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IN THE HIGH COURT OF JUSTICE
(CIVIL)
A. D. 1994

SUIT No. 588 of 1992

BETWEEN

SANDRA AUBERT

Plaintiff

and

1. IGNATIUS MANGAL
2. REILLY ELIBOX

Defendant

Mr. E. Calderon for Plaintiff
Mr. A. McNamara for Defendants

1994: June 1 and 8.

JUDGMENT

MATTHEW J. (*In Chambers*)

On December 1, 1992 the Plaintiff filed a writ of summons indorsed with statement of claim asking for damages for personal injuries sustained on December 1, 1989 as a result of the first Defendant driving a vehicle owned by the second Defendant.

The Defendants entered appearance on April 14, 1993. The next step in the proceeding was a summons for summary judgment under Order 14 of the Rules

of the Supreme Court filed on April 14, 1994 supported by an affidavit of the same date.

Submissions of Counsel

Learned Counsel for the Plaintiff stated that he had been negotiating with the Defendants' solicitor. He stated that on September 22, 1993 he wrote requesting for a defence but no defence had been filed and this being the case he was applying for summary judgment under **Order 14** in default of defence.

Learned Counsel for the Defendants submitted that the Plaintiff could not ask for judgment in default of defence under Order 14 summons. Counsel submitted in reply to the **Order 14** summons that the Defendants have a defence.

Counsel also relied on **Order 34 Rule 11** of the **Rules of the Supreme Court** and submitted that the matter is abandoned and incapable of being revived and if it was not abandoned it was deserted under **Order 34 Rule 7** and there had been no order for consent or revivor to enable further proceedings to be taken in the matter.

In reply learned Counsel for the Plaintiff submitted that he was quite aware of **Order 34 Rule 11** but the reason why time elapsed was because of the negotiations he was undertaking with the Defendants' solicitors.

Conclusions

It seems to me that the prudent thing to be done by the Plaintiff or his Counsel was to enter judgment in default of defence as soon as the period for that defence to be entered had expired. This could be done by virtue of **Order 19 Rule 3**. No summons is required for that or any order from the Judge.

A matter shall be deemed deserted if no request for setting down is filed within six months after the expiration of the period fixed for the filing of such request. **Order 34 Rule 7(1)**.

When the Defendants failed to deliver defence the matter did not become ripe for hearing because the Plaintiff did not comply with **Order 19. See Order 34 Rule 3(1)(a)**. It follows that there was no duty on the Plaintiff to file a request for hearing six weeks thereafter in accordance with **Order 34 Rule 1**; and so there could be no desertion of the Suit.

Order 34 Rule 11 (1)(a) was not complied with since one year elapsed between the appearance of the Defendants on April 14, 1993 and the filing of the summons for summary judgment on April 14, 1994. It follows that the matter was deemed abandoned by April 13, 1994 and was incapable of being revived.

The Plaintiff has not prosecuted this case with diligence. She barely made the deadline for issuing the writ for according to the statement of claim the

accident occurred on December 2, 1989 and the writ was filed on December 1, 1992. I am not even sure if it was saved. **Article 2121** of the **Civil Code** lists among the actions which are prescribed by three years, actions for damages resulting from delicts, under which head the Plaintiff's claim may fall.

In my judgment the fact that the Plaintiff's solicitor was negotiating with the Defendant's solicitor is no reason for her to be delinquent in observing the substantive law or the Rules of Court and the cases have so illustrated. I have in mind the **Jamaican case** where the solicitor who was negotiating with the insurance company and who at his peril allowed the period of limitation to slip by without filing the writ of summons.

In **Privy Council Appeal No. 37 of 1988** between **Barbuda Enterprises Ltd v the Attorney General of Antigua and Barbuda** the issue raised concerned the interpretation and application of **Order 34, Rules 7 and 11.** The Privy Council described Rule 11 as having the draconian effect that, if a Plaintiff fails to take the appropriate steps within specified time limits to have his action set down for hearing, the action is automatically struck out and cannot be restored. At page 4 of the judgment of the Judicial Committee it is stated:

> "Harsh as it may seem, this is, in their Lordships' judgment, the inescapable consequence of the plain language of Order 34 and the Court has no discretion to relieve against it."

The Board seems to have agreed with *Mitchell J* and the Court of Appeal that Order 34 was not a mere irregularity giving the Court a discretion either to set aside the proceedings under Order 2 or to extend the time under Order 3.

However, they advised that the judgments of the Courts below should be set aside. They arrived at that view by coming to the conclusion that since no order as to the place or mode of trial was made on the summons for directions the action never became ripe for hearing within the provisions of **Order 34 Rule 3(1)(c)**.

In the **Barbuda Enterprises** case the Attorney General relied on sub-paragraph (b) of Rule 11(1) as the cause for deeming the suit abandoned and incapable of being revived. This provision is related to the suit having been deserted. In this case the Defendants rely on subparagraph (a) of Rule 11(1) which is unrelated to the matter first having been deserted.

Another relevant authority on **Order 34 Rule 11** is **Robertson v Isaac (1981) 28 W.I.R. 86; 1984 3 A.E.R. 140**.

In my judgment the action is deemed altogether abandoned and incapable of being revived.

The application for summary judgment is dismissed. There will be no order as to costs.

A.N.J. MATTHEW
Puisne Judge.