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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. F139/1994

BETWEEN	FITZGERALD FRANCIS	PLAINTIFF
A N D	HERBERT MALCOLM	FIRST DEFENDANT
A N D	JUNIOR MALCOLM	SECOND DEFENDANT
A N D	T. GEDDES GRANT LTD.	THIRD DEFENDANT

Mr. N. Samuels for Plaintiff

Mr. R. Braham instructed by Livingston Alexander and Levy for third Defendant.

Heard: May 13, and July 13 1998

C. A. Beswick (Master Ag.)

The Plaintiff and the third defendant are each seeking orders in this action. The third defendant seeks an order that the action be dismissed for want of prosecution whilst the Plaintiff seeks an order to restore the action to the Cause list.

The Plaintiff filed suit in 1984 claiming that he was injured in 1980 as a result of the negligence of the defendants and/or their breach of the Occupier's Liability Act. Various pleadings followed slowly after the commencement of the suit, culminating with the matter being set to be tried on 21st January 1991.

On that occasion the Defendants' Attorney-at-Law reported that the first Defendant had recently died. The Plaintiff's Attorney-at-Law sought an adjournment to determine the manner in which he would then proceed. On 23rd September 1991, when the matter next came before the Court, no decision had yet been taken as to the manner in which to proceed. The Presiding Judge ordered that the matter be taken off the Cause list with costs to the Third Defendant.

In December 1993, more than two years later, the Summons was filed to restore the action to the Cause list. In the affidavit supporting this the plaintiff said that it was he who had instructed his Attorney-at-Law to apply for an adjournment on the trial date in September 1991. Since then that Attorney-at-Law had advised him to proceed against the Second and Third defendants resulting in the filing of the Summons to allow for continuation of the action.

In an affidavit filed in February 1994 the Attorney-at-Law for the Plaintiff swore that the Plaintiff instructed him to proceed against the Third Defendant only. Still later, in April 1994 the Attorney-at-Law swore that the matter had not proceeded because of the failure/refusal of the defendants to provide

information to allow the appointment of a legal representative to continue the matter against the First defendant. The plaintiff was then ready to proceed and an order to restore the action should be made.

Attorney-at-Law for the Third defendant maintained in his affidavit that since the matter was removed from the Cause list, the Second defendant had disappeared. He opposed restoring the action to the Cause list asserting that the defendants, particularly the Third defendant, would be severely prejudice if there were now to be a trial with the only witnesses of the Third defendant being unavailable.

Further, the Plaintiff had options open to him to prosecute his case and ought not to have been relying on the Third Defendant, who had neither the ability nor the duty, to assist him in the appointment of a legal representative of the first Defendant. Consequently he submitted that the matter should not be restored to the Cause list, but rather, should be dismissed for want of prosecution.

Attorney-at-Law for the third Defendant argued that there was inordinate and inexcusable delay displayed by the Plaintiff in the prosecution of this matter. Whilst recognising that the cause of action arose in 1980 he relied only on the period after removal of the matter from the Cause list, i.e. , almost seven years.

There was some activity seen in 1994 when the summons to restore the matter to the Cause list was set for hearing. However no parties attended and the matter was Adjourned Sine Die.

The third Defendant's application is based on the delay of the Plaintiff in prosecuting the matter being so protracted that during that period the first Defendant died and the second Defendant disappeared causing the third Defendant to be deprived of its important witnesses.

The argument by the third Defendant was that the delay was inordinate and inexcusable and would cause prejudice and prevent a fair trial.

The third Defendant would have had to rely on the evidence of the first and second Defendants to defend this claim. There is some allegation that the Plaintiff contributed to or was responsible for his injury, which evidence would have had to emanate from an eyewitness.

Even if the first and second Defendants had been available it would have been eighteen years since the accident and memories would have dimmed with the passage of that amount of time.

Attorney-at-Law for the third Defendant argued that by virtue of the Plaintiff's Attorney-at-Law's affidavit of February 14th 1994 in which he says he would abandon the action against the first and second Defendants, the Court is obliged to dismiss the action against them at the very least.

Now more than eighteen years after the accident, the matter has not yet been tried.

The Plaintiff portrays himself as the hapless victim of the trial judge's premature removal of the matter from the Cause list and the defendants' lack of co-operation. He seeks redress by virtue of an order to restore the matter to the Cause list rather than to dismiss it for want of prosecution.

Lord Diplock in *BIRKETT v JAMES* [1977] 2 All ER 801, spoke of the principles concerning dismissal for want of prosecution. He said,

“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.”

There has been no suggestion of contumelious default therefore the first question is whether there has been an inordinate and inexcusable delay.

Although reliance is being placed on the delay since 1991 it must still be recognised that over eighteen(18) years have passed since the accident.

That there has been delay in the prosecution of this matter is indisputable, some amount being attributable to all parties.

It is my view that in the circumstances a delay of seven(7) years is inordinate, a fortiori, eighteen(18) years.

Is this inordinate delay excusable? Is it an acceptable reason that the plaintiff was awaiting the co-operation of the defendants to help the plaintiff proceed with its case? Surely that cannot be.

Although the plaintiff made the decision in 1993 to proceed against only the second and third defendants, when the summons to restore the matter to the Cause List came up for hearing, no parties attended and the matter was adjourned sine die.

That summons was not actively pursued again until the instant hearing, almost four years after it was filed.

The delay is inordinate and inexcusable.

There was a defence filed in this matter disputing details of the statement of claim. The memories of eye witnesses would have to be relied on to recount events of the incident.

Without that evidence the trial could not be fair.

The Court of Appeal has held that in some situations delay in itself can cause an unfair trial or cause prejudice *WEST INDIES SUGAR v MINNEL SCCA No 91/92* *VASHTI WOODS v H.G. LIQUORS et anor SCCA No 23/93*.

This case exemplifies this principle. The unjust and prejudicial situation facing the defendants as a result of the delay is exacerbated by the absence of the 1st and 2nd defendants.

Further through its own affidavit the plaintiff expressed a wish to proceed against the third defendant only.

An application of the principles concerning dismissal of actions for want of prosecution results in the conclusion that this matter must be so dismissed.

Order in terms of summons to dismiss the action dated 18th January, 1994 as amended.

Summons to restore the action to the cause list dated the 6th day of December, 1993 is dismissed.