

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

DOMHCV 2011/0158

BETWEEN:

[1] EUSEBILA LEWIS
[2] DUANE LEWIS

Claimants

and

LANNICK BARDOUILLE

Defendant

Before:

Ms. Agnes Actie

Master [Ag.]

Appearances:

Mr. Wayne Norde of counsel for the Claimants/Ancillary Defendant

Mrs. Gina Dyer-Munroe of counsel for the Defendant/Ancillary Claimant

2012: November 21;

2013: March 28

JUDGMENT

[1] **ACTIE MASTER [AG.]:** This is a claim and counterclaim for damages as a result of a motor vehicle accident.

Background

[2] The claimants by claim form with statement of claim filed on 27th May 2011 claim against the defendant for damages and interests thereon as a result of a motor vehicular accident. The second claimant being the driver of the vehicle owned by the first claimant.

- [3] The defendant filed a defence and counterclaim on 27th June 2011 disputing the claim and by way of counterclaim claimed for damages, costs and interests as a result of the accident against the claimants.
- [4] The claimants/ancillary defendants failed to file a defence within the time prescribed by **CPR 2000**.
- [5] By application filed on 18th October 2011, the ancillary claimant/defendant filed a request for judgment in default of defence on the counterclaim against the claimants/ancillary defendants.
- [6] By Order dated 24th October 2011, the Court entered judgment in default of defence on the counterclaim for the ancillary claimant/defendant.
- [7] By notice of application and defence filed on 1st March 2012, the claimants/ancillary defendants applied for the judgment in default of defence to be set aside and leave to enter their defence to the counterclaim out of time.
- [8] On 27th March 2012, Master Lanns refused the claimants/ancillary defendants' application to set aside the default judgment in the counter claim. Master Lanns also refused the application for leave to file the defence out of time on the ground that the claimants/ancillary defendants had failed to give a good explanation for the failure to file a defence within the time prescribed .
- [9] On 19th July 2012, Master Mathurin set aside the judgment in default granted by the Court on 24th October 2011 as being irregular pursuant to Part 18.2(4) (b) and advised that any application in this regard would be considered by the Court at a subsequent hearing.
- [10] On 14th September 2012, the claimants/ancillary defendants filed a defence to the counterclaim denying the ancillary claimant's claim. The claimants/ancillary defendants aver that the accident was caused by the negligence of the ancillary claimant/defendant.

- [11] By notice of application with affidavit in support filed on 19th September 2012, the ancillary claimant/defendant applied to strike out the defence to the counterclaim filed by the claimants/ancillary defendants. The ancillary claimant/defendant contends that the defence should be struck out and judgment entered on the ancillary claim in accordance with **CPR 2000** Rule 18.12(2). The claimant further contends that the said defence was not filed within the permitted time in accordance with CPR Rule 18.9(2) and as such the claimants are deemed to have admitted the claim in accordance with **CPR 2000** Rule 18.12(2)(a).
- [12] The ancillary claimant/defendant contends that the defence should be struck out as it was filed on 14th September 2012, some 318 days after the said claim was served on the defendants.
- [13] The claimants/ancillary defendants in response referred the Court to **CPR 2000** part 26.7(2) which provides:
- “if a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance **imposed by the rule** (defendant’s emphasis) direction or the order has effect unless the party in default applies for and obtains relief from sanction, and rule 26.9 does not apply”.
- [14] The claimants/ancillary defendants further contend that the failure to file and serve the defence to the counterclaim after the time had passed attracts no sanction and therefore the corresponding result is that filing and service of the said defence to the counterclaim may be effected at any time before the defendant/ancillary claimant made any appropriate request to the court. The claimants/ancillary defendants relied on the Privy Council decision in **The Attorney General v Keron Matthews** (2011) UKPC 38.

The Law

- [15] **CPR 2000** 18 deals with ancillary claims. Rule 18.9 deals with defence to an ancillary claim and provides:
- (1) A person against whom an ancillary claim is made may file a defence.

(2) The period for filing a defence is the period of 28 days after the date of service of the ancillary claim.

[16] **CPR 2000** 18.12 provides special provisions relating to judgment on failure to file defence to ancillary claim and states:

(1) This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

(2) The party against whom the ancillary claim is made: –

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim.

Analysis

[17] A defendant may file a defence after the expiration of the time prescribed by **CPR 2000** 10.3 with or without permission at any time before the claimant files for a default judgment without any sanctions. The Privy Council in **Attorney General v Keron Matthews** [2011] UKPC 38I held that a defence can be filed without the permission of the court after the time for filing a defence has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises.

[18] The position is different in ancillary claims. The failure to file a defence to an ancillary claim within the time prescribed will be deemed to be an admission of the ancillary claim and to the extent that it is relevant, the ancillary defendant will be bound by any judgment or decision in the substantive claim. (**Blackstone's Civil Practice 2000** Para 29.8 pg. 247).

[19] A defendant who fails to file a defence within the 28 days prescribed under **CPR 2000** 10.3 can benefit from the inaction of the claimant. The defendant may file a defence at any time before the claimant makes a request for a default judgment.

The defendant in such a case would not be deemed to have admitted the claim. The converse obtains under **CPR 2000** 18.12. The ancillary defendant who fails to file a defence to an ancillary claim within the prescribed 28 days period will be deemed to have admitted the ancillary claim after the expiration of the period without any request for default judgment by the ancillary claimant. It is to be noted that default judgments are not permitted in ancillary claims. **CPR 2000** 18.2(4) (c) provides that Part 12 (default judgments) does not apply to ancillary claims.

[20] The claimants/ancillary defendants urge the Court to exercise its general powers under **CPR 2000** 26.9 and to permit the defence to the counterclaim. The Court notes that the defendant had by a two-tier application dated 1st March 2012 sought leave for an extension of time within which to file the defence to the counterclaim out of time and also to set aside the default judgment granted by the Court on 25th October 2011. By Order dated 27th March 2012, Master Lanns refused to set aside the default judgment in the counter claim. The Learned Master also refused the application for leave to file the defence out of time on the ground that the claimants had failed to give a good explanation for the failure to file the defence within the prescribed time. It is to be noted that the exact same defence before the Court was filed on 1st March 2012 together with the application before Master Lanns.

[21] The Order of Master Mathurin made on 19th September 2012 setting aside the default judgment granted by the Court on 25th October 2011 rendered the Order made by Master Lanns refusing to set aside the default judgment redundant. However Master Mathurin's Order did not affect the Order of Master Lanns refusing leave to file the defence to the counterclaim out of time. The setting aside of the default judgment in any event would not stop the time from running in relation to the period to file the defence and the consequences for the non-compliance with **CPR 2000** 18.12.

[22] It is axiomatic that the application for leave to file the defence out of time has been dealt with by Master Lanns and as a result the issue is *res judicata*. The Order of Master Lanns refusing leave to file the defence out of time has not been set aside, varied or successfully appealed. The Privy Council in the case of **Isaacs v Robertson** 3 WLR 705 held that an order of the Court is valid unless set aside, varied or successfully appealed. The extant Order of Master Lanns refusing the extension of time is still alive. An application to determine the same issue is an abuse of process. The second defence to the counterclaim filed by the claimants/ancillary defendants on 14th September 2012 is a nullity.

[23] Even if I were to rule otherwise the claimants/ancillary defendants defence would still fail having regard to the factors that the Court usually take into consideration in exercising its discretionary power under **CPR 2000 26.9** namely: (1) The length of time- inordinate delay of 318 days after the filing of the defence; (2) The reason for the delay – the change of solicitors. Litigation belongs to the litigant not the solicitors. It is the litigant's duty to follow up on his matter; (3) The likelihood of success – the claimants have not provided any convincing evidence to influence the court; (4) The prejudice if granted or refused – it is the ancillary claimant and not the ancillary defendants who would be prejudiced if the defence was allowed.

Order

[24] Upon reviewing the facts, the relevant rules, authorities and in keeping with the overriding objectives of **CPR 2000**, it is ordered as follows:

- (1) The defence filed on the 14th September 2012 by the claimants/ancillary defendants on the counterclaim is struck out as an abuse of process.
- (2) The claimants/ancillary defendants are deemed to have admitted the counterclaim filed by the defendant/ancillary claimant on 27th June 2011 pursuant **CPR 2000 18.12(2) (a)**.

- (3) Costs to be assessed if not agreed within 21 days of this order.
- (4) The matter is adjourned to a date to be fixed by the Registrar for further case management.

Agnes Actie
Master [Ag.]