

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0976

BETWEEN:

1. MODESTE JOSEPH
2. MARILYN JOSEPH

Claimants

and

PETER FELICIEN

Defendant

Appearances:

Mr. Horace Fraser for the Claimants

Mrs Wauneen Louis Harris for the Defendant

2012:

2012: April 17th

Decision

[1] **BELLE J:** On 23rd May 2011 this court made a case-management order and stated in paragraph 1 of that order:

"The Claimant is granted an extension of time to file a defence to the Defendant's Counterclaim on or before 6th June 2011.

[2] On July 25th 2011 the Applicants/Claimants Modeste Joseph and Marilyn Joseph applied for the following Orders:

1. "That leave be granted to them to have their Defence to the Counterclaim filed herein on the 25th July deemed as properly filed.
2. That they be granted relief from sanctions for not filing and serving their Defence to the Counterclaim by 6th June, 2011 as ordered by the Court."

[3] Perusal of the grounds of the application and the affidavit in support reveal that the Applicants claim to believe that the Defence was done sometime in late May and given to the Clerk for filing at

the Registry. The Claimants assert that the Defence to counterclaim was lodged at the Registry but during a recent check at the Registry it was discovered that there was no record of its filing.

[4] In paragraph 3 of the Affidavit of Clarita Phillip Manager of the Law Office of Fraser & Company it was stated on the Applicants' behalf that she Clarita Phillip was advised by counsel and believes that before the 6th June, 2011 a Defence to the Counterclaim was prepared and lodged at the Registry for filing.

[5] The deponent states at paragraph 4 of the affidavit that:

"I ordered the Clerk at Chambers to check at the Registry to ascertain the status of the said Defence but the information relayed to us was that there was no record of the said Defence recorded on the system at the Registry."

[6] I must say at the outset that the factual foundation for seeking relief from the court in this matter is quite dubious. This is important since both parties agree that Part 26.8 is of relevance in determining relief from sanction, and it is noted that in order to satisfy the criteria laid down in that Part of the CPR the court must be inclined to accept that the failure to comply with the order of the court was not intentional and that there was a good explanation for the failure to comply.

[7] As I examine the language of the Applicants, the Applicants claim that they lodged the document for filing. Nothing is said about the process of lodging documents at the Registry to convince the court that a genuine effort was made to file the Defence to counterclaim before the court's deadline of 6th June 2011. There is no reference to the person with whom the document was lodged, the time of day on which it was lodged, no stamped copy was produced to show that any lodging was done and no member of the registry staff gave evidence in support of the Applicants that they recall such a document being filed on any particular date.

[8] The affidavit therefore has the hallmark of a well contrived but shallow story based on bare bone assertions, which are difficult to refute but are in no way supported by any independent evidence. I therefore conclude that this story is untrue.

[9] The Respondent attacks the affidavit on other grounds, but I believe that the person used to make the affidavit was as good as any in the circumstances since there is no evidence that the Claimants themselves could have provided a better explanation for the failure to comply with the court's order.

- [10] Having concluded that the factual matrix is untrue it is extremely difficult for me to find that there was a good reason for failing to comply with the court's order since that good reason has not been provided to the court.
- [11] In the final analysis then the respondent's argument must prevail. Counsel for the Defendant submitted that the court has no power to deem a document which has been filed outside of a time limit imposed by an Order of the Court as validly filed. I think that this submission is correct. While the court may have made such an order where the application was not opposed, when there is opposition as there is in this case, there can be no declaration that the document is validly filed when it clearly is not validly filed.
- [12] The court can grant an extension of time to file the document or vary the court's timetable imposing a particular time limit for filing. Parts 27. 8 (3) and (4) provide for this approach to be taken in the appropriate circumstances.
- [13] I agree that after the deadline has passed the applicant must seek an extension of time (a) and (b) relief from sanction, if any.
- [14] Counsel also argued the Applicants had failed to comply with part 26.8 which provides guidelines for granting relief from sanction.
- [15] I note here that even though there was no clearly stated sanction set out in the order of the court, it must have been implied in the court's order granting leave for the Defence to counterclaim to be filed by 6th June 2011 that failure to comply would mean that the Defence could not be filed without a further application seeking leave from the court.
- [16] Counsel for the Applicants states that Part 26.8 of the CPR 2000 provides for preconditions (i) prompt application and (ii) that the failure to comply was not intentional and (iii) there is a good explanation for the failure to comply.
- [17] Counsel argued that the application was made promptly after it was discovered that no filed defence was returned to Counsel's Chambers and the reason advanced by the Applicant speaks to a good explanation for non-compliance which was not deliberate nor calculated.

- [18] While I accept that the failure to comply with the Court's order may not have been deliberate, I reject the notion of a good explanation. As I have noted before, the explanation is not good and appears to me to be untrue. I expand on that theme below.
- [18] In the circumstances of this case counsel should have been on high alert in relation to the filing of the defence to counterclaim. It would have been important not only to file it, but also to serve it. A defence to a counterclaim requires no date of hearing to be inserted so what would have been the delay in retrieving a copy for service? Any delay would have triggered an immediate phone call to counsel on the other side providing some explanation for the delay. Nothing has been said about any such call being made to allay fears that there would have been another failure to comply with the court's order or rules.
- [19] Counsel argues that where the fault of non-compliance falls at the feet of counsel and not of the client, relief ought to be granted. There was an insinuation here that the fault may have lay with the Registry staff but I reject this insinuation without further proof.
- [20] In my view where counsel is at fault and gives a good explanation then certainly relief from sanction may be considered if other criteria are satisfied. But where counsel fails to provide a good explanation, it is of no moment that the failure to comply is counsel's fault. In this case the explanation is unbelievable and is rejected by the court.
- [21] Counsel also raised the issue of prescription. In my view the matter of prescription is for another hearing if or when the issue of judgment being entered against the Claimants is being considered. At this time the issue before the court was whether there was a legitimate explanation for failing to comply with the court's order. I hold that there was not.
- [22] I would therefore dismiss the Claimants application to grant leave to them to have the Defence to the Counterclaim deemed properly filed. I would also dismiss the application for the Applicants to be relieved from sanction for failing to file and serve the Counterclaim by the 6th June, 2011 as ordered by the court.

[23] The Claimants are to pay the Defendant's costs in this matter pursuant to part 65 of the CPR 2000.

Francis H V Belle
High Court Judge