THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 300 OF 2003

BETWEEN:

BUDHILL JOHNSON

Respondent/Claimant

v

EPHRAIM WILLIAMS

Applicant/First Defendant

Appearances: Mr. Ronald Jack for the Respondent/Claimant
Mr. Emery Robertson for the Applicant/First Defendant

2005: July 19
2007: July 29
December 14

JUDGMENT

[1] **THOM, J (IN CHAMBERS)**: This is an application to set aside a judgment given in the absence of the Applicant pursuant to Part 39.4 of CPR 2000.

[2] At the hearing of this application on the 19th July 2005 Learned Counsel for the Applicant Mr. Emery Robertson informed the Court that the very issue to be determined in this application was the subject of an appeal from the jurisdiction of Saint Vincent and the Grenadines. By consent it was agreed that the matter should be adjourned until the Court of Appeal had ruled on the matter. Unfortunately, the matter was not listed again until June 29th 2007. At that hearing Learned Counsel for the Applicant informed the Court that the decision of the Court of Appeal was delivered some time ago but due to inadvertence a request for hearing was not made. To date, Learned Counsel has not provided the Court with the decision.

BACKGROUND:

[3] The background to this matter is that on the 29th October 2003 a Case Management Conference was held by the Learned Master. Both the Applicant and his Counsel were present. Trial of the claim was set for April 19, 2004. On April 19, 2004 the Defendants failed to attend Court and Judgment was entered for the Claimant with damages and costs to be assessed by the Master. On April 28, 2004 the Applicant made application to have the judgment set aside. The ground of the application was that there was a genuine error as to the date of the trial. This application was heard by the Learned Master on the 2nd June 2004 and the application was dismissed. Damages and costs were assessed by the Master on July 30, 2004 and the Order entered on 17th March 2005. On March 21, 2005 the Respondent/Claimant made application for a writ of execution.

[4] The Applicant/First Defendant made this Application on the 8th day of June 2005 to have the Judgment entered for the Claimant on April 19, 2004 set aside.

SUBMISSIONS:

[5] Learned Counsel for the Respondent/Claimant submitted that the Master having heard the application to set aside, and having dismissed the application, the Court had no jurisdiction to hear the application. The Applicant's only recourse if dissatisfied with the Master's decision was to make an appeal to the Court of Appeal.

[6] Learned Counsel for the Applicant submitted that the Master had no jurisdiction to hear an application under Part 39.5 of CPR 2000. The application ought to have been heard by the trial judge who heard the matter or another judge. The Court should hear the application and exercise its discretion.

[7] Learned Counsel for the Applicant further submitted that the Judgment should be set aside on the following grounds:

(a) The Order of the Court omits to set out proof of notice as is required by Part 39.4 (1) – ***White v Weston*** (1968) 2QB p. 643; further it was for the Court to inform the litigants of the date set for hearing ***Grimshaw v Dunbar*** (1953) 1 AER p. 350.

(b) There has been no undue delay in making the application.

(c) The Applicant has a good reason for failing to attend the hearing.

(d) The Applicant has a real prospect of success on the issue of vicarious liability.

ISSUES:

[8] The issues to be determined are:

(a) Whether the Court has jurisdiction to hear the Application the Learned Master having heard an earlier application and dismissed same.

(b) If the Court has jurisdiction to hear the Application whether the judgment should be set aside.

JURISDICTION:

[9] The Learned Master having heard the application the issue whether the Master had jurisdiction to hear the application is in my view a matter which must be the subject of an appeal to the Court of Appeal. In the event that I am wrong I will consider the application on its merit.

PART 39.4 AND 39.5:

[10] The power of the Court to grant judgment in the absence of a Party and to set aside such judgment is outlined in Part 39.4 and 39.5 respectively.

[11] Under Part 39.5 an application must satisfy the Court of the following:

(a) The application must be made within 14 days of service of the judgment or order.

(b) The Applicant by way of affidavit evidence must show:

(i) a good reason for failing to attend the hearing.

(ii) That it is likely that had the applicant attended some other judgment or order might have been given or made.

In my opinion a Court can only set aside a judgment pursuant to 39.5 where all of the requirements have been satisfied.

NOTICE OF HEARING:

[12] In relation to the submission on behalf of the Applicant that the Order omitted to set out proof that notice of the hearing was served on the Applicant, the Order reads as follows:

> "This action having by Order dated the 29th of October 2003 been set down for trial on the 19th day of April 2004 and the Defendants not appearing upon hearing the evidence of the Claimant and his witnesses:
> IT IS HEREBY ORDERED:
> 1. That judgment be entered for the Claimant against both Defendants with costs.
> 2. That damages and costs be assessed by the Master in Chambers."

[13] The Applicant in his affidavit dated 28th April 2004 which was exhibited with his affidavit dated 8th June 2005 deposed in paragraphs 3 and 4 as follows:

> "3. On the 29th October 2003 I attended a Case Management Conference where a time table was set for the handling of the case.
> 4. At the Case Management Session I incorrectly recorded the date for standard disclosure as the 19th November 2003 and the date of trial as 28th April 2004. The correct dates were the 28th November 2003 and 19th April 2004."

[14] The Applicant was present when the Order of the Court was made on October 29, 2003 fixing the trial of the matter for April 19, 2004. The Learned Trial Judge referred to this very order in her Order of April 19, 2004. The case of ***White v Weston*** can be distinguished from this case. In ***White v Weston*** the summons was posted to an address which at the relevant time was not the defendant's residence or his place of business. The Court held there was no service of the summons.

[15] In my opinion Part 39.4 requires the Court to be satisfied that a Party is notified of the trial date. It does not make it mandatory for the trial judge to state in the Order that the Court is satisfied that the Party was notified of the trial date.

TIME FOR MAKING APPLICATION:

[16] In relation to the time within which the Application must be made Learned Counsel for the Applicant submitted that the application was made within 14 days and dismissed by the Master. There was no undue delay in making the application. Part 39.5 requires an application to set aside to be made within 14 days. I agree that the application which was heard by the Learned Master was made within the 14 day period. There is no order extending the time within which to file this application. This application was filed one (1) year and two (2) months after judgment was granted and one (1) year after the application was dismissed by the Learned Master. The Applicant has given no explanation for the delay in his affidavit in support of this application. I find that this application is out of time and there has been unreasonable delay in making this application.

GOOD REASON FOR ABSENCE:

[17] Learned Counsel for the Applicant submitted that there was a genuine error on the part of the Applicant and his Counsel that resulted in the Applicant being absent from the trial. Having read the affidavit of the Applicant and his Counsel at the time Mr. Ronald Marks, I find that there was a genuine error as to the date of the trial.

LIKELIHOOD OF SOME OTHER JUDGMENT OR ORDER BEING MADE:

[18] Learned Counsel for the Applicant submitted that the Applicant has a real prospect of success on the issue of vicarious liability and referred the Court to paragraph 5 of the Applicant's defence and paragraph 10 of his affidavit in support of his application.

Paragraph 5 of the Applicant's defence reads as follows:

> "It is not admitted that the said accident was caused by negligence of the Second Defendant. It is denied that the Second Defendant was acting as a servant or agent of the First Defendant. At all material times the Second Defendant was employed as a conductor. The Second Defendant by driving the van as alleged was not authorized or employed in the capacity of a driver. The alleged action of the Second Defendant constituted an unauthorized act in an unauthorized manner

and the First Defendant denies that he is vicariously liable as implied by paragraph 5 of the Statement of Claim."

While paragraph 10 of the Applicant's affidavit reads:

> "10. That the Statement of Claim raised the question of my liability for the act of my employee in circumstances which clearly warrants a hearing on the merits before any decision can be made and in these circumstances to allow the decision to stand does create injustice to me."

Reference is made to paragraph 3 of the Statement of case which states:

> "The Second Defendant was at all material times employed by the First Defendant as Conductor and to paragraph 5 of my defence which specifically defines the nature of his employment "as a conductor and his unauthorized use of the vehicle as a driver."

[19] No witness statement was filed by the Applicant nor was any witness statement filed on his behalf. Having reviewed paragraph 5 of the Applicant's defence and paragraph 10 of his affidavit, I find that there is no evidence upon which the Court could make a finding that had the Applicant attended it is likely that some other judgment or order might have been given or made.

CONCLUSION:

[20] In view of the above I find that the Applicant has not satisfied all of the requirements of Part 39.5. The Application is dismissed. The Applicant shall pay the Respondent costs in the sum of $1,500.00.

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Gertel Thom
HIGH COURT JUDGE