[2021] JMSC Civ 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 0119986

BETWEEN	**PAMELA REIDY**	**CLAIMANT/APPLICANT**
AND	**JONI YOUNG-TORRES (Administrator, Estate of Karl Young)**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Jovell Barrett instructed by Nigel Jones & Co. McBean & Co., Attorneys-at-Law for the Claimant/Applicant.

Alexis Robinson and Rachel McLarty instructed by Myers, Fletcher and Gordon, Attorneys-at-Law for the Defendant/Respondent.

Heard: December 1, 2020 and January 15, 2021

Civil Procedure - CPR 26.8 - Application for relief from sanction - Promptitude - Whether the failure to comply with court order was not intentional - Whether there is a good explanation for the delay.

C. BARNABY, J

[1] On the 1st December 2020 I heard the Claimant's Notice of Application for Court Orders filed 10th July 2019. Judgment was reserved to today's date for the provision of copies of authorities relied on in the course of submissions.

[2] The application follows the Claimant's failure to comply with the order of L. Pusey, J made on the 15th May 2019 upon the Defendant's application for security for costs. So far as is relevant, the order provided that:

1. *The Claimant on or before June 28, 2019 shall provide security for the Defendant's costs in this action in the sum of $2,500,000.00.*

2. *The above-mentioned sum shall be paid into an interest bearing account at the National Commercial Bank Jamaica Limited, Duke Street, Kingston in the name of the Defendant's Attorneys-at-Law and be held in escrow as security for the Defendant's costs of this action until determination of the action or further order of the court in relation to the same.*

3. *The Claimant's claim is stayed until such time as the security for costs as ordered above is provided.*

4. *In the event the said sum of $2,500,000 is not provided in the manner and by the time ordered in paragraphs 1 and 2 above, this claim shall stand as struck out, with costs to the Defendant.*

5. *…*

[3] Although the sum which is the subject of the order was sent by wire transfer on the 26th June 2019, it was only credited to the Defendant's bank account on the 4th July 2019. The sums were therefore paid into the Defendant's bank account after 28th June 2019. Consequently, pursuant to the order of L. Pusey, J., the Claimant's claim stood as struck out, with costs to the Defendant.

[4] The following affidavits were in use during the hearing of the application:

i. Affidavit in Support of Notice of Application for Court Orders filed on July 10, 2019;

ii. Affidavit of Moveta McNaught-Williams filed on July 16, 2019;

iii. Further Affidavit of Moveta McNaught-Williams filed on July 16, 2019;

iv. Affidavit of Shantal Brown in Support of Notice of Application for Relief from Sanctions filed September 30, 2019;

v. Affidavit of Moveta McNaught-Williams in Response to the Affidavit of Shantal Brown filed on December 9, 2019; and

vi. Affidavit of Service filed on October 26, 2018.

[5] On the 16th July 2020 Justice C. McDonald ordered that no further affidavits were to be filed without the permission of the court; and that parties were to file and exchange skeleton submissions and list of authorities one of before 13th December 2019. The Affidavit of Moveta McNaught-Williams in Response to the Affidavit of Shantal Brown was filed out of time on the 9th December 2019 but reliance thereon was permitted by the court at the hearing of the application. This was without objection. Leave was given to both parties to each file a bundle of authorities for my attention by the 2nd December 2020. The court is in receipt of the Defendant's Bundle of Authorities.

[6] At the hearing of the application, arguments were made by counsel for the parties as to the merits of the substantive claim for a declaration that the Claimant was the surviving spouse of Karl Young. Without diminishing in any way the competing submissions in that regard, in light of the matters of which the court must be satisfied in order to grant the relief sought by the Claimant, I find that the disposition of the application only turns on three issues which are:

(i) Whether the Claimant was prompt in making her application;

(ii) Whether the failure to comply was not intentional; and

(iii) Whether a good explanation has been given for the Claimant's failure to comply with the order of L. Pusey J.

[7] On consideration of the applicable law and evidence before the court, I resolve the application in favour of the Defendant and refuse the Claimant's application for relief from sanctions for the reasons set out below.

Whether the application was made promptly

[8] The Claimant's application for relief from sanction is made pursuant to CPR 26.8, paragraph (1) (a) of which requires that the application be made promptly. It is

contended on behalf of the Claimant that having filed her application twelve (12) days after the sanction took effect, she has acted promptly. I do not agree with that assessment, having regard to the particular circumstances of this case.

[9] Mr. Barrett prayed in aid a number of decisions where applications for relief from sanction were granted in circumstances where they were made twenty-six (26) days; three (3) months; and nine (9) months in one instance, after the sanctions took effect. Promptitude is not assessed simply on the basis that like passages of time have been judicially determined to be so. As was stated by Brooks JA (as he then was) in **H.B. Ramsay & Associates Ltd. et al v Jamaica Redevelopment Foundations Inc. et al** [2013] JMCA Civ 1, [10] while "…*the word* '*promptly'*, *does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."* What then, are the circumstances here.

[10] On the 15th May 2019 Justice L. Pusey made his order for the payment of security for costs by the 28th June 2019, failing which, the Claimant's claim would stand struck out. He also directed that it be paid in the name of Defendant's Attorneys-at-Law at the National Commercial Bank Jamaica Limited (hereinafter called "NCB").

[11] It is the unchallenged evidence that a request for the Defendant's Attorneys-at-Law (hereinafter called "MF & G") bank account information was made by the Claimant's Attorneys-at-Law (hereinafter called "NJ & Co") on the 21st June 2019 by electronic mail at 1:26 p.m. This was a little over five (5) weeks after the date of Justice Pusey's order and only eight (8) days before the 28th June 2019, when the security for costs was due to be paid.

[12] On the said 21st June 2019, by email time stamped at 5:03 p.m., MF & G responded to the request of NJ & Co, indicating that they were looking forward to receiving payment of the security for costs by cheque in its name or RTGS to the account information said to be in the email; and asked that the NJ & Co confirm by

telephone those RTGS instructions before finalising the RTGS instructions to the latter firm's bank to avoid possible interceptions. It turns out that the RTGS account information was not in fact included in the email. It was only by email dated 24th June 2019, time stamped 11:49 a.m. that NJ & Co responded to MF & G's email of 21st June 2019 to advise that the account information was not in the email. The account information was transmitted to NJ & Co on the 24th June 2019 and supplied to the Claimant on the same day.

[13] It was not until two (2) days later that the Claimant proceeded to effect an international wire transfer of the sum representing security for costs at CHASE. It is clearly stated on the "Consumer International Wire Transfer Combined Disclosure and Receipt" dated 26th June 2019 (hereinafter called "the CHASE Receipt"), that the funds would be available to the recipient, MF & G, on 5th July 2019, seven (7) days after the sums were due to be paid into their NCB account. The name of the sender on that receipt is "Pamela Ann Reidy Young".

[14] On the following day, 27th June 2019 NJ & Co wrote to MF & G to advise of the wire transfer made on the previous day and requested confirmation of receipt of the funds. MF & G responded on the 28th June 2019 that the funds had not been received. Like indications were made on 1st, 2nd and 3rd July by MF & G to NJ & Co. On the latter date, NJ & Co were advised by MF & G via email that on the advice of their accounts department, there was no possibility of the funds being received with a "received as at" date prior 29th June 2019 so that the Claimant's claim stood struck out with costs to the Defendant.

[15] On the evidence, the Claimant ought to have known, based on the clear indication on the CHASE Receipt that MF & G would not likely receive the funds until 5th July 2019. With this in mind, the communication from MF & G to NJ & Co on the 28th June 2019, 1st and 2nd July 2019 that the sums had not been received was a good indication that there was non-compliance with the order of Pusey J and that in consequence, the sanction of striking out had likely crystallised. By 3rd July 2019, that good indication was converted to utmost clarity when MF & G advised that

they were still not in receipt of the sums, and on the advice of their accounts department, the sums could not be "received as at" a date prior 29th June 2019. This notwithstanding, the application for relief from sanctions was not made until 10th July 2019. This was only six (6) days until the start of the three (3) day trial which was then scheduled for the 16th to 18th July 2019. The proximity between the trial dates and the making of the application also meant that the minimum period of seven (7) days prescribed by the CPR 11.11 (1) (b) for service of a notice of application for court orders could hardly have been met, even when calculated in reference to the last day fixed for the trial.

[16] It is in these particular circumstances that I conclude that the making of the application for relief from sanctions twelve (12) days after the sanction came into effect was not done with promptitude. On the authorities, in the absence of an application for extension of time, I am permitted to refuse to hear the Claimant's application for relief from sanction. Should the circumstances of the case admit of a contrary finding in respect of promptitude, I shall consider the matters set out at CPR 26.8(2).

Whether the failure to comply was not intentional and whether there was good reason for the delay

[17] I find it convenient to deal with these issues together as on this application, the facts which go to determining both are identical. It was contended on behalf of the Claimant that the failure to comply with the order of the court for payment of security for costs by 28th June 2019 was not intentional and that she has a good explanation for her failure to comply. I am unable to agree with either submission.

[18] CPR 26.8 (2) states,

> *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.

[19] It was stated by Brooks JA (as he then was) in **H.B Ramsay** that,

> *"[22] …[r]ule 26.8(2) stipulates that it is a precondition for granting relief, that the applicant must satisfy all three elements of the paragraph… [31] … Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to the applicant."*

[20] There was no affidavit evidence by Claimant in support of her application for relief from sanction. The application was supported by the affidavits of a legal intern and a legal assistant engaged at NJ & Co. Although affidavits filed by the Claimant in support of the substantive claim were exhibited to one of the affidavits filed in support of the application, the averments in them do not address the issues arising on the application for relief from sanctions.

[21] It was the evidence of the intern that she was instructed by the Claimant, and verily believes that the Claimant was advised by her bank that the funds representing security for costs *"were actually received"* by NCB prior to 28th June 2019; and that if the sums were not deposited into MF&G's account on or before that date, the failure was unintentional. What the Claimant said her bank told her is not admissible to prove the truth of that statement, if it was in fact made.

[22] The representation from CHASE, as evidenced by the CHASE Receipt, is that the funds would be available to MF & G on the 5th July 2019, seven (7) days after the sums were due to be paid into their accounts. By email dated 4th September 2019, Counsel for the Claimant sent a copy of correspondence from CHASE addressed to *"Doris Mae Olson or Pamela Ann Reidy*" wherein it was confirmed that the recipient received the transferred funds on 4th July 2019.

[23] The correspondence also states that CHASE *"… determined that the recipient was credited on or before* ***the date available that is on the disclosure you received***

***when you scheduled the wire**."* [**Emphasis added**] There is no indication from CHASE that it had represented to the Claimant that MF & G's account would be credited with the wired funds by 28th June 2019 and no evidence from the Claimant herself to this effect, upon which she could be cross examined to test the credibility of what was told to the intern. I therefore accept the evidence as appears on the CHASE Receipt, that the Claimant was advised by that entity at the time of scheduling the wire transfer that the funds would be available to MF & G on 5th July 2019 which could not have given the Claimant any reasonable expectation that it would be available before that date to enable her to comply with Justice Pusey's order. In proceeding to pay the funds by wire transfer in the face of the written disclosure by CHASE, I believe it is open to me, as invited by Counsel for the Defendant, to infer from the Claimant's conduct that she intended to the breach the court order.

[24] In addition to the foregoing, prior to the email of 4th September 2019, there is no evidence of the Defendant or her Attorneys-at-Law having ever been advised of the possibility that the funds were sent in the name of *"Doris Mae Olson"*, the Claimant's mother. In consequence of this very belated disclosure, months after the security for costs was due to be paid, in September of 2019, the funds were eventually tracked by NCB and MF & G advised that an amount in the sum of the security for costs was received on 4th July 2019.

[25] There is no explanation for the failure to make this disclosure sooner, which causes me to doubt the sincerity of the intern's averment, that the Claimant's failure to comply with the order of Pusey J was not intentional. The disclosure itself also puts to death the assertion by the intern in her affidavit that *"…the Claimant's failure to comply with the order was caused by the Defendant's Attorney's Bank in failing to update the Defendant's Attorneys-at-Law's account with the funds that would have been sent to it from before June 28, 2019."* In my view, to say that one has scheduled a wire transfer which is what was done on the 26th June 2019, is entirely different from causing the recipient's account to be credited with the funds which are the subject of the transfer on or before the 28th June 2019.

[26] It has also remained unexplained why a request for banking information for the Defendant's Attorney's-at-Law was only requested five (5) weeks after Justice Pusey's order and only days before the Claimant was required to comply; why it took two (2) days to indicate to MF & G that its bank account information had not in fact been included in its email of 21st June 2019 in response to the request for it; or why a further two (2) days passed between the Claimant being supplied with the banking information by her Attorneys-at-Law and the scheduling of the wire transfer.

[27] On the evidence before me I am not satisfied that the Claimant's failure to comply with the order of Justice Pusey was not intentional or that there is any good explanation for her failure to comply. Not being so satisfied, the Claimant's application for relief from sanction must therefore fail. In the circumstances I find it unnecessary to consider whether there has generally been compliance by the Applicant with other relevant rules, orders or directions. If all three requirements at CPR 26.8 (2) must exist for the Claimant to obtain the relief she seeks, a finding, one way or the other, as to the requirement at paragraph (3) cannot change the outcome for the Claimant.

ORDER

1. The Claimant's application for relief from sanctions contained in the Notice of Application for Court Orders filed on 9th July 2019 is refused.

2. Costs of the application to the Defendant to be taxed if not sooner agreed.

3. The Claimant's Attorneys-at-Law are to prepare file and serve this order.