



[2015] JMSC Civ. 182

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2011HCV03288**

**BETWEEN MELROSE BARTON THELWELL CLAIMANT
AND MAVIS WILLIAMS DEFENDANT**

Mr. Leonard Green and Ms Sylvan Edwards for the claimant instructed By Chen Green and Company attorneys at law for the Claimant.

Mr. Douglas Leys QC. and Kimone Pennant instructed by LeySmith Attorney-at-Law for the Defendant.

Application to enlarge time to file defence - locus standi of Applicant/Executor - delay in filing application-whether proposed defence properly before the court-whether the defence has a reasonable prospect of success - Application to enter default judgment - the overriding objective.

HEARD ON THE 12th March 2015, 15th April 2015 and 21st September 2015

In Chambers

Bertram-Linton, J. (Ag.)

The Applications

There are two applications before the court for determination.

[1] The first one was filed on November 5, 2014 and names the defendant as the applicant acting through her executor Ms Tanya Ewers. The Defendant died in February 2013. This application requests that;

“1. The time for filing the defence in this matter be enlarged for filing a defence to the particulars of claim herein;

2. permission be granted for a defence to be filed on behalf of the estate of the defendant by the executor Tanya Ewers and the same be served

on the claimant within a period of seven days from the date of the order of this honourable court;

3. Costs of the application to be costs in the claim.”

This application is supported by five different affidavits filed on December 19, 2013, December 27, 2013, February 24, 2014, November 5, 2014 and March 4, 2015 from Ms Tanya Ewers.

[2] The second application filed on December 10, 2014 is from the claimant and requests as follows;

1. “An order that the Application for extension of time to file defence, made on behalf of the applicant Tanya Ewers, for and on behalf of the defendant’s estate be struck out.
2. An order that the Applicant’s draft defence discloses no real prospect of successfully responding to and defending the claim made by the Claimant.
3. An order that judgment be entered for and on behalf of the claimant in default of defence pursuant to Part 10 of the Civil Procedure Rules 2002.
4. An Order that the delay caused by the defendant’s failure to file defence on time is inordinate and inexcusable and it would be unjust and unfair to allow the applicant to file a defence on behalf of the defendant’s estate under Part 10.39 of The Civil Procedure Rules of 2002.
5. An order that the Applicant pays the Claimant’s costs for these proceedings.
6. Further and other relief that the court deems just.

[3] The substantive claim was filed in May 2011 over four years ago and served on the defendant on June 1, 2011. Acknowledgment of Service was filed on the 16th June 2011 by the defendant’s attorney at law. This application comes over some three years after the acknowledgement of service was filed by the defendant.

[4] Both parties have filed written submissions in this matter and have agreed to have the applications heard together. These submissions and the cases cited have been all duly noted as well as the oral submissions and will be referred to in so far as they are relevant to the decision in the matters before us.

The Law

[5] Rule 10.3(9) of the CPR permits a defendant to apply for an extension of time for filing a defence.

Rule 26.1(2)(c) permits the court to extend or shorten any time for compliance with a rule even if the time for compliance has passed.

The Application on behalf of the defendant.

[6] In examining this application I must resolve the following issues;

- A. Does an executor who has not received a grant of probate have a right to approach the court for relief in a matter where the testator before death was engaged as the defendant?
- B. Can such an executor, without more, be regarded as the defendant when that approach is made and get an order from the court? If so;
- C. Is the proposed defence, when one takes into account the criteria in case law, one that has a reasonable prospect of success?

A. THE POSITION OF AN EXECUTOR BEFORE PROBATE

The issue is dealt with in **Chetty v Chetty [1961] 1AC, 603**. At page 608 Lord Parker of Waddington says;

“It is clear that an executor derives his title and authority from the will of his testator and not from any probate. The personal property of the testator, including his rights of action, vests in him upon the testator’s death, and the consequence is that he can institute an action in the character of executor before he proves his will. He cannot, if it is true, obtain a decree before probate. But that is not because his title depends on probate,

but because production of probate is the only way in, by the rules of court he is allowed to prove his title.”

[7] Similarly the learned author Anthony Mellows in his book “The Law of Succession” 4th ed. at page 316 in a section entitled ‘Executor’s authority prior to grant’ says;

“The executor derives his authority from the will and the probate merely confirms his rights. Generally however, the executor can only prove his right by taking a grant of probate. The result is that he can do any act without a grant except:

- a. sue to judgment where it is necessary to show his title as executor; and
- b. in practice, make title.

Thus it has been held that an executor without a grant may levy distress for unpaid rent, [Whitehead v Taylor (1839) 10 A&E, 210], pay and release debts [Wankford v Wankford (1699 I Salk, 299], receive payments, sell chattels and pay legacies. On the other hand before he has taken out a grant he may be sued by a creditor of the testator, Mohamidu Mohideen v Pitchey 1894] A .C, 437.”

In light of this I find that the executor can take acts to defend a suit on behalf of the estate but this would seem to be after death, prior to a grant of probate and certainly it would be then clearly stated to be in a representative capacity.

B. CAN THE EXECUTOR BECOME THE DEFENDANT?

Mr. Leys has extrapolated from the authorities that if the executor can bring an action before probate then she can certainly defend one in her similar capacity. I accept that this principle is correct because I could find no statute or case law which separates initiating proceedings by an executor and the right of an executor to defend an action which affects the interest of the estate even if it is to carry on the defence of a matter previously underway.

How though is this to be done? Can the executor simply file a defence in a matter already underway?

[8] I am in agreement with Mr. Green, attorney for the claimant on this point, that the executor cannot just utilize Rule 10.3(9). She is not a defendant, as defined by Rule 2.4 of the Civil Procedure Rules i.e.

“Defendant means a person, against whom a claim is made and, in relation to any claim commenced before these Rules came into force, includes a respondent to any petition, originating summons or motion.”

[9] Furthermore the claim was never conceived to capture the participation of a representative. An action brought against an estate would certainly look and sound different from one directed at the testator during lifetime. This would require a different approach from the situation where the executor is sued and called upon to answer in protection of the rights of the estate.

[10] Consequently I find that the executor Miss Ewers who has sought to intervene cannot be treated as a defendant in this matter.

C. THE DEFENCE AS FILED,

In light of the above conclusion it is obvious then that the proposed defence would not be acceptable as it did not come from a defendant in the suit.

The Claimant's Application

[11] Having settled on the issues mentioned above I will go on to consider the claimant's application.

The claimant seeks to challenge the right of the executor to enter the suit as put forward and also the bona fides of the proposed defence. She requests that default judgment be entered in her favour. I have already looked at the first issue and propose for completeness to look at the proposed defence in more detail in light of the obligation to consider the overriding objective.

[12] In this regard the counsel has submitted that to shut out the executor and allow a default judgment would be a disproportionate use of the court's resources and discretion. Since the primary concern should be achieving justice, he submits that allowing the claimant who has also slept on her right of applying to enter default judgment runs counter to the overriding objective where there is merit to the defence and a reasonable prospect of success at trial.

[13] The executor sought to explain the delay by her mother as a result of illness that she suffered. There was no detail as to the nature of the illness and the time period in which her mother was ill. In fact her mother eventually died and we are left without particulars to presume that she died from the illness spoken of but that presumption without detail is simply conjecture. In fact after the Acknowledgement was filed in 2011 there were two years that intervened before her death. Nothing was done in the matter by either parties until the defendant's daughter sought to move the court with her, what we have now decided, is her ill conceived approach.

[14] It has not gone unnoticed by the court that the defendant was the last surviving joint tenant listed on the certificate of title for the premises and as such may have been secure in that thought.

[15] There is always a vital consideration that defendants and by extension their estate must not be prevented from putting forward their cases but the executor has had ample opportunity and time to do this .Careful note is also taken of the letter from the doctor about the state of ill health of the executor.

[16] I note as well that the claimant has been living with the deceased Fitzhoborn Thelwell as man and wife along with their children since 2000, and then continued to do so after his death in 2005. Despite having seemingly been dispossessed of her joint tenancy no steps were taken to actively participate in the suit after the acknowledgement was filed.

I am of the view that in all the circumstances that the claimant's application should prevail and order;

1. That the Application for extension of time to file defence by Tanya Ewers is refused.
2. That permission is granted for judgment to be entered for the claimant in default of a defence.
3. The Applicant Tanya Ewers pays the claimant's cost for this Application.