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SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 383 of 1990

BETWEEN:

PETER MAX AUGUSTE

Plaintiff

and

EDWARD JULES

Defendant

Mrs. P. Nelson for Plaintiff
Mrs. S. Lewis for Defendant

1996: September 25;
October 2.

J U D G M E N T

MATTHEW J. (In Chambers).

On November 23, 1990 the Plaintiff filed a writ of summons indorsed with statement of claim asking for special damages of $40,000 and other relief for personal injuries.

The Defendant was served on December 5, 1990.

On July 28, 1993 the Plaintiff filed a notice to proceed with the matter.

Nothing further happened until April 16, 1996 when the Plaintiff filed a summons for an order to revive the action.

Learned Counsel for the Plaintiff submitted that the notice of proceedings filed in July 1993 was pursuant to Order 3 Rule 6 of the Rules of the Supreme Court and it was necessary to ask for revivor under Order 34.

Anticipating her difficulties under Order 34, Rule 11, learned Counsel submitted that there was a contradiction between Order 3,

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Rule 6 and Order 34 Rule 11 and she asked the Court to rule which of the orders took precedence.

In her reply learned Counsel for the Defendant submitted that the matter ought to be deemed abandoned under Order 34 Rule 11 (1) (a) and (b).

Apparently Counsel has not given much heed to the distinction between the applications of Rule 11 (1) (a) and Rule 11 (1) (b). I am going to confine my attention only to Rule 11 (1) (a). The authority of **SYDNEY BUTCHER v. LAURENCE HUNTE Suit No. 189 of 1994** which Counsel relied on was based on Rule 11 (1) (a).

Rule 11 (1) (a) is as follows:

> "A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein."

Two periods run foul of that rule:-

(a) the period between the filing of the affidavit of service, December 7, 1990 and the notice to proceed with the matter filed July 28, 1993; and

(b) the period between July 28, 1983 and the summons to revive filed on April 16, 1996.

Learned Counsel for the Plaintiff attempts to answer the difficulties by submitting that there is a contradiction in terms between Order 3, Rule 6 nd Order 34 Rule 11.

Order 34 Rule 11 (1) (a) is peremptory in its terms. It states clearly that a matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for

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hearing any party has failed to take any proceeding or file any document for one year since the last proceeding or filing.

Order 3 rule 6 simply states that if a year or more has elapsed since the last proceeding any party who desires to proceed must give to the other party one month's notice.

In my view there is no inconsistency between the orders. These two orders were considered in Civil Appeal No. 21 of 1993, **ST. HILLAIRE v. LEWIS** decided on February 6, 1995. At pages 7 - 8 Floissac C.J. stated:

> "Order 34 Rule 11 (1) confers upon a defendant a procedural right which he is entitled to waive if he considers that it is in his interest so to do. Order 3 Rule 6 does not deprive the defendant of that right."

Singh J.A. expressed the same sentiments at pages 13 - 14 where he said:

> "I observe from the record that some five weeks after the appellants moved the the Court to have the cause deemed abandoned, the respondent sought refuge under Order 3 Rule 6 and filed a notice of intention to proceed after a year's delay. In the context of this matter, this notice is ineffective. Such a notice will only have had the desired efficacy, if the appellants had chosen not to avail themselves of the benefit of Order 34, Rule 11."

For the reasons expressed above I dismiss the summons to revive the action and I order that the matter be deemed abandoned and

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incapable of being revived. I order the Plaintiff to pay the Defendant's costs in the sum of $500.00.

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A. N. J. MATTHEW
Puisne Judge

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