[2018] JMSC Civ.128

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012 HCV 03449**

| | | |
|---|---|---|
| **BETWEEN** | **NORDA WILLIAMS** | **CLAIMANT** |
| **AND** | **JUICI PATTIES LIMITED** | **1ST DEFENDANT** |
| **AND** | **CMK BAKERY LIMITED** | **2ND DEFENDANT** |

**IN CHAMBERS**

**Mr. Lemar Neale instructed by Bignall Law for the Claimant**

**Mr. Monroe Wisdom instructed by Nunes, Scholefield, DeLeon & Co. for the 2nd Defendant**

**Civil Procedure - Application for Relief from Sanctions – Civil Procedure Rules – Rule 26.8 – Whether application was made promptly – Attorney's failure to inform client of case management conference – Defence under the Limitation of Actions Act**

**Heard: 7 June and 25 September, 2018**

**SHELLY WILLIAMS, J**

**BACKGROUND**

**[1]** The Claimant who was employed as a Janitor to the 2nd Defendant, filed a claim for damages for negligence and breach of their statutory duty under the **Occupiers' Liability Act**.

**[2]** The claim concerns the alleged failure of the Defendants to provide a safe system of work for the claimant or in the alternative a breach of the **Occupiers' Liability Act**. As a result of this breach the Claimant developed discomfort and pain in her hands.

**[3]** The matter proceeded to Case Management Conference and was adjourned on a number of occasions for the attendance of the Claimant.

**[4]** On the 24th of November2016, at that Case Management Conference, Master Ms Pamela Mason (Ag) adjourned the Case Management Conference to the 22nd of February 2017 and made an order that:-

> *Claimant and Defendant be present at the CMC (Case Management Conference) hearing.*

**[5]** On the 22nd of February 2017 the matter was again listed before Master Ms. Pamela Mason. The case was adjourned to the 6th of April 2017 with an unless order, namely:-

> *Unless the Claimant attends the adjourned Case Management Conference her statement of case stands struck out.*

**[6]** On the 6th of April 2017 when the case was listed before Master Ms Pamela Mason the parties failed to attend. The Master adjourned the case to the 26th of June 2017 and made another unless order, namely:-

> *Claimant and Defendant to attend failing which the Claimant's statement of case stands struck out.*

**[7]** On the 26th of June 2017 the case was listed before Master Mrs. A. Pettigrew Collins (as she then was) and again the Claimant did not attend. On that date the Claimant's statement of case was struck out in keeping with the unless order of Master Mason.

**[8]** On the 10th of July 2017 the Claimant filed a Notice of Application for Court Orders seeking that-

> 1. *Judgment entered on June 26, 2017 in the Applicant's absence be set aside; and*
>
> 2. *In the alternative to (1) above, the Applicant I be granted relief from sanctions for failure to attend the Case Management Conference on June 26, 2017.*

**[9]** No affidavit was filed in support of the Notice of Application on the 10th of July 2017. Two affidavits in support were filed on the 15th of November 2017 and the 20th of November 2017, with the matter first coming up for hearing on the 27th of November 2017.

**[10]** The Claimant filed an affidavit in support of the Notice in which she advanced a number of excuses for her non-appearance at the various Case Management Conferences. Her excuses included:-

i) She was informed of the Case Management Conference for the 26th of November 2016 but she did not receive a follow up call about it and she forgot the court date.

ii) That on the 22nd of February 2017 she had a small child that she did not have anyone to leave her with. She was late attending court and her Attorney informed her it did not make sense as she would be very late.

iii) On the 10th of April 2017 she did not have anyone to leave her child with. She did attend the Case Management Conference with the baby. She was in court for about three minutes and then went outside. She indicated then that the Judge would have seen her.

iv) Her evidence is that she was not informed at all about the last Case Management Conference date.

[10] The Attorney-at-Law for the Claimant, Mr Vaughn Bignall, filed an affidavit in support of the Notice of Application indicating that he had failed to inform the Claimant that she needed to attend the Case Management Conference. His evidence is that in light of the fact that she had attended court on the 6th of April 2017, he was unaware that she needed to attend on the 26th of June 2017.

**Issues**

**[11]** There are a number of issues in this matter namely:-

a. Whether the application for relief from sanctions was made promptly.

b. Whether the said application was defective in light of the fact that there was no affidavit accompanying it.

c. Whether the reasons advanced for the Claimant's non-attendance meet the standard for setting aside the order to strike out the Claimant's case.

d. Whether either party would be prejudiced, if the Claimant was granted relief from sanctions.

**Claimant's Submission**

**[12]** The premise of the Claimant's submission is that there was a misunderstanding by the Claimant's Attorney-at-Law as to whether the Claimant was to attend the last case management hearing date. As a result of this, the fault was the Attorney's and not the Claimant's. Counsel for the Claimant submitted that there was no prejudice to the Defendant and as such the order to strike out the statement of case should be set aside.

**[13]** Counsel for the Claimant further argued that the application had been made promptly, despite the fact that the affidavit did not accompany the application. He submitted that the Notice of Application was filed within two weeks of the order to strike out the Claimant's statement of case which meant he would have satisfied the first rung of rule 26.8 of the Civil Procedure Rules (i.e. rule 26.8(1)(a)).

**[14]** He further argued that the although the affidavit had not been filed simultaneously with the Notice of Application, the affidavits in support had been filed before the matter was heard and as such the Defendants were not prejudiced. He argued that the Civil Procedure Rules did dictate that the application should be made promptly but there was no such stipulation for the affidavit in support.

**[15]** Counsel for the Claimant argued that the Claimant should not be prejudiced by having her matter struck out due to the failing of her Attorney. The claim, he argued, should be reinstated.

**[16]** In support of his application he relied on a number of cases of including, **Morris Astley v The Attorney General of Jamaica and anor** [2012] JMCA Civ 64. He urged that the approach of Morrison JA (as he then was) in this case.

**[17]** Counsel also relied on a number of authorities including the case of **Patrick Allen v Theresa Allen** [2018] JMCA Civ 16. He specifically relied on paragraphs [42] and [43] of the judgment which deals with how the court should deal with the issue of administrative errors of counsel which may put their client in jeopardy.

**Defendant's Submission**

**[18]** Counsel for the 2nd Defendant argued that although relief from sanctions is at the discretion of the court, in this case, no relief from sanctions should be granted. He argued that the full application was not made promptly, as although the Notice of Application may have been made in a timely manner, the affidavits in support were not filed until almost four months afterwards. This he argued could not be viewed as making an application in a timely manner. He relied on the case of **H. B. Ramsay & Associates Limited and Others v Jamaica Redevelopment Foundation Inc and anor** [2013] JMCA Civ 1 and **The Attorney General v Universal Projects Limited** [2011] UKPC 37 to support this position.

**[19]** Mr. Wisdom argued that it should not be an option for the Claimant's counsel to merely file an affidavit saying that it was his fault and that would be enough to convince the court that the order should be set aside. This he argued, did not amount to a good explanation as required by the rules. He cited a number of cases where the court has rejected such a claim by the attorney including the cases of **Jamaica International Insurance Company Limited v The Administrator General for Jamaica** [2013] JMCA App 2**,** and **Kristin Sullivan v Rick's Café**

**Holdings Inc T/A Rick's Café (No 2)** (unreported), Supreme Court, Jamaica, Claim No. 2007 HCV03502, judgment delivered 15 April 2011 .

**[20]** Mr. Wisdom also argued that his clients would be prejudiced if the claim is reinstated as they would not be allowed to utilize the limitation defence, pursuant to the **Limitation of Actions Act**, that is now open to his clients.

**[21]** Counsel argued that rule 26.8 had not been satisfied as and such no relief from sanction should be granted.

**Analysis**

**[22]** For this application to succeed the Claimant would have to satisfy the court in relation to all of rule 26.8 of the Civil Procedure Rules. This rule states that :-

*(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.*

*(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.*

**[23]** The first question to be answered is whether the application was made promptly? In the case of The **Attorney General of Trinidad and Tobago v Universal Projects Limited** (unreported), Court of Appeal, Trinidad and Tobago, Civ. App No. 104/2009, judgment delivered 26 February 2010, a delay of ten (10) days was deemed not to be prompt by the Court of Appeal in Trinidad and Tobago. In the case of **H. B. Ramsay & Associates Limited** it was held that an application that was made thirty days after the order could not be deemed to be made promptly.

**[24]** In this case the order of the court was made on the 26th of June 2017 however the formal order was filed on the 3rd of July 2017. The application was filed on the 10th of July 2017 some 7 days after the day the formal order was filed. Under usual circumstances it may be viewed that this application was filed promptly. This, however, is not the usual situation due to the fact that no affidavit was filed along with the Notice of Application for court orders on the 10th of July 2017. The fact is that no affidavit was filed in relation to this application until the 15th of November 2017, i.e. almost four months after the Notice of Application.

**[25]** Rule 26.8(1) states that the application must be made promptly and that it must be supported by evidence on affidavit. Counsel for the Claimant argued that the rule states that the Notice of Application must be made promptly but it does not so state in relation to the affidavit. In reviewing rule 26.8 it is clear that the Notice of Application and the affidavit must be filed simultaneously. The Notice of Application would be incomplete without an affidavit as it is the evidence that is contained in the affidavit that would ground the application to seek to move the court to consider granting the relief being sought.

**[26]** In light of this, the application would not be considered to be properly made before the 15th of November 2017. That is the date the affidavit was filed which would be almost four months after the statement of case was struck out. This could not be considered under any circumstance to be a prompt application, and as such the application for relief from sanctions would not be granted.

**[27]** Normally this would settle the entire application but in the event that my decision is incorrect on this matter I will proceed to consider whether or not the Claimant had fulfilled the other aspects of rule 26.8.

**Was the failure to comply intentional? Is there a good explanation for the failure?**

**[28]** There were a number of reasons advanced that would have led up to the non-attendance of the Claimant in this matter. The primary reason being advanced for her non-attendance on the 26th of June 2017 was that the Attorney-at-Law failed to advise the claimant to attend.

**[29]** Guidance as to what amounts to a good reason for non-compliance can be gleaned from the case of **Attorney General v Universal Projects Limited.** In that case Lord Dyson opined at paragraph [23]:

> *… if the explanation for the breach…connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.*

**[30]** I am aware that there are a number of cases where the Attorney has failed to inform their client about an order which has been deemed to be a good reason to grant an order for relief from sanctions. In the case of **Morris Astley v The Attorney General of Jamaica** , Morrison JA (as he then was) stated at paragraph [36]:

> *…While it would obviously have been helpful to see an affidavit sworn to by the appellant himself, it seems to me to be that the fact of Mr Nelson's advice that there was*

*no need for him to attend the pre-trial review, in the absence of any challenge whatsoever, must in the circumstances amount to a good reason for his non-attendance…*

[31] There is also the case of **Villa Mora Cottages Limited and Anor v Adele Shtern** (unreported), Court of Appeal, Jamaica, SCCA 49 of 2006, judgment delivered 14 December 2007 where Harris JA stated at page 17 that:

> *The failure to comply could, to a large extent be ascribed to be the fault of the appellants' attorney-at-law but this in itself would not be sufficient to bar the appellant from proceeding. Even in cases where the fault can be laid at the feet of the defaulting party the court may lend its sympathy to his cause...*

**[31]** I also aware however, that this particular reason is not one that can be applied in all cases. In the case of **Jamaica International Insurance Company Limited v The Administrator General for Jamaica** Phillips JA Stated at paragraph [36]:

> *In my opinion, not much needs to be said on the delay in this matter. Even if eight months could not be considered to be an inordinate amount of time, the explanation tendered by the applicant is inadequate. One would certainly have expected that senior counsel with many years of experience at the Bar would have acted with greater diligence, responsibility and expedition. I agree with counsel for the respondent that this was not a matter of mistake of the law or a misunderstanding of the rules but a careless approach to one's professional obligation. As a consequence, had the application been dependant on this alone it may not have succeeded.*

[32] In this particular case there were four orders for the Claimant to attend Case Management Conference. The attendance of the parties at a Case Management Conference is not optional. Rule 27.8 actually indicates that unless a party is excused the parties shall attend Case Management Conference. The importance for the parties to attend Case Management Conferences cannot be overstated as these conferences are utilised for among other things to:

i) assess a case as to whether it should proceed to trial,

ii) make applications either orally or in writing which may determine the case, and

iii) to settle the cases.

**[32]** These are some of the reasons that the attendance of the parties is required. The fact that the Claimant may have attended one conference for about three minutes where she basically showed that she exists and was not a figment of the imagination of her Attorney, does not qualify as attending court.

**[33]** Any Attorney-at-Law, being aware of the Rules, and knowing the importance of a Case Management Conference, could not have envisioned that the mere three-minute appearance of his client could qualify as their client attending court. In addition, the fact that the Case Management Conference had been adjourned on four occasions for the attendance of the Claimant must have alerted the attorney to the importance of having his client present. There was no order excusing her from attending (per rule 27.8(3)) which automatically means that she should have attended.

**[34]** I note that the Claimant had indicated in her affidavit that she was unaware that she was to attend court. The Claimant would have been aware on at least three occasions, according to her affidavit, that she was to attend court for the Case Management Conference. On her evidence she even had to attend court with her young child as she had no one to leave her child with. It would, under the circumstances, be incumbent on her to make some enquires about any further attendance at court.

**[35]** I find that the reason(s) advanced in relation to the non-attendance of the Claimant in court is unreasonable and does not amount to a good explanation, the application for relief from sanctions must fail.

**Has the Claimant generally complied with all other relevant rules, practice directions, orders and directions?**

**[36]** I note that the usual Case Management Orders had been made from disclosure to the setting the date for trial. The case however, does not appear to have progressed further than this due to the numerous adjournments awaiting the

attendance of the Claimant at Case Management. This rule would not therefore appear to apply in this case.

**The Overriding Objective and the Administration of Justice**

**[37]** In considering whether to grant the relief I have considered that the Claimant would be deprived of the opportunity to pursue her case. The Claimant's case concerns injuries she alleges she experienced at her work place between March and August 2010. The Defendant on the other hand for the same reason would be deprived of a defence under the **Limitation of Actions Act**.

**[38]** Additionally, counsel for the Claimant, Mr Neale has argued that the orders made in Case Management could still be fulfilled due to the dates that had been set, with the trial dates being the 14th to 16th of February 2019. He argued that in keeping with the overriding objective of the Rules and in the interest of justice, the relief from sanctions should be granted.

**[39]** In making this decision as to whether to grant the relief from sanctions I considered:-

a. The failure of the Claimant to comply with the four Case Management orders for her to attend court.

b. The fact that even after the order was made for the case to be struck out it took almost four months for the affidavits in support of the Notice of Application to be filed.

c. The fact that the 2nd Defendant would be deprived of a defence in this matter.

d. The fact that the 2nd defendant had complied with the order of the court for a representative to attend the Case Management Conference.

e. The fact that no good reason was advanced as to the failure to comply with the case management order.

**[40]** Based on the foregoing, I would not be minded to grant the order for relief from sanctions or alternatively to set aside the order made on the 26th of June 2017, as sought by the Claimant.

**Order**

**[41]** It is hereby ordered:

1. Application to set aside, judgment is refused.

2. The application for relief from sanctions is refused.

3. Cost to the 2nd Defendant to be agreed or taxed.