[2015] JMSC Civ. 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 02768

BETWEEN	**NORMA HINES-BRISSETT**	**CLAIMANT**
A N D	**LENNOX ROXROY BRISSETT**	**DEFENDANT**

Gordon Steer instructed by Chambers, Bunny & Steer for the claimant

Althea B. Anderson instructed by Althea B Anderson & Co. for the defendant

Heard: 15 May, 2014, 3 July 2014, 30 October, 2014 and 3 March 2015

Application for extension of time to file defence – Whether good reason for failing to file a defence shown – Whether proposed defence has a real prospect of success – Determination of shares in Matrimonial Property CPR Rule 26.1(2)c - Rule 10.3(9) - Rule 1.1 – The over-riding objective.

BERTRAM-LINTON
MASTER-IN-CHAMBERS

Introduction and Facts

[1] The parties were married in June 1998 and subsequently a decree absolute for dissolution of their marriage was granted on 8th December 2006. During the marriage they purchased the property located at 60 East Norbrook Drive in St. Andrew in their joint names. Since the breakdown of the marriage the claimant has resided at her Oakwood Townhouse and the defendant lives at the premises in dispute. The claimant brought an action filed on 18th May 2012 seeking inter alia that she be declared 50% owner of the Norbrook property, that the defendant/former husband pay rent to her from the date of separation, and that she realize her share in the value of the property by its valuation and sale.

[2] An Acknowledgement of Service was filed on behalf of the defendant on 25th June 2012 which admits service on June 5, 2012 even though the claimant's Affidavit of Service says they served on the 7th June 2012. No defence has been filed. The claimant applied for Judgment in Default on October 16, 2012, which application was subsequently amended on 12th February 12013 and served on 10th April, 2013.

[3] On 27th May 2013, three (3) days before the claimant's application was scheduled to be heard, the defendant filed his application for extension of time to file a defence which we now consider, as the claimants application to enter default judgment was held in abeyance pending the outcome of the issue of the extension to file defence.

The Law

[4] CPR rule 10.3(1) states that:

> *"The general rule is that the period for filing the defence is the period of 42 days after the date of service of the claim form."*

Rule 10.3 (9) states:

> "*The defendant may apply for an order extending the time for filing a defence."*

Rule 26.1(2)c states under the court's general powers of management.

> *…the court may*
>
> *(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."*

Submissions

[5] Counsel Ms. Anderson for the applicant says Mr. Brissett is relying on his affidavit in support of his application filed on 27th May 2013. It is important to outline the specifics of this affidavit as far as is relevant to us as follows:

> *"I, Lennox Roxroy Brissett , of 60 East Norbrook Drive Kingston 8 in the parish of Saint Andrew, being duly sworn, make oath and say as follows:-*
>
> 1. *…*
> 2. *…*

3. *That on the 18th day of May 2012, the Respondent herein filed with this Honourable Court, Claim Form and Particulars of Claim, Number 2012 HCV 02768 against me wherein she claims inter alia (50%) interest in the property to which I own and reside and occupation rent from the date of separation to present.*

4. *That on the 25th of June my attorney-at-law acting on my instructions, filed with this Honourable Court an Acknowledgement of Service of Claim Form, wherein I indicated my intention to defend the claim.*

5. *That subsequent to the filing of the Acknowledgement of Service of Claim Form, I was unable to provide further instructions to my attorney and as such a defence was not filed.*

6. *This was due to me having suffered serious economic hardship coupled with personal challenges involving my children which required my immediate attention. Consequently, my mental state was seriously affected.*

7. *That despite my challenges, it was always my hope that the matter between the Respondent and myself could be settled amicably, since I made it known to the Respondent that I was not opposed to (she) sic receiving a share of the property named in her claim.*

8. *However, I am not of the view that the Respondent is entitled to fifty percent interest of the property based on its current value but that any entitlement must be based on the value at the time that the Respondent and I were legally separated. The property was undeveloped during the time the Respondent and I were married and was improved solely by me subsequent to dissolution of our marriage.*

9. *Further that the Respondent never made any financial contribution to the purchase of the property neither has she made any payments towards the mortgage.*

10. *That it is in circumstances outlined in paragraphs 8-9 above that I had intended and still intend to file a defence.*

11. *However, I have been advised by (my) sic attorney that the time for filing the defence had passed, but that I could still apply to this court for an extension of time to file same.*

12. *I have been further advised by my attorney, that there will be a hearing at this Honourable Court on May 30, 2013 at 10am for what is believed to be a Default Judgment hearing.*

13. *I deeply regret not filing a dispense as I honestly believe that I have a good prospect of successfully defending the Respondent's claim and it would be in the interest of Justice for me to be afforded an opportunity to be heard before any judgment is entered. In support of my application I exhibit a draft defence marked LRB1 for identity."*

[6] In his defence thereafter he outlines his version of the acquisition of the property and states categorically that he was the sole purchaser of the property and the only one who made improvements to the property after the divorce and paid the monthly mortgage even though falling into arrears from time to time and he finally "completely settled" the mortgage in or about March 2013 in the sum of One Million Seven Hundred Thousand Dollars ($1,700,000.00).

[7] This information and especially the dates as outlined are not lost on the court as the original claim was served on the defendant as admitted on 5th June 2012 at the time he says he was having financial difficulty. The defence would have been due sometime in or around the 17th July 2012.

[8] It was in October 2012 that the Applicant first asked for Judgment in Default and that application was amended in February 2013 and served on the 10th April 2013, one month after the mortgage was settled according to Mr. Brissett.

[9] Mr. Steer submits that the application for extension should not be granted since, no good reason for the delay in filing a defence has been given. The defendant seems to have been spurred into action only when realising that Judgment was to be entered and after having done work on the property and indeed paying off the mortgage. He points to the Affidavit of Urgency filed by the defendant that suggests that the request for default was irregular and improper but says this was not true.

[10] Just alleging economic hardship without more is not sufficient he says and points out that the economic hardship did not prevent the defendant settling the mortgage just

two (2) months before filing this application in May 2013. Interestingly both counsel cite the case of ***Philip Hamilton v Flemmings*** **SCCA # 53/2009** where the Jamaican Court of Appeal looked at the issue of hardship being raised as an argument to justify being tardy in filing a defence and a request for an extension of time to do so. Mr. Steer further contends that the construction and improvement done to the property after the separation was not sufficient to oust/reduce the claimant's entitlement to 50% of the value of the property.

[11] In the Phillip Hamilton case the grounds of the application before Master Lindo (as she was) were that the applicant (executor) had been unable to file a defence because he had been ill and so unable to instruct his attorney fully and he also averred that he had a real prospect of successfully defending the claim for specific performance and damages. He outlined that there was also "exceptional hardship" being suffered by a third party who was the beneficiary of the estate and who lived on the property the subject of the disputed sale. The proposed defence admitted to the validity of the sale agreement, and sums paid by the claimant in pursuance of it, but asked the court to deny the claim for specific performance because of the hardship it would cause, and instead award damages.

[12] Mr. Steer calls to his aid the reasoning that was examined and approved in the Court of Appeal which looked at the lack of detail as to the onset of the illness as well as specifics of the other issues, and the determination of the Master as to whether all this represented a real prospect of success at trial.

[13] In that instance the Master's refusal to grant the extension was disturbed by the Court of Appeal based on the examination of what had been considered and what tests had been applied. Counsel also in strengthening his submissions, looked at the issue raised in the defence about the improvement to the property and whether the claimant is still entitled to 50%. He spoke of the principle in ***Patten v Edwards*** **SCCA No. 29/95.**

[14] In that case Patterson, JA (as he then was) gave approval to the principle enunciated in Muetzel v Muetzel [1970] 1ALL ER, 1443 where Edmund Davis, LJ said:

> *"…the fact that one spouse spends money on extension of that house does not mean that the other can claim no part of the increased value of the property resulting from the extension. On the contrary, in the absence of a specific agreement, the extension should be regarded as accretions to the respective shares of each and not as affecting the distribution of the beneficial interests. In other words, the division must stand whether applied to the house in its original or in its extended form."*

[15] Mr. Steer commended the principle as applicable in the case before us even though ***Patten v Edwards*** was a dispute between a brother and a sister who held as tenants in common.

[16] Mr. Steer argues in addition that the defendant has not in his affidavit or defence been able to put forward any argument which would refute the fact that an agreement had been executed between parties, in 2010 long after the marriage had been dissolved for the claimant to get 50% of the value of the property. This speaks to a common intention which ought to be enforced. The case of ***Forest v Forest*** **SCCA No 78/93** was cited as instructive on how the interest of spouses in property acquired whether matrimonial or otherwise should be determined based on the common intention of the parties at the time of acquisition of the asset. Where President Rattray (as he then was) approved the following dicta from ***Pettitt v Pettitt*** **[1969] 2 ALL ER, 385 AT 413:**

> *"…when a family asset is first acquired from a third party the title of it must vest in one or other of the spouses, or be shared between them, and where an existing family asset is improved this too must have some legal consequence even if it is only that the improvement is an accretion to the property of the spouse who was entitled to the asset before it was improved."*

[17] President Rattray went on to say at pages 11-12 that the original beneficial interest and intention of the parties at the time of acquisition would stand in the absence of evidence to the contrary.

> *"However the wife would be entitled to recover the share of the mortgage arrears payment to which the husband would have been liable to pay, that is 50% thereof."*

Analysis

[18] The rules applicable here are CPR 10.2(1)

> *"A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5)."*

CPR 10.3(1) as stated above and CPR 26.1 (2) (c)

Neither rules 10.3(a) or 26.1(2)(c) give guidance as to how the exercise of the power to extend time is to be applied. I will however apply the guidance given by Lightman J in ***Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others*** **[2001] EWHC Ch 456** which has been approved by the Jamaican Court of Appeal in ***Fiesta Jamaica Limited v National Water Commission*** **[2010] JMCA Civ 4** at 15 where Harris JA (as she then was) invoked this dictum

> *"In deciding whether an application for extension of time was to succeed under Rule 3.1 (2) it was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.*
>
> *Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were to be observed and the resources of the parties which might, in particular be relevant to the question of prejudice."*

[19] I must then ask myself these vital questions:

(1) Is there then enough material before me to justify the delay in complying with Rule 10.3(1) and

(2) Is there sufficient merit in the proposed defence such that there is a real prospect of success for the defendant?

(3) How does all this reconcile with the duty to consider the

(i) administration of justice and the

(ii) application of the over-riding objective?

Length of Delay and Explanation for Delay

[20] After filing his Acknowledgment of Service on the 25th June 2012 the defendant did nothing until 27th May 2013 when the time for the defence had long passed and the claimant was seeking to secure a default judgment set for hearing on 30th May 2013

almost one full year after the Acknowledgment and three (3) days before the hearing for default judgment.

[21] Mr. Steer may well be correct in concluding that it was the paper served in April 2013 that spurred the defendant into action. I am also persuaded to this view. I am also of the view that the reasons given of, *"serious economic hardship coupled with personal challenges involving my children which required my immediate attention. Consequently my mental state was seriously affected"* is too vague and unsupported for the court to rely on them.

[22] What were these pressing issues? For the court to exercise its discretion in a litigant's favour, that litigant has certainly to speak in less than the general terms than most Jamaicans who are feeling the general economic pinch characterised by inflation, speaks. Certainly there is reason to believe that general economic hardship of the time would not necessarily prevent the compliance of the rules and deadlines as anticipated by the court. If this were the case, then this statement might almost be a valid excuse for everyone who missed a deadline unless there were specific occurrences cited and the effect on the person supported, or as graphically described that it was hard not to envisage. No timeline is given as to when the hardship began or ended and it is noteworthy that the mortgage was settled and work done on the property during the time that elapsed. The defendant has not in my view offered a reason that I am able to rely on as credible.

[23] However I accept the view stated in ***Finnegan v Parkside Health Authority*** **[1998] WLR 411** that a procedural default, however unjustifiable, if it has not caused the claimant any prejudice for which there can be compensation by an award of costs it should not be viewed as fatal. Mr. Steer has not submitted on any prejudice and the claimant herself waited for a substantial period after the time for the filing of the defence had passed to move the court for default Judgment.

Reasonable Prospect of Success

[24] The proposed defence would also have to be examined in order to see if there is any merit in allowing it to go forward.

In his defence Mr. Brissett contradicts the claimant's assertion that she contributed at all to the acquisition, mortgage payments, maintenance and improvement of the property. He says her name on the title is merely a matter of convenience. He admits however that some time after the marriage was dissolved in 2010 he did agree to a 50% interest to be awarded to her and but for his lack of financial resources and no purchaser having been found the agreement executed by the parties would have been finalised.

[25] His major view as to the triable issue between them, is the value he has added between November 2010 when the Agreement as to their interests was executed and May 2013 when his application and proposed defence were filed.

Bearing in mind the dicta approved in ***Forrest v Forrest*** above and the dicta of President Rattray, I am of the view that Mr. Brissett's prospect of changing or affecting the interest of each party from 50% each would not be real based on the information put forward.

In ***Patten v Edwards*** above Patterson JA said:

> *"Any amount expended by the appellant to improve the property must be regarded as an accretion to the value of the property as a whole."*

The Over-riding Objective

[26] In exercising my discretion in this matter, I must also consider the over-riding objective. Rule 1.1 says

> *"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
> *(2) Dealing with a case includes-*
> *(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*
> *(b) saving expense;*
> *(c) dealing with it in ways which take into consideration –*
> *(i) the amount of money involved;*
> *(ii) the importance of the case;*
> *(iii) the complexity of the issues; and*
> *(iv) the financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously and fairly; and*

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The defendant had a considerable amount of time to intervene. It is true that the remedy sought would bring the defendant to full compliance, but the interests of justice and the use of the court's resources will not necessarily be advanced bearing in mind that Mr. Brissett did not act with alacrity and would not necessarily succeed with changing the respective percentage interests as a whole.

The Administration of Justice

[27] There are many sides to the interest of the administration of justice, chief among them is that litigation is to be pursued in the context of the rules and its proposed time frame. However, as far as possible matters must be ventilated and disposed of on their merits. Rule 1.1 must work for everybody and especially litigants who proceed with alacrity to conform to the Rules. This must also be viewed in the context of what is fair and just, in the interest of time and the proper use of the resources available in the judicial system.

Each case for extension of time to file a defence must be decided on its own unique set of circumstances. CPR rules 12.10 states:

"(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the particulars claim.

(5) An Application for the court to determine the terms of the judgment under paragraph (4) need not to be on notice but must be supported by evidence on affidavit and rule 11.15 (service of application where order made on application made without notice) does not apply."

[28] Taking all the issues into account including the defence, the delay, the case law applicable and the over-riding objective. I am of the view that that the application for

Extension of time to file a defence must be refused;

Costs are awarded to the claimant to be agreed or taxed;

The matter of the Application to enter Default Judgment is to move forward.