[2015] JMSC Civil 117

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 03558 OF 2008

BETWEEN SHARLTON GILROY CLAIMANT

AND FERNANDO HUDSON DEFENDANT

Mr. Barrington Frankson, and Ms. Zaieta Skyers, instructed by Ms. Alethia Meiklejohn of Frankson & Richmond for the defendant/applicant.

Ms. Analisa Chapman, instructed by Gayle Nelson & Co. for the claimant/respondent.

Entry of Default Judgment for Failure by Defendant/applicant to Attend a Hearing - Rule 27.8(5) & (6) of the Civil Procedure Rules – Application to Set Aside Such a Judgment – Rule 39.6 of the CPR - Whether Requirements Satisfied – Application to Set Aside Judgment ex debito justitiae - Inherent Jurisdiction of the Court – Whether Claim One for a Specified Sum of Money – Rule 12.8 of the CPR – Whether Assessment of Damages Necessary.

IN CHAMBERS

Heard: March 6, and June 16, 2015.

Coram: F. Williams, J.

Nature of Application

[1] This matter comes before me as an application to set aside a judgment, which was entered as a result of the defendant/applicant's failure to attend a pre-trial review. The judgment was entered on August 18, 2010, pursuant to rule 27.8(5) of the Civil Procedure Rules (CPR), which reads as follows:

> "(5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with

these Rules, then

(a) if the claimant does not attend, the court may strike out the claim; and

(b) if any defendant does not attend, the court may enter judgment against that defendant/applicant in default of such attendance.

(6) The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial."

[2] As would have been seen, rule 27.8(6), which deals with the procedure to apply to set aside such a judgment, has also been set out above, for convenience.

The Claim

[3] In this matter the claimant/respondent, by way of claim form dated and filed on the 15th day of July, 2008, sued the defendant/applicant, seeking the following relief:

"…to recover the sum of Twenty-one Million Eight Hundred Thousand Dollars ($21,800,000) being monies due and owing for professional services rendered by the Claimant to the Defendant/applicant inclusive of interest thereon at the bank credit rate of twenty-five per centum (25%) per annum being $6,500,000 from the 1st January, 2006 to 15th July, 2008 being $4,452.05 per day and interest continuing thereafter on a daily basis at the said sum of $4,452.05 per day until the date of payment of the debt; and $15, 300,00.00 being monies due and owing for professional services rendered by the Claimant to the Defendant/applicant inclusive of interest thereon at the bank credit rate of 25 per centum (25%) per annum from the 1st January, 2007 to 15th July, 2008 being $10,479.45 per day until the date of payment of the debt; and which sums the Defendant/applicant has failed to pay despite repeated demands on the Defendant/applicant by the Claimant himself and the Claimant's attorneys-at-law."

The Order Being Challenged

[4] The terms of the order that is being challenged also merits reproduction in full so that we might seek to ascertain what exactly is the defendant/applicant's complaint. These are its terms:

> "1. Judgment in default of Appearance entered against the Defendant/applicant pursuant to rule 27.85 of the Civil Procedure Rules 2002;
>
> 2. Claimant's Witness Statements filed on the 17th August, 2010 to stand;
>
> 3. Costs to the Claimant to be agreed or taxed;
>
> 4. Claimant's Attorneys-at-Law to … prepare, file and serve this Order."

[5] This order was made at the pre-trial review.

The History of the Matter

[6] The history of the matter indicates that the defendant/applicant has been dilatory in taking steps to lay the foundation for the presentation of his defence. For example, the defence having been filed on September 23, 2008, there was no compliance by the defendant/applicant with any of the case-management orders (made on November 23, 2009), within the time ordered. Neither did the defendant/applicant attend the mediation in this matter.

[7] When the case-management orders were made, the pre-trial review was set for July 19, 2010; and the trial was set for October 19 and 20, 2010. The defendant/applicant was represented by counsel at that case-management conference.

[8] When the pre-trial review came on for hearing, it was adjourned to August 18, 2010. The defendant/applicant did not attend that hearing. Neither was he

represented by counsel. The result was that the adjournment of the hearing was accompanied by the award of costs to the claimant. The order also required the claimant's attorneys-at-law to serve the formal order within seven days.

[9] Proof of the service of this order was provided by way of the stamp of the firm of attorneys-at-law acting for the defendant/applicant, showing that service was effected on July 23, 2010 – that is, some four days after the order was made, and within the seven days for service that was ordered.

[10] The firm of attorneys-at-law which appeared on the record for the defendant/applicant at that time later filed an application for an order to remove its name from the record. This application was filed on May 1, 2012. It was supported by an affidavit filed on the same date. In essence, the contents of the affidavit are to the effect that the deponent had not heard from the defendant/applicant despite "numerous phone calls to his cell phone". Also, that the deponent had left messages on the said cell phone and visited his home and was told that he was "out of the jurisdiction for a while". Additionally, that he had not heard from nor seen the defendant/applicant since July 2010; and could not represent the defendant/applicant without his instructions.

[11] It was at the pre-trial review hearing on August 18, 2010 that the order complained of was made.

[12] At least two other affidavits are of significance to the court's consideration of the issues in this matter. These are the affidavits of Michelle Clarke, filed on February 7, 2013; and the affidavit of Corporal Errol Chin. In Miss Clarke's affidavit, she depones to personally serving the defendant/applicant on October 30, 2012 with an original sealed "copy" of the judgment in default that was entered against him in this matter. In his affidavit, Corporal Chin depones to personally delivering to the defendant/applicant on July 24, 2013, a letter from the claimant/respondent's attorneys-at-law dated July 23, 2013. By that letter the claimant/respondent's attorneys-at-law reminded the defendant/applicant of the judgment that the claimant/respondent had obtained against him, giving him the total amount of the judgment and advised him that steps to recover the amount due were being taken. It

also invited him to enter into arrangements to settle the matter amicably by August 16, 2013, failing which, execution would proceed.

[13] No steps were taken by the defendant/applicant, with the result that an order for seizure and sale was issued by this court on October 1, 2013.

[14] It was on the bailiff's attempt to execute the order for seizure and sale on October 8, 2013, at the defendant/applicant's premises, at which the defendant/applicant was present, that the defendant/applicant was stirred into action, filing an application for a stay of execution on October 15, 2013. This application was refused on November 1, 2013. A notice of change of attorneys-at-law was filed on December 16, 2013. On October 15, 2013 a notice of application to set aside the default judgment was filed. This notice was amended on December 18, 2013 and a further amended notice was filed on March 25, 2014. Each of these discloses a difference in tack and approach taken by the defendant/applicant in his efforts to overturn the default judgment, as the following brief review will show.

The Applications to Set Aside the Default Judgment

The First Notice of Application

[15] In the first notice of application to set aside the default judgment, the main orders sought are simply stated to be as follows:

> "1. Relief from sanctions for non-compliance of (sic) Rule 39.6(2).
>
> 2. An Order to set aside the Judgment in Default of Appearance which was granted against the Defendant on the 18th August 2010…"

[16] The main grounds of that application were as follows:

> "1. The Defendant did not appear at a Pre-Trial review on the 18th August 2010 and Judgment in default of appearance was entered against the Defendant.

2. That the Applicant had filed a defence and has a good defence.

3. The Applicant has a good reason for failing to attend the hearing, in that he was incarcerated overseas…

5. That Rule 27.8(5) (b) of the Civil Procedure Rules permits the Court to enter judgment against a defendant in default of attendance at a pre-trial review.

6. Rule 39.6(2) of the Civil Procedure Rules permits the defendant to apply to set aside an order made under Rule 27.8(5) (b).

7. Rule 39.6(2) of the Civil Procedure Rules states that the application to set aside must be made within fourteen days after the Judgment was served on the Applicant…."

[17] It should be noted as well in relation to the first application that the affidavit in support, filed by another firm of attorneys-at-law, appears to lay the blame for the entering of the default judgment largely at the feet of the firm of attorneys-at-law now representing the defendant/applicant.

The Second Notice of Application

[18] The second notice of application reflects the introduction, as a basis of the application, of the request that the judgment be set aside *ex debito justitiae*. This request is itself based on two limbs: (i) material non-disclosure by the claimant of his alleged knowledge that the defendant/applicant "…was imprisoned overseas and/or was out of the jurisdiction due to circumstances beyond his control…" (ii) Also, the claimant's alleged failure to comply with Rule 8.7 of the Rules. This alleged failure to comply relates to the claimant's alleged misstating of his true address and occupation. This approach is reflected in (in particular) paragraph 23 of the defendant/applicant's further supplemental affidavit sworn on December 18, 2013.

The Third Notice of Application

[19] The third notice of application reflects yet another approach being taken by the defendant/applicant. In this "Further Amended Notice of Application…", there is no reference to the contention of non-disclosure or to non-compliance with Rule 8.7. The focus of this notice might be seen in, say, the first two grounds of appeal, and the application also seeks to overturn all steps previously taken or obtained by the claimant/respondent subsequent to the entering of the default judgment. These are the first two grounds:

> "i. The Judgment entered in Default of Appearance is patently irregular on the face of it in that the Claim herein, albeit pleaded for a specified sum, was for an unliquidated sum which ought to have been assessed by this Honourable Court;
>
> ii. A claim for a specified sum with or without calculations

> or particulars does not convert what is in substance an
>
> unliquidated claim into a liquidated claim."

[20] Of course, it is entirely open to a litigant to amend an application as many times as is desired. I mention these matters merely for the sake of completeness.

[21] As might be expected, this last document (the means by which the matter now comes before the court), presages the arguments that have been advanced on behalf of the defendant/applicant.

[22] In answer to a question from the court as to on which rule in the CPR this application is based, learned counsel for the defendant/applicant indicated that the application was being brought pursuant to the inherent jurisdiction of the court. It should be noted, however, that proposed order 8 of the further amended notice of application seeks:

> "Relief from sanctions for non compliance with Rule
>
> 39.6(2) of the Civil Procedure Rules (2002)."

Summary of the Submissions

The Defendant/Applicant's Submissions

[23] Citing cases such as **Anlaby v Praetorious** (1888) 20 QBD 764, and **Craig v Kanseen** [1943] 1 All ER 108, counsel for the defendant/applicant submitted that an irregularly-obtained judgment ought to be set aside *ex debito justitiae*. The court (as did counsel for the claimant/respondent), accepts this as a correct statement of the

law. The further question, however, is whether the facts in this case warrant the application of this principle.

[24] Another argument and submission advanced by counsel for the defendant/applicant is that the transaction that is the subject of this suit arises from an agreement for dealings in land and, as it was not reduced to writing so as to satisfy the statute of frauds, is unenforceable; and the claim, if decided on the merits, must fail. In support of this submissions, some of the cases cited were: **Shandlaw v Cotterrell** (1881) 20 Ch D 90; **Auerbach v Nelson** (1919) 2 Ch 383; **McMorris v Cooke** (1887) 35 Ch D 681.

[25] For the claimant/respondent it was argued that this is not a claim relating to a land transaction. Rather, it is a claim for payment in respect of professional services rendered.

[26] In the court's view, the contention of the claimant/respondent must be accepted. As the relevant parts of the claim form (reproduced in paragraph 3 of this judgment), indicate, the claim, in its essence, is one for compensation for professional services rendered. Any mention of a possibility of a transfer of real property never came to fruition. It was only mentioned as a possible way of compensating the claimant/respondent for the said professional services that he indicates was rendered for and on behalf of the defendant/applicant. Any transfer would be the means of payment; and, if the work was done, then payment would be due whether those means were employed or not. This claim, therefore, could not correctly be classified as: an "…action…brought upon [a] contract for the sale or disposition of land or any interest in land…" (as the defendant/applicant contends in paragraph 1 of his Further Skeleton Submissions dated November 28, 2014).

Rule 39.6

[27] Before proceeding further, however, with the analysis of the particular arguments being advanced by the defendant/applicant, I wish to examine the particular provision dealing with applications to set aside a default judgment, referred to in the rule itself, pursuant to which the judgment was entered. That rule, which was also referred to in the defendant/applicant's three notices of application, is rule 39.6. These are its provisions:

> "**Application to set aside judgment given in party's absence**
>
> 39.6 (1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[28] It will be apparent that this section sets out three requirements in the bringing of an application to set aside a judgment: (i) the application must be made within 14 days of the order or judgment being served; (ii) there must be affidavit evidence putting forward "good reason" for the applicant's failure to attend; and (iii) the affidavit evidence must show that, had the applicant attended, it is likely that the court would made or given a different judgment or order.

Would a Different Order Have Been Made?

[29] In light of the fact that the default judgment was entered pursuant to rule 27.8(5), which is premised on the absence of the defendant/applicant, I am prepared to say (without delving into the affidavit evidence on this issue), that a different order would have been made had the defendant/applicant attended.

Was the Application Filed Within the Required Time?

[30] The defendant/applicant accepts and acknowledges that the application was not filed within the 14 days required by the section. In fact the affidavit evidence discloses that the judgment was served on October 30, 2012 at the very latest (see the affidavit of Michelle Clarke filed on February 7, 2013). The first notice of application to set aside the default judgment was filed on October 15, 2013 – that is, almost a year after the judgment was served (using the date of October 30, 2012).

Any Good Reason?

[31] As to whether there is any or any sufficient explanation for the lengthy delay in the filing of the application; and as to whether there is any good reason advanced for the defendant/applicant's failure to attend will be seen from a consideration of the affidavit evidence submitted by the defendant/applicant.

Summary of the Affidavit Evidence of the Defendant/Applicant

[32] Paragraphs 7-9 of the defendant/applicant's affidavit filed on October 15, 2013, shows that he left Jamaica for the Bahamas on January 29, 2009, thereafter (as he puts it), "made [his] way" to the United States of America and was deported to Jamaica on the 11th October, 2012. As it turns out, he made his way there illegally, and for this he was charged in July 2011. This occurred whilst he was serving an 18-month sentence for drug-related offences. He received no information on his case until his forced return to Jamaica, when he was served "two or three days after returning to Jamaica" with papers in the matter. He handed these over to his then attorneys-at-law "within two to three days of being served". He appears to lay the blame for the inactivity in this matter thereafter at the feet of his then attorneys-at-law.

[33] In his Further Supplemental Affidavit sworn to on December 18, 2013, the defendant/applicant in essence seeks to cast aspersions on the claimant/respondent's integrity, character and truthfulness; and raises what he tries to establish as certain formal defects with the pleadings. Further, this is what he states in paragraph 18 of that affidavit:

> "18. I do verily believe that on the 18th day of August, 2010, when the Claimant attended the Pre Trial Review and obtained Judgment in Default of Appearance against the Defendant, the Claimant knew and did not disclose to the Learned Master that I was incarcerated overseas and/or was out of the jurisdiction."

[34] In his Further Further Supplemental Affidavit filed on March 25, 2014, he recants his averment that he was incarcerated at the time of the pre-trial review and seeks to explain it as a genuine mistake. His main contention in this affidavit is that the judgment is a nullity in that it was entered for a specified sum, whereas the claim was for an unliquidated sum, which should have been determined by way of an assessment of damages.

Discussion

[35] On my view of the matter, the affidavit evidence of the defendant/applicant shows that he was out of the jurisdiction (and not incarcerated) at the time of the pre-trial review at which the judgment was entered; and also at the time of the adjourned hearing before that. That is all; or the information that is most favourable to him that might be gleaned from a reading of the said affidavits. In fact, it would not be

unreasonable to assume or infer that drug-trafficking might possibly have been either his sole reason or primary among his reasons for entering the United States of America illegally.

[36] This view would be buttressed by a perusal of the documents exhibited to the affidavit of the claimant/respondent filed January 8, 2014 and to the affidavit itself. These documents reveal a previous conviction of the defendant/applicant in the state of Philadelphia for marijuana trafficking; the use of multiple aliases and fraudulent documents in the names of those aliases; and the use of Federal Express and the United Parcel Service (UPS), in a complex scheme to send and receive drugs and money apparently earned from their sale.

[37] To my mind, therefore, no good reason has been advanced by the defendant/applicant for his absence from the hearing; and, similarly, no plausible or good explanation has been proffered for the failure to file the application within the 14 days stipulated by the rules. It is reasonable to infer that the defendant/applicant deliberately absented himself from the island to engage in illegal activities abroad, failing to keep in touch with his attorneys-at-law during that time. The delay in this case is, in the court's finding, inordinate and inexcusable.

[38] How, therefore, should the application pursuant to rule 39.6 be treated with? The approach, in my view, should be guided by the following words of Panton, JA (as he then was) in the case of **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co.** SCCA No 18/2001, delivered on March 11, 2002:

> "For there to be respect of the law, and for there to be
>
> the prospect of smooth and speedy dispensation of
>
> justice in our country, this Court has to set its face

> firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

[39] In adopting this approach, I am guided as well by the dicta of the Court of Appeal in the case of **David Watson v Adolphus Sylvester Roper** (SCCA No 42/2005, judgment delivered 18 November 2005) in which it is clearly indicated that an applicant, in making an application under rule 39.6, must comply with all three requirements set out therein as their application is cumulative and mandatory. In that case, K. Harrison, JA expressed the view (at pages 8-9) that the conditions in rule 39.6:

> "…are cumulative...There is no residual discretion therefore, in the trial judge, to set aside the judgment, if any of the conditions is not satisfied…"

[40] The end result of this analysis is that if the application should be considered solely on the basis of rule 39.6, (as I believe it should), then it must be dismissed.

The Application under the Court's Inherent Jurisdiction

[41] His application under rule 39.6 being (in my respectful view), hopeless, if the defendant/applicant is to reap success in trying to have the default judgment set

aside, that could only be done pursuant to the court's inherent jurisdiction. But should the court's inherent jurisdiction be invoked in circumstances such as these?

[42] In cases in which the court's discretion was exercised *ex debito justitiae* in setting aside judgments or orders that the court considered a nullity, there was, of course, a prior finding that the judgment or order was in fact a nullity. Can such a conclusion or finding be made in the instant case?

[43] The basis of the defendant/applicant's contention that the judgment in this case is a nullity is its position that the claim is for an unliquidated sum; and so an interlocutory judgment should have been entered with an order for damages to be assessed, rather than a final judgment in a specified sum. What therefore is a "claim for a specified sum of money"?

[44] The term "claim for a specified sum of money" is defined in the CPR, at rule 2.4 of the CPR. This is the definition:

> **"claim for a specified sum of money"** means -
>
> (a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract…"

[45] When one looks at the wording of the claim form (set out at paragraph 3 of this judgment); and the particulars of claim, it is apparent that the sum of money being claimed is specified. The interest as well is specified – even to the stating of the daily rate at which interest accrues. To my mind, therefore, the sums claimed can properly be said to be "…ascertained or capable of being ascertained as a matter of

arithmetic…". The sums claimed are, therefore, properly to be regarded as a claim for a specified sum of money; and, in my finding, the judgment was properly entered.

[46] This, therefore, makes the instant case distinguishable from those dealing with the application of the principle of setting aside judgments or orders *ex debito justitiae*, as cited by the defendant/applicant. The factual circumstances of those cases (such as, for example, **Re Pritchard (deceased)** (1963) 1 All ER 873; and **Chief Kofi Forfie, Odikro of Marban v Barima Kwabena Seifah, Kenyasehene** etc. Privy Council Appeal No. 32 of 1952), are sufficiently different in material respects from the instant case to make limited their usefulness to this matter, although the general principles stated in them are accepted.

[47] If I am wrong in this regard, however, other considerations are that: (i) the concept and doctrine of "inherent jurisdiction" has been somewhat of an unruly horse; and, as such has been exercised in relatively exceptional cases. As was observed by Freedman, CJ at page 547 of the case of **Montreal Trust Co. et al v Churchill Forest Industries (Manitoba) Ltd**. [1974] 4 WWR 542:

> "Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."

[48] The second consideration (mentioned in the just-cited case as well), is that apparently, it is normally not used in a manner to conflict with an existing legal provision or rule. In the case of **Baxter Student Housing Ltd. et al v College Housing Co-operative Ltd. et al** [1976] 2 SCR 475, at page 480, Dickson, J, writing for the Supreme Court of Canada, observed:

> "In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. "

[49] To my mind, following these dicta, the court's inherent jurisdiction should not be exercised where the provisions of rule 39.6, exist, clear as they are,

[50] A third consideration is that the invoking of the court's inherent jurisdiction is a matter of the exercise of the court's discretion. The question that arises is: whether the court's discretion should be exercised in circumstances such as these, especially considering the behavior of the defendant/applicant which led to his absence from the hearings, which conduct has been previously outlined. To my mind, the answer must be "no".

Conclusion

[50] I am of the view that, for the reasons just rehearsed, the court's inherent jurisdiction should not be invoked in the defendant/applicant's behalf – if only for the reason that the clear terms of rule 39.6 exist which adequately address the issues in this case.

[51] Additionally, the defendant/applicant has failed to cross the threshold of conditions stipulated in rule 39.6, by which he could have the default judgment set aside, his conduct especially weighing heavily against him. The application must, therefore, be dismissed with costs to the claimant/respondent to be taxed, if not sooner agreed.

[52] These, therefore, will be the orders:

a. Application dismissed.
b. Costs of the application to the claimant/respondent to be taxed, if not sooner agreed.