[2018] JMSC Civ 180

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV02896

BETWEEN	**RESFORD SAUNDERS**	**CLAIMANT**
AND	**ALPHONSO DAVIS**	**1ST DEFENDANT**
AND	**STEPHEN ALVA ROSE**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Everton Dewar instructed by Everton J Dewar & Co for the Claimant

Ms Jacqueline Cummings instructed by Archer, Cummings & Co. for the 2nd Defendant

September 28, 2017 and July 30, 2018

Application for Relief from Sanctions – Failure to comply with 'unless' order

MASTER MASON (AG.)

BACKGROUND TO THE APPLICATION

[1] This is a Notice of Application for Court Orders filed on June 28, 2017 by the second defendant, Stephen Alva Rose for Relief from Sanctions for failure to comply with Orders made on the 1st day of May 2017.

[2] The Application comes against the background of the Claimant (Resford Saunders) commencing a claim against both Defendants, in which he claims damages for negligence; that on or about the 27th day of September, 2011 he was lawfully riding his bicycle along Brunswick Avenue, Spanish Town in the parish of Saint Catherine, when the 1st Defendant, who is alleged to be the driver, servant and/or agent of motor vehicle registered PC 3844, and owned by the 2nd Defendant; negligently drove and/or operated and/or managed the said motor vehicle**,** causing and/or permitting the said motor vehicle to violently collide into his bicycle causing damage to same.

[3] The claim was subsequently served and an Acknowledgment of Service and Defence was filed on the 17th day of October 2014 on behalf of the 2nd Defendant. Following a referral to mediation, a Notice of Application for Court Orders was filed by the Claimant for Mediation to be dispensed with and for the matter to be scheduled for Case Management Conference because the 2nd Defendant and his attorney-at-law failed to attend mediation. A Formal Order was then made on May 1, 2017 for mediation to be dispensed with as well as an unless order, on the condition that if the 2nd Defendant failed to attend Case Management Conference his statement of case will be struck out.

[4] On the date of the hearing of the Case Management Conference, June 28, 2017, the 2nd Defendant failed to attend and an application for relief from sanction was filed on said date, June 28, 2017 with the Case Management Conference being adjourned to facilitate the hearing of the application. With the court's permission the 2nd Defendant was allowed to serve the Claimant with the application and to respond if necessary by September 18, 2017. The hearing was adjourned to September 28, 2017.

ISSUES

[5] The issues that the Court must address are as follows:

(a) Whether the issue of service can now be raised.

(b) Whether, pursuant to Rule 26.8(2) of the CPR, the 2nd Defendant is entitled to relief from sanction for failure to comply with the order made for him to be present at the Case Management Conference.

THE SUBMISSIONS OF THE 2nd DEFENDANT

[6] The 2nd Defendant/Applicant submits that having regard to the wording of Rule 26.8 in order for the Court to entertain an application for relief from sanctions, certain prerequisites must be present.

[7] The case of **H.B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** [2013] JMCA Civ 1 is relevant to this application.

In that case Rule 26.8 of the CPR was interpreted by Brooks JA as creating a step-by-step process.

The 2nd Defendant submits that a Judge must consider whether an applicant has satisfied Rule 26.8(1) and 26.8(2) before considering the factors listed in Rule 26.8(3).

[8] The 2nd Defendant submits that firstly, the application was made prior to the sanction being imposed (i.e prior to the CMC date of June 28, 2017) and having made a pre-emotive application for a relief from sanction, it cannot be argued that the application was not made promptly.

[9] Secondly, in the present circumstances, the 2nd Defendant was not served the Claim Documents nor was he or his attorneys informed, that there are legal proceedings against him and at no point did the Insurance Company successfully contact the 2nd Defendant informing him of the proceedings. Consequently, the 2nd Defendant's non-attendance is not only unintentional, it was unachievable as his whereabouts were unknown and there was no information as to whether he was within the jurisdiction or deceased.

[10] Thirdly, as it relates to whether there is a good explanation for his failure to attend the CMC, the 2nd Defendant submits that not only can it be said that his failure to attend a CMC was due to the fact that he was unaware of the existence of the claim against him (let alone the case management conference) but it is a good explanation for his failure to attend, as it is not the 2nd Defendant's fault that he was completely unaware of the claim.

[11] The 2nd Defendant submits further that his Attorneys have complied generally with all other relevant rules and practice directions including the filing of a Defence and Acknowledgement of Service and by attending CMC on his behalf. Furthermore, if his statement of case is struck out, the Court cannot grant judgement against him alone as the 1st Defendant's interest is tied to his and cannot be dealt with separately pursuant to rule 12.9(2)(b).

The Rules provide:

> *12.9(2) where a Claimant applies for Default Judgment against one of two or more Defendants*
>
> *12.9(2)(ii) the Claimant may continue the proceedings against the other Defendant*

I am of the view that the 2nd Defendant can be dealt with alone.

[12] Lastly, as it relates to the issue of whether the failure to comply has been or can be remedied within a reasonable time, the 2nd Defendant submits that this consideration is not applicable as he is not seeking a requirement for his attendance to be remedied, but rather for the Court to exercise its discretion under Civil Procedure Rule 27.8(3) to dispense with the requirement for him to attend the Case Management Conference.

[13] It is for the aforementioned reasons, that the 2nd Defendant submits that the Court should respectfully allow the application for relief from sanctions.

THE SUBMISSIONS OF THE CLAIMANT

[14] Pursuant to the requirements outlined in Rule 26.8; the Claimant does not take issue with rule 26.8(1) because the application was made in time and as such, the 2nd Defendant has satisfied rule 26.8(1). However, in order to determine whether the 2nd Defendant has satisfied the mandatory requirements of rule 26.8(2), the court has to carefully analyse the affidavit evidence filed in support of the application.

[15] In the case of **Wayne Andrew Lattibeaudiere v Flames Production Incorporation & Anor,** Claim No. 1999CLL00053 it was declared that the affidavit filed in support of the application should be one of merit and not merely used to satisfy compliance with rule 26.8(1)(b).

[16] On the issue of whether the failure to comply was unintentional and whether there was a good explanation for the failure to comply, the Claimant submits that the acts of omission discussed in their submissions were intentional/deliberate thus resulting in the breach which further begs the question as to whether the explanation for the breach connotes real or substantial fault on the part of the 2nd Defendant or his Attorneys-at-Law. However, with reliance on the case of **Wayne Andre Lattibeaudiere** (Supra) and **Elenard Reid et al v Nancy Pinchas et al,** Claim No. 2002CLR00031 the Claimant submits that the foregoing authorities do not distinguish between the client and his attorneys and the present circumstances is no different from the foregoing authorities, as the 2nd Defendant does not have a “good explanation” for the failure to comply.

[17] Further, in addition to the non-compliance with the terms of the unless order, the Claimant submits that the 2nd Defendant has failed to attend mediation in which his attendance was mandatory pursuant to Civil Procedure Rule 74.9.

[18] It is therefore on such premise, that the Claimant submits that the 2nd Defendant has not satisfied the provisions of rule 26.8(2) and as such it follows inexorably that the 2nd Defendant’s application for relief from sanction must be denied.

[19] Additionally, whether the issue of service can now be raised, the Claimant submits that an Acknowledgement of Service was filed on behalf of the 2nd Defendant and with reliance on the case of **Cedric Landon Harper v David Lee** [2016] CD00094, where Laing J adopted the principles enunciated by Morrison JA (as he then was) in the case of **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2 the Claimant submits that in the said Acknowledgement of Service there was no challenge to the court's jurisdiction under CPR 9.6. Furthermore, the wording of the certificate in the Defence appeared as though the claim was brought to the attention of the 2nd Defendant. Therefore, at this juncture, it is trite law for the 2nd Defendant to raise the issue of service post Acknowledgement of Service

[20] The 2nd Defendant having been served with the Claim Form and Particulars of Claim on his insurers who having filed an Acknowledgement of Service on behalf of the 2nd Defendant, is now properly before the court and is bound by the rules, orders and directions of the said court.

THE LAW AND ANALYSIS

a) Whether the issue of service can now be raised?

[21] Based on paragraphs 5 and 9 of the Affidavit in Support of the Notice of Application for Court Orders for relief from sanction, the affiant, Mrs. Jacqueline Cummings, attorney-at-law for the 2nd Defendant seeks to raise the issue of service.

[22] The affiant at paragraph 5 of her affidavit deponed that, "to the best of her information and belief, the 2nd Defendant resides outside the jurisdiction and that the Claim Form and Particulars of Claim were not served on him personally as stated on the Acknowledgement of Service filed on behalf of the 2nd Defendant on October 17, 2014. The documents instead were served on a relative of the 1st Defendant who then delivered the documents to the 2nd Defendant's insurance company AGIC."

[23] At paragraph 9, the affiant deponed that, "no orders as to alternative methods of service or substituted service were made in the Claim herein to deem the service on the relative of the 1st Defendant as regular. But, even if substituted service on the 2nd Defendant was contemplated (even though it was not), there is no mention of an overseas address for the 2nd Defendant. It is noted that the address given for the 2nd Defendant on the Acknowledgement of Service form filed on October 17, 2014 was 118 Brunswick Avenue, Spanish Town, St. Catherine.

[24] In deciding on the validity of this submission reference is made to the case of **Cedric Landon Harper v David Lee** (Supra) in which Laing J at paragraph 9, adopted the principle enunciated by Morrison JA (as he then was) in the case of **B & J Equipment Rental Limited v Jospeh Nanco** (Supra)**:**

> *" ….. after having filed an Acknowledgement of Service, the failure of the appellant to take the additional step of raising the matter of the non-compliance with CPR 8.16(1) as a preliminary issue by way of a challenge to the Court's Jurisdiction under CPR 9.6,* **amounted to a waiver of the irregularity and the appellant thereby submitted unconditionally to the jurisdiction of the court."**

[25] Morrison JA went on further to state at paragraph 24 in the **B&J Equipment Rental Limited** case:

> *"Such a Defendant must first file an Acknowledgment of Service before making the application (rule 9.6(2) and the application must be made within the period for filing a Defence (rule 9.6(3), supported by evidence on Affidavit (rule 9.6(4)). A Defendant who files an Acknowledgment of service and does not make an application under this rule is treated as having accepted that the court has jurisdiction to try the claim: (rule 9;6(5))."*

[26] It follows therefore that having filed an Acknowledgment of Service without filing an application pursuant to Section 9.6 of the CPR and asking the court not to exercise jurisdiction in the matter, the 2nd Defendant would have waived any irregularity in service by submitting to the jurisdiction of the court. It was

submitted that the 2nd Defendant could not at this juncture raise the issue of service, as the filing of an Acknowledgment of Service and the Defence at the same time on October 17, 2014 precludes him from challenging the jurisdiction of the court with regard to any defect or irregularity in the service of the Claim form.

The 2nd Defendant fails on this issue.

b) **Whether, pursuant to *Civil Procedure Rule 26.8(2),* the 2nd Defendant is entitled to relief from sanction for failure to comply with the order made for him to be present at the Case Management Conference.**

[27] Pursuant to Civil Procedure Rule 26.8 of the CPR:

(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.

[28] In interpreting Civil Procedure Rule 26.8, it was stated by JA Brooks in **H.B Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc et al** that:

> *"An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must comply with the provisions of rule 26.8(1) in order to have his application considered. If he fails, for example, to make his application promptly the court need not consider the merits of the application. Promptitude does, however, allow some degree of flexibility and thus, if the court agrees to consider the application, the next hurdle that the applicant has to clear is that he must meet all the requirements set out in rule 26.8(2). 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 that applicant."*

[29] In analysing the meaning of "good explanation" Fraser J in **H.B Ramsay** at paragraph 55 made reference to the case of **Attorney General of Trinidad and Tobago v Universal Projects Limited** [2011] UK P.C 31 where Lord Dyson stated the following:

> *"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. Similarly, if the explanation for the breach is administrative inefficiency."*

[30] Further, as highlighted by Sykes J (as he then was) in **Eleanard Reid et al**:

> *"Rule 26.8(2) requires that al three paragraphs are met before the exercise of the discretion can arise. In my view this provision is to be read conjunctively. Were it otherwise, then it would not be intelligible. A court could not sensibly proceed to rule 26.8(3) if the applicant only met rule 26.8(2)(3). In other words, if the applicant fails any of these paragraphs then that is the end of the matter for him."*

[31] Having filed the application for relief from sanction and affidavit in support on the 28th day of June 2017, the date that the sanction took effect; it is submitted that the 2nd Defendant has satisfied the requirements of Civil Procedure Rule 26.8(1), the application was made promptly and supported by evidence on affidavit.

[32] However, as it relates to the requirements outlined in Rule 26.8(2), on the issue of whether the failure to comply was intentional, in applying the case of **Attorney General of Trinidad and Tobago** which was cited by Fraser J in **H.B Ramsay** it can be argued that the Affidavit of Mrs.Jacqueline Cummings reveals that it was known from the inception that they were unable to contact the 2nd Defendant as stated in paragraph 6 of her affidavit, where she stated that, ***"we have been unable to contact the 2nd Defendant since the commencement of this claim"*** but they proceeded nonetheless to mislead the Claimant and more importantly the court that they have been in contact with the 2nd Defendant. The deceit continued when the 2nd Defendant and his attorney-at-law consented to attend mediation and did not turn up for mediation set for March 17, 2015. On May 28, 2017 wrote the Claimant to say that they were trying to locate the 2nd Defendant.

[33] Further, pursuant to ***Civil Procedure Rule 3.12(4)(a) and (b),*** which states as follows:

> *(4) A certificate of truth given by the attorneys-at-law must also certify –*
>
> *(a) the reasons why it is impractical for the lay party to give the certificate; and*

(b) that the certificate is given on the lay party's instructions.

[34] The Certificate of Truth of Ms. Jacqueline Cummings in their Defence suggests that there was communication between both parties and that the claim was brought to the attention of the 2nd Defendant. As in satisfying the requirements of Civil Procedure Rule 3.12 (4)(a) and (b), it was stated by Ms. Cummings in the Certificate of Truth that, "….. this certificate is given on the 2nd Defendant's instructions as the 2nd Defendant cannot give the certificate as he is not able to attend our office before the time limited for filing of the Defence has expired."

[35] However, paragraph 8 of the Affidavit of Ms. Cummings, states, "that to my knowledge and to the knowledge of our client AGIC, the 2nd Defendant has not had sight of the Claim Form, Particulars of Claim, Acknowledgement of Service or Defence in the Claim herein and we verily believe that he has no knowledge of the existence of this claim", clearly this statement contradicts the Certificate of Truth as being given by her on the instructions of the 2nd Defendant.

[36] Additionally, at paragraph 11 of the affidavit of Ms. Cummings, she states that, "due to the aforementioned circumstances, the 2nd Defendant does not know of his requirement to attend the Case Management Conference in compliance with Master P. Mason's Formal Order as he was not served with the Claim Form or Particulars of Claim and is completely ignorant of the fact that this claim exists"; this reiterates that the 2nd Defendant was not served with the pleadings and is completely ignorant of the fact that this claim exists, yet, his attorney formulated a Defence and certifies a Certificate of Truth on his behalf. It is therefore submitted that on the acts and or omissions by counsel or the 2nd Defendant that her acts and explanations come across as misleading and intentional.

[37] The failure to comply with the Court's orders can be argued as being intentional and/or deliberate. This however, raises the issue of whether the explanation for the 2nd Defendant's non-compliance connotes a real or substantial fault on the part of the 2nd Defendant or his Attorneys. However, as opined by K. Anderson J

in **Wayne Andrew Lattibeaudiere** at paragraph 66, the failure of a party to comply with a court order or rule of the court being as as a result of the exclusive fault of the party's attorney-at-law will not always, in and of itself constitute a good reason for a party having failed to comply with an unless order, or a requirement of a rule of court. It follows therefore that the 2nd Defendant does not have a "good explanation" for the failure to comply with the Court's order. I am of the view that the explanation proffered on behalf of the 2nd Defendant is contradictory, deliberate and without merit.

[38] The 2nd Defendant submits that they complied generally with the relevant rules. I disagree with that statement particularly regarding the filing of the Acknowledgement of Service, it was filed out of time.

[39] Further, it is also submitted that apart from the non-compliance with the terms of the unless order, by not attending Case Management Conference on June 28, 2017 the 2nd Defendant had also failed to attend mediation set for March 17, 2015 in which his attendance was made mandatory pursuant to Civil Procedure Rule 74.9(1) which states.

> *"All parties along with their attorneys-at-law (where represented) must attend all mediation session."*

[40] On the basis of the 2nd Defendant's failure to satisfy the requirements outlined in Rule 26.8(2) and enunciated in the case **H.B Ramsay & Association Limited et al**, the court is precluded from granting the 2nd Defendant relief from sanction having failed to cross the threshold created by Rule 26.8(2). Consequently, the Court need not consider the provisions of Rule 26.8(3) in relation to the 2nd Defendant's application.

[41] I therefore order accordingly:

1. The application made on behalf of the 2nd Defendant and filed on June 28, 2017 is refused.

2. Judgement is entered for the Claimant against the 2nd Defendnat with damages to be assessed.
3. Costs of the application to the Claimant to be agreed or taxed.
4. The Claimant's Attorney-at-law to prepare, file and serve the order made herein.