



ORAL JUDGMENT

[2016] JMSC Civ. 95

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV00795

BETWEEN	CONSIE THOMPSON-REID	CLAIMANT
AND	LODIAN REID	1ST DEFENDANT
AND	HOPE LAWRENCE	2ND DEFENDANT
AND	INEZ DAVY	3RD DEFENDANT
AND	RENATUS DAVY	4TH DEFENDANT
AND	DELROY DAVY	5TH DEFENDANT

Mr. Maurice Smith and Ms. Jordan Ebanks for claimant

Mrs. Simone Gentles for 1st defendant

Ms. Jamella Thomas instructed by Mr. Ricardo Sancroft for 2nd defendant

Ms. Gilda Daley for 5th defendant

Heard: 12th May and 31st May 2016

Application for relief from sanction

STRAW J

REASONS FOR JUDGEMENT

Application

[1] This matter was listed for the hearing of a Notice of Application for Relief from Sanctions filed on 2nd May 2016 by the 2nd Defendant. However, at the time of the court hearing, the applicant substituted an Amended Notice of application for court orders filed on 11th May 2016. Although the other parties, the claimant, 1st and 5th defendants, had just been served with the amended application, they all consented to the court proceeding to hear that matter.

Background

[2] On the 2nd day of December 2014, this matter was listed for trial before Mr. Justice K. Anderson. The matter did not proceed but further case management orders were made by Anderson J. Three of these orders, number 3, 5 and 7 are relevant to the present application and are set out below:

3. The 2nd Defendant is granted an extension of time up to and inclusive of December 5th, 2014, within which to file and serve a witness Statement, List of Documents, List Questionnaire and Summary of Legal Propositions and List of Authorities and PROVIDED THAT this order is complied with, no sanction shall be applied to the 2nd defendant arising from her failure to comply with any earlier Court order as regards the date for the filing and or service of same.; unless the 2nd Defendant shall have fully complied with this Order in terms of the filing and service of the documents specified therein then the 2nd Defendant's statement of Case shall stand as struck out without the need for further Court Order.

5. The Defendants shall each notify every other Defendant and the Claimant of the documents which they would wish to have included in the Bundle of Documents to be filed by the Claimant pursuant to rule 39.1(6)(b) of the Civil Procedure Rules and said notification shall be filed by or before April 5th 2016.

7. Unless each Defendant shall have been in full compliance with Orders number 5 above then the Statement of Case of either Defendant as may be in

default with that order shall stand as struck out without need for further Court Order.

- [3] The matter was again listed for trial on 2nd May 2016 before Mrs. Justice Bertram Linton (Ag.). On the minute sheet signed by my sister, it is noted that the 2nd defendant, having failed to fully comply with the orders of Anderson J made on 2nd December 2014, that statement of case stands as struck out. Consent orders were then made between the claimant and 1st defendant in relation to the disposal of the claim. Cost orders were made against the 2nd defendant to the benefit of the claimant and 5th defendant. These costs were to be agreed or taxed.
- [4] During the hearing before me, all the parties admitted that the order that the claimants case stand as struck out was a result of the failure of the 2nd defendant to abide by the timeline set out at order number 5. The original application made by the 2nd defendant is a request for relief from sanction in relation to order number 5. This order as set out above, had required all the defendants to notify each other and the claimant as to documents they wished to be included in the Bundle pursuant to rule 39.1 [6] [b] of the Civil Procedure Rules on or before 5th April 2016. It is apparent that all the parties including Mr. Sandcroft who appeared on behalf of the 2nd defendant, understood that to mean that this notification was to include any and all documents being relied on by them. Rule 39 .1 [2] requires a party to send to the claimant all documents they wish to have included in the bundle of documents for use at the trial.
- [5] Mr. Sandcroft had filed a Notice of Intention to rely on Hearsay Evidence by virtue of Section 31E of the Evidence [Amendment] Act, exhibiting 3 documents. These are listed below:
- Copy of Certificate under the Facilities Titles Act
 - Copy death certificate for Renatus Davy [4th defendant]
 - Copy death certificate for Inez Davy [3rd defendant]

[6] Counsel also filed a second Notice of Intention to rely on affidavit. The body of the application describes it as witness statement of Hope Lawrence filed on December 5, 2014. Both these notices were filed on 12th April 2016. It is apparently as a result of this late filing, 7 days after the 5th April [as mandated by Anderson J] that Mrs. Justice Bertram Linton (Ag.) pronounced that the 2nd defendant's statement of case stood struck out.

[7] Amended Notice of Application

Paragraph 1 of the amended notice before this court for consideration reads as follows:

(1) That having regard to the Orders of Mr. Justice Kirk Anderson, made on the 2nd of December 2014 as at the trial date of May 2, 2016, the 2nd Defendant's Statement of Case did not stand as struck out.

[8] In relation to the time allotted for the hearing, the court entertained submissions from counsel in relation to order no 1 above and stated that the alternative application for relief from sanctions would have to be rescheduled depending on the judgment of this court in relation to that order.

Submissions of Counsel Ms. Thomas on behalf of 2nd Defendant

[9] Reliance was placed on the Further Affidavit of Ricardo Sandcroft filed on 11th May 2016. He stated at paragraph 11 that the 2nd defendant was never in breach of order number 5. Ms. Thomas referred the court to rule 39.1 [6] [b] of the CPR [referred to in order number 5.] It is set out below for ease of reference:

Rule 39.1 (6)(b)

Not less than 10 days before the date fixed for the trial the claimant must file at the registry –

(a)

(b) *a second bundle comprising copies of –*

(i) all witness statements;

(ii) all expert reports;

(iii) any agreed statements under rule 38.7(2)(c)(ii)-(iv)

- [10] Ms. Thomas submitted that Mr. Sandcroft was of the opinion that there had been noncompliance with order number 5 due to an erroneous interpretation of the said order as to what the 2nd defendant was required to do. His affidavit speaks to the fact that this was the reason he did not strenuously dispute that there was no breach of the said order.
- [11] The issue involves what rule 39.1 [6] [b] requires to be filed for placement in the bundle. Those documents were not included in documents filed on 12th April and Mr. Sandcroft stated that there was no other document that the 2nd defendant wished to have included in the bundle so there was no necessity to have given notice to any other party. For example, the witness statement had been filed previously and should have already formed part of any bundle.
- [12] Mr. Smith, counsel for the claimant, stated that while it is clear that the substance of order number 5 was that all documents ought to have been filed at a particular time, [as required by rule 39.1[2], he cannot protest too strenuously as order number 5 would not have been breached in form. As far as this court is concerned, since the effect of the breach was capable of such a draconian result, it could not in keeping with the overriding objective of doing justly to allow the case to stand as struck out merely on that basis.
- [13] In so far as the order of Mrs. Justice Bertram Linton (Ag.) rests on the assumption that the case of the 2nd defendant had been struck out as a result of that breach, this order cannot be allowed to stand. However, the issue does not end here. Mr Maurice Smith has submitted that, in any event, the statement of case would have already been struck out from as far back as 5th December 2014 as a result of the failure of the 2nd defendant to comply fully with order number 3.
- [14] Order number 3 required the 2nd Defendant to file and serve witness statement, list of documents, listing questionnaire, summary of legal propositions and list of authorities on or before 5th of December 2014, failing which the statement of case 'shall stand as struck out without the need for further Court Order'.

- [15] Counsel Mr. Smith has stated that the 2nd defendant had failed to fully comply with order number 3 as all the above named documents were not served on the claimant until 18th December 2014 by courier under cover letter dated 15th December. He attached a copy of the cover letter from Mr. Sandcroft to his affidavit.
- [16] It is to be noted that counsel representing the 1st and 2nd defendants respectively indicated to the court that they were served with the relevant documents within the prescribed time. Ms Thomas referred the court to the further affidavit of Sandcroft disputing this late service on counsel Mr. Smith. He testifies that service would have been effected on the 5th December 2014 on Mr. Smith via fax machine of the several documents and in accordance with his usual practice, he later sent hard copies of the documents faxed. He attached a copy of the facsimile transmission dated 5th December 2014, bearing the fax number of the law offices of Mr. Smith.
- [17] Mr. Smith submits that there are severe challenges to this assertion. He referred the court to rule 3.8 of the CPR which speaks to filing and service by fax. Rule 3.8 [b] states that any document served by fax must include a cover page stating certain details. Suffice it to say, that certain of these elements are missing from the cover page, for example the date and time [printed] of transmission as well as the name and (phone) number of the person to be contacted if a problem arises.. Mr. Smith also submitted that, although the page speaks of a Mr. Bryan, no affidavit of service has been sworn to and filed by this person. He referred the court to rule 5.12[1] which speaks to proof of service by an affidavit. Mr Smith also points out that the letter sent by Mr. Sandcroft to him indicated that several attempts were made to serve by fax but these were unsuccessful.
- [18] It is to be noted also that Mr. Sandcroft indicated in that letter the following words:
Kindly admit service on the front page and fax to the above fax number.
Mr. Smith has also attached his reply to Mr. Sandcroft dated 19th December 2014, where scanned copies of the documents received were enclosed and indicated that there had been several attempts to return the same by fax, however it appears that the fax line provided does not appear to be working.

- [19]** In essence then, Mr. Smith maintains he did not receive the documents by fax on the 5th December and only received the hard copies on the 18th, though they were dispatched on the 15th December. It appears that the fax used by Mr. Sandcroft was not in working condition as he also [Mr. Smith] was unable to send documents by fax to his office. He maintains also that Mr. Sandcroft would have been aware that service by fax was unsuccessful based on his letter admitting to that fact.
- [20]** It is to be noted also that by virtue of rule 6.6 [1], the relevant date of service by fax is set out. If it is transmitted on a business day before 400pm, service is effected on that day. In any other case, the business day after the day of transmission. Based on the transmission header exhibited by Mr. Sandcroft, there is no evidence of a time of transmission.
- [21]** The evidence is compelling therefore and the court accepts that service was not effected on the claimant's attorney until after the 5th of December. The 2nd defendant's case would already have been struck out as of that date. At the time the matter came before my sister, Bertram Linton J for trial, there had been no application for relief from sanctions. I am unable therefore to grant the orders as requested by the 2nd defendant on the Amended Notice of Application.
- [22]** Paragraphs 2 -10 of the Amended Notice of Application for court orders filed on 11th May 2016 is to be set down for hearing as expeditiously as possible.