



[2016] JMSC Civ. 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV05635

BETWEEN	MARY CHANDLER	CLAIMANT
AND	PATRICK MARZOUCA	DEFENDANT

Mr. Chukwuemeka Cameron for the Claimant

Mr. Patrick Foster Q.C. and Mrs. Camille Wignall Davis instructed by Nunes Scholefield Deleon and Company for the Defendant

Heard: December 16, 2015 and January 05, 2016

Procedure – Application for extension of time to file defence – delay – Application for entry of judgment – Procedural error – Civil Procedure Rules 2.4, 10.3 (9), 12.10 & 26.1 (2)(c).

V. HARRIS, J

IN CHAMBERS

[1] An oral judgment in this matter was delivered on January 05, 2016.

[2] There are two applications before me. The first is by the claimant who is requesting that judgment be entered in her favour against the defendant in default of acknowledgement of service.

[3] The second, which is made by the defendant, comes by way of an amended Notice of Application for Court Orders which seeks the following reliefs:

- (i) That the Claimant's Request filed on May 16, 2013 for the entry of judgment against the Defendant in default of Acknowledgement of Service be denied; or in the alternative that the judgment entered against the Defendant in default of the Acknowledgement of Service be set aside.
- (ii) That the Acknowledgement of Service filed on behalf of the Claimant on July 17, 2013 be allowed to stand as filed.
- (iii) That the time for filing and serving the Defence be extended to fourteen (14) days of the date hereof.

[4] The defendant's initial application was not supported by an affidavit and was also not served on the Claimant. It was made on the following grounds:

- I. The Defendant has a real prospect of successfully defending the Claim.
- II. The Applicant only became aware of the Request for Judgment in or around January 2013 in course [sic] of carrying out a court file search.
- III. The Applicant did not receive copies of the Claimant's Claim Form and Particulars of Claim prior to carrying out the search.
- IV. The Applicant is the party who stands to be injuriously affected by the Default Judgment if it is entered or is not set aside.
- V. The Application is being made as soon as reasonably practicable to do so and the Applicant has a good explanation for the delay in filing the Acknowledgement of Service in this Claim.

- VI. The interests of justice require that the Orders sought be made.

The Proceedings

[5] On October 16, 2012 the Claimant commenced proceedings against the Defendant asking for the following orders:

- I. An Order that the Defendant pay to the Claimant the sum of \$23,963,364.68 together with commercial interest at 21.4% p.a.
- II. An account and an inquiry of the trust property, namely the trust fund as described in the Deed of Retirement and Appointment of New Trustees executed on the 11th day of February, 2010, which was created by the Last Will and Testament of Abdulla Charles Marzouca dated May 25, 1975.
- III. A declaration that the investment made by the defendant as trustee of the trust fund was not authorized by the trust instrument or by law.
- IV. An inquiry whether any and what money subject to the trust fund has been invested by the Defendant in or towards the purchase of the unauthorized securities and whether and when the unauthorized investment was sold or realized by the Defendant and whether any and what sum has been lost to the estate subject to the trusts by the investment being made and realized.
- V. An Order that the Defendant be charged with the commercial interest at the rate of 21.4% per annum in the amount from time to time invested by him.
- VI. An order that the Claimant be entitled to trace the sums found missing from the trust property.

[6] The defendant was served on January 17, 2013 with the claim form and particulars of claim.

[7] The claimant filed a Request for Judgment on March 19, 2013 asking for judgment to be entered against the claimant in default of acknowledgement of service in the amount of \$23,963,364.68 with interest at 21.4% p.a. and costs, as well as, judgment in default of defence for \$39,373,844.80 representing the total claimed along with interest and costs.

[8] The defendant filed an acknowledgement of service on July 17, 2013 which was followed by the filing of an application for extension of time to file a defence. On August 19, 2013 the application was amended seeking orders that the Request for Judgment to be stayed or that the judgment entered against the defendant be set aside.

Submissions

[9] Learned Queen's Counsel Mr. Foster submitted that the claim as filed was not one for a specified sum of money and the claimant's application requesting judgment to be entered was misconceived. He further submitted that if she wished to pursue recovery of the pecuniary relief only, then the amount to which she would be entitled would need to be determined by the Court.

[10] Additionally in order to obtain the additional reliefs in her claim form, Mr. Foster argued, the claimant would be required to file an application supported by affidavit evidence in order for the Court to determine the terms of the judgment that she was to receive.

[11] Having failed to adhere to the proper procedure for the obtaining of a default judgment, Mr. Foster contended, no default judgment could be entered by the Court. Consequently, the appropriate application for the defendant to make was one asking for an extension of time to file defence under Rule 10.3 (9) of the Civil Procedure Rules 2002 (the CPR).

[12] Mr. Foster relied upon Rule 12.10, as well as, Rule 2.4 of the CPR in support of his submissions.

[13] Mr. Cameron, on behalf of the claimant, did not take much issue with the submissions made by Mr. Foster concerning the improper procedure that was taken in relation to the claimant's application.

The provisions of the CPR

[14] Rule 12.10 of the CPR sets out the provisions for the entry of a default judgment depending on the type of claim that is filed.

[15] Rule 12.10 (1) (a) provides that default judgment on a claim for a specified sum shall be judgment for the payment of that specified amount; or where part has been paid, for the amount that is certified by the claimant as outstanding, at the time and rate ordered by the Court where the defendant has applied for time to pay under Part 14; or in all other cases at the time and rate specified in the request for judgment.

[16] However default judgment for an unspecified sum of money shall be judgment for the payment of an amount to be decided by the Court. (Rule 12.10 (1) (b))

[17] Where default judgment is being in a claim for some other remedy it shall be in such form as the Court considers the claimant to be entitled to on the particulars of claim. (Rule 12.10 (4))

[18] An application made under Rule 12.10 (4) need not be on notice but must be supported on affidavit. (Rule 12.10 (5)).

[19] Rule 2.4 defines what a claim for a specified sum of money entails.

Analysis and disposal

[20] Having considered the submissions made by Mr. Foster and the relevant provisions of the CPR, I quite agree that the claim that was initiated by the claimant is not one for a specified sum of money as contemplated by the Rule 2.4 of the CPR.

[21] Additionally, the application as filed failed to comply with Rule 12.10 of the CPR.

[22] Consequently, the application made by the claimant requesting entry of judgment/default judgment was procedurally incorrect and cannot succeed. The outcome of this decision is that this application is therefore denied.

[23] I will now go on to consider the defendant's application for extension of time to file defence.

The application for extension of time

[24] The defendant has presented affidavit evidence which sets out his explanation for the delay in filing the acknowledgement of service. His draft defence is also exhibited.

[25] The explanation advanced for the delay is that shortly after the defendant was served, he travelled overseas on urgent personal business after giving instructions to his attorneys. He was away for a protracted period and expected his attorneys to protect his interests in the claim in his absence.

[26] However, the acknowledgement of service was not filed on his behalf due to the inadvertence of his attorneys. It has been submitted by Mr. Foster that this explanation is reasonable in the circumstances as it shows an absence of wilful delay or default on his part.

[27] In his draft defence, the defendant sets out the circumstances in which he was appointed a trustee in February 2011. He also sets out the provisions of the will of Mr. Abdulla Marzouca which created the trust.

[28] It was further argued by Mr. Foster that under the terms of the trust, the claimant would not be entitled to the sum she claimed and that it would be unjust for the Court to allow her to proceed to judgment in default when she does not have the right to this relief.

[29] Mr. Foster posited that there was merit to the defence as it raised serious issues which could only be resolved at a trial. These issues included:

- i) that the defendant never acted as a sole trustee and took no decisions on his own in relation to the trust fund;
- ii) that the Claimant was aware of the status of the fund and the transactions conducted on the account;
- iii) that it was the Claimant who requested the dissolution of the trust fund; and
- iv) that the balance left over after the fund was dissolved was deposited to a joint investment account in their names and the Claimant had access to this account.

[30] He relied on Rules 10.3 (9) and 26.1 (2) (c) of the CPR as well as the cases of **The Attorney General of Jamaica and Western Regional Health Authority v. Rashaka Brooks Jnr (A Minor) by Rashaka Brooks Snr** [2013] JMCA Civ 16; **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4 and **Philip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Fredrick Flemmings & Gertrude Flemmings** [2010] JMCA Civ 19.

Submissions

[31] Mr. Foster submitted that neither Rules 10.3 (9) nor 26.1 (2) (c) of the CPR set out the criteria for the exercise of the Court's discretion to make an order extending the time for a defendant to file a defence. It is from the case law that guidance is provided.

[32] He argued that in **Brooks Jnr**, Brooks JA stated that in the absence of stated criteria the Court was to have regard to the overriding objective of ensuring that cases are dealt with justly. It was also stated in that case that the court should not take an inflexible stand where it was given a discretion and that in general each case was to be decided on its own facts.

[33] Mr. Foster urged the Court to consider the views adopted by Phillips JA from the authority of **Finnegan v Parkside Health Authority** [1998] 1 W.L.R. 411 which were applied in **Philip Hamilton** that:

“...a procedural default, even if unjustifiable, and particularly where no prejudice had been deponed to or claimed, the litigant ought not to be denied access to justice.”

[34] Mr. Cameron objected to the application on the basis that no explanation has been advanced for the failure of the defendant to file his affidavit in support of his application for over two and a half years. He submitted that while there was an explanation for the delay in failing to file the acknowledgement of service in time there was nothing more. He reminded the Court that the initial application was not served on the claimant.

[35] The Court was therefore not in a position to assess whether there were good reasons for the delay in failing to comply; the delay was inordinate and as a result the defendant’s application ought to be denied.

Analysis and Disposal

[36] I have taken into account the date on which the application for extension of time was filed, albeit without the supporting affidavit and the necessary service on the claimant. I do not consider that this delay was inordinate. In any event, “the consideration of whether the application was made timeously is merely a factor to be borne in mind, and ought not by itself to be determinative of the application.” (Per Phillips JA in **Rohan Smith v Elroy Hector Pessoa and Nickeisha Misty Samuels** [2014] JMCA App 25)

[37] The oversight of his attorneys in failing to file the acknowledgement of service in time cannot in my view be attributed to him. It seems clear on all the evidence that he had every intention of defending the claim, having instructed his attorneys prior to leaving the Island

[38] I have also considered the explanation given by Mr. Marzouca that he was overseas for a protracted period on urgent personal matters and found it to be a reasonable one. This no doubt could have contributed to the delay in placing the affidavit in support of his application before the Court.

[39] I have also assessed his defence and found that there is valid defence on the merits and that the defendant has a real prospect of successfully defending the claim..

[40] Additionally, there has been no argument or evidence put forward by Mr. Cameron that any prejudice has been suffered by the claimant as a result of the delay.

[41] I bear in mind that in exercising my discretion in a matter of this nature I am not to adopt a rigid approach, that each case is to be decided on its own facts and each application is to be judged by the criterion of justice

[42] I am guided by the principles laid down in the cases cited at paragraph 28 above and in particular by the views adopted by Phillips JA from **Finnegan** that were applied in **Philip Hamilton** that “a procedural default even if unjustifiable and particularly where no prejudice has been deponed to or claimed, the litigant ought not to be denied access to justice.”

[43] In all the circumstances I have come to the conclusion that the justice of this case requires that the defendant be permitted to defend the claim.

Orders

1. The claimant's request filed on May 16, 2103 for judgment to be entered against the defendant in default of Acknowledgement of Service is denied.
2. Acknowledgement of service filed by the defendant on the 17th July, 2013 is allowed to stand.
3. The application for extension of time to file defence is granted.

4. The time for filing and serving the defence is extended to seven (7) days from the date hereof.
5. No order as to costs.
6. The defendant's attorneys-at-law to prepare file and serve the orders made.