file the application within three days. I am of the view, that being ordered to do something on or before a particular date by a court that ought to have been made on your own volition, cannot be considered prompt.

Whether there was a good explanation for the failure.

[15] The Defendants Application for Relief from Sanction was supported by an Affidavit from Kristen Fletcher, an Attorney-at-law instructed by the Director of State Proceedings. She deponed that the defendants have not complied with the Case Management Orders because Dr. Franz Pencle who was part of the team that treated the Claimant and was the intended witness ~~was~~ advised that he is no longer employed to the Cornwall Regional Hospital, as a consequence, arrangements had to be made to locate another doctor to give a witness statement. She also deponed that the application was not made before because of the volume of files that the particular counsel had conduct of. She further cited that the Chambers faced staffing challenges during the period as two senior members of the Litigation Division fell ill and proceeded on extended sick leave. This resulted in Ms. Hall having to take on several other matters. She ended by saying that the Claimant would not be prejudiced as the Defendants would still be able to meet the trial dates.

[16] In proof of her assertions that they were unable to comply because Dr. Pencle was no longer employed attached to the Cornwall Regional Hospital, (CRH) Ms. Fletcher exhibited an email thread. The emails demonstrate that from as early as February 15, 2023, the defendant was aware that that Dr. Pencle was no longer attached to the CRH. On that very day Ms. Hall contacted CRH and indicated what Dr. Pencle had told her and requested the availability of another doctor from the team. A response was received on February 17, 2023, wherein the assurance

was given that another witness would be identified. It would have been prudent at this stage for an application to be made however no application was made although it was apparent that Dr. Pencle was unavailable and as such no witness statement would have been forthcoming from him. I find that Ms. Fletcher's assertions that the defendants explained that they had to take alternate steps to locate medical personnel to speak to the incident is unacceptable particularly since no follow up was done between February 17, 2022, and April 7, 2023. I am not certain what steps to locate other personnel needed to be taken, the defence filed on April 29, 2019, named the two other doctors who were part of the claimant's neurosurgery team. The other doctors were therefore known from the outset.

- [17]** I bear in mind that this matter was being treated as one of urgency, the judge at the Pre-trial Review indicated that a speedy trial date was needed, and one was set. With this in mind, the defendants made no attempt to follow up on the February 17, 2023, email until April 25, 2023, some 18 days after the deadline for filing witness statements. The email sent on April 25, 2023, made it pellucid that the DSP was aware that they had missed the deadline and that the Pre-Trial Review date was fast approaching. However, no steps were taken to file and serve the application. I find myself in agreement with counsel for the Claimant, that from as far back as February 15, 2023, the DSP having been informed that Dr. Pencle was unavailable could have done one of two things file an application for Relief from Sanctions or use the Report signed by Dr. Pencle to do a witness summary. They did neither.
- [18]** It has not gone unnoticed that no explanation was given for the period between December 12, 2022, when the Case Management Conference orders were given and February 15, 2023, when based on the emails presented by the DSP the first attempt was made to contact Dr. Pencle. That fact, however, does not affect my examination of the explanations given for the failure to comply.
- [19]** The next leg of the Defendants' explanation for failing to comply can be summed up as one thing, the Chambers had administrative challenges as two senior

lawyers fell ill and proceeded on protracted sick leave. Their absence meant that Ms. Hall had to take on their cases. The **JPS Case** also highlighted that administrative inefficiency without more does not qualify as a good explanation. In the case at bar the explanation really amounted to staff shortage which led and an overburdened attorney. However, it bears repeating that counsel responsible for this case addressed the case in February 2023. She was aware at that time that a witness statement was needed. The reasons for her inability to comply were known. Even with a staff shortage, she was dealing with the file and as such the application could have been drafted then. Similarly in April 2023, after the date had passed but before the Pre Trial-Review date she once again followed up with the file and made a conscious decision not to file the relevant application. It was submitted that the noncompliance was not intentional. However, given the email thread, the opportunities evident therein for the application to have been filed, in conjunction with the fact that the court had to order the Defendants to file the application, I am hard pressed to view the failure as anything other than intentional, whether brought about deliberately or negligently. It is my view that that no good explanation for failure to comply with the order has been given.

The appellants had generally complied with other rules, orders and directions.

[20] Counsel for the Defendant submitted that there was general compliance with the rules. However, on my examination of the file, that is not true. Counsel for the Claimant produced a table to outline the defendants' general noncompliance with the rules and orders of the court. The table began where the court began, this claim was filed on July 20, 2018, and served on July 23, 2018. The defence should have been filed on or before October 18, 2018. The defence was not filed until April 23, 2019, after the court granted an extension of time to file the defence on April 11, 2019. At the Case Management Conference, the order was for Standard Disclosure to be completed on or before January 20, 2023, the defendants did not file their List of Documents until February 16, 2023. Inspection was to take place on or before February 3, 2023. According to the Claimant, this had not yet taken

place. This is not disputed by the defendant. Listing Questionnaire was to be filed and exchanged on or before April 14, 2023. The Defendants filed theirs on May 19, 2023. No application has been made regarding the late filing of the Listing Questionnaire. The Pretrial Memorandum was to be filed and exchanged on or before April 14, 2023, my examination of the file discloses that they have yet to comply with this order.

- [21]** The Claimants attorney also pointed out that on June 12, 2019, they filed a Request for Information to be provided in 14 days. This was served on the defendants on May 29, 2019. To date the defendants have not complied with the Request for Information. Last but by no means least up to the date of the application, no witness statement had been filed. The affidavit of Ms. Fletcher seems to indicate that someone has been identified to provide a witness statement. She averred that alternate steps had to be taken to locate other medical personnel who could speak to the incident to sign witness statements.+ It is in those circumstances that she indicated additional time was required to finalize these witness statements.
- [22]** Since Dr. Pencil is unavailable it seems to me that whoever is identified will also have to submit a medical report. I have also borne in mind that the defendants have not filed an application for the appointment of an expert witness as yet. This would have to be done at another Pre-Trial Review and will impact the impending trial date.
- [23]** During the submissions I enquired of counsel if a witness had been identified, it was only then that counsel for the defendant indicated that she had just been informed that someone had been identified. This is somewhat different from what Ms. Fletcher had indicated in her affidavit. It is safe to say that the defendants have been generally non-compliant.
- [24]** The applicant has failed to meet the requirements of rule 26.8, as such there is really no need to consider rule 26,8 (3).

[25] In the premises the Notice of Application for Relief from Sanctions filed on May 8, 2023, is denied.

[26] Costs of the Application to the Claimant to be taxed if not agreed.

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Opal Smith

Puisne Judge (Ag.)