THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2011/0320

BETWEEN:

ADAM BILZERIAN

Respondent/Claimant

and

KEVIN HORSTWOOD

Applicant/Defendant

Appearances:-

Dr. Dennis Merchant with Mr. Jermaine Chiverton of Counsel for the Respondent/Claimant.
Applicant/Defendant unrepresented.

2016: February 05

DECISION

[1] **CARTER J.:** On 02nd November 2011, the respondent/claimant filed a claim form supported by Statement of Claim seeking the following relief:

> *"1. A declaration that he owns all of the issued and outstanding shares of CBS*
> *2. A declaration that the defendant is not a shareholder nor does he hold any position in CBS*
> *3. A declaration that the defendant is not a shareholder nor does he hold any position in Lemon Grove*

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4. An injunction restraining the defendant whether by himself, his agents or assigns from in any way interfering in the running or affairs of either CBS or Lemon Grove
5. Costs and
6. Such further or other relief as to the court seems just."

[2] The applicant/defendant filed a defence to the claim and counterclaim on 05th December 2011.

[3] On 13th December 2011, the applicant/defendant filed an application to stay the proceedings until 1st February 2012. The order of 16th December 2011 indicates that the court considered the application and ordered that:

"*1. The matter is to proceed in accordance with the Civil Procedures Rules 2000; and*
2. No order as to costs"

[4] The respondent/claimant filed a notice of application for summary judgment (hereinafter referred to as the "1st application") on 16th January 2012. The respondent/claimant applied for an order that he is entitled to summary judgment on his claim without a trial by reason that the applicant/defendant has no real prospect of successfully defending the claim as his defense discloses no reasonable ground for defending said claim. This matter was due to be heard on 3rd February 2012.

[5] The first application with the affidavit in support of the application, and certificate of exhibits were served on the applicant/defendant on the 26th January 2012. The service of these documents was evidenced by the affidavit of service of Deborah Claxton filed on 27th January 2012 which stated that she had on "*Thursday the 26th day of January 2011 at 9:20a.m., personally served a notice of application for summary judgment, an affidavit in support of that application and certificate with exhibits referred to in the said affidavit on Kevin Horstwood the defendant in this*

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action under the arch of Her Majesty's Prison. He was outside the precincts of the prison and in the presence of a Prison Officer."

[6] On the 31st January 2012, the respondent/claimant filed a certificate of extreme urgency wherein Counsel for the respondent/claimant related that the first application "*is one of extreme urgency in that there is a risk of uncertainty as no person is presently in control or possession of the respective premises and movable assets have already begun to disappear*."

[7] On the 1st February 2012 the respondent/claimant filed a reply and defence to counterclaim.

[8] On the 3rd February 2012 at the hearing of the first application Counsel for the claimant appeared. The defendant did not appear and the matter was adjourned to a date to be fixed by the court officer after notification to the court office.

[9] There is no further indication on the court file as to why the matter was adjourned, however the claimant on the 10th February 2012 filed another notice of application (hereinafter referred to as the "2nd application") seeking to have the "*hearing of an application for Summary Judgment which was set for the 3rd day of February 2012 be adjourned from that date to the 17th day of February 2012, notwithstanding that the hearing date initially set has passed without the matter being heard."*

[10] The grounds of the 2nd application of 10th February 2012 was to the effect that:

> *"1. The hearing date was set for the 3rd day of February 2012.*
> *2. The respondent/defendant who was unavailable to be served was only served on the 26th day of January 2012. The mandatory fourteen (14) days' notice was unable to be met between the date set by the Court office and the service of the application on the respondent/defendant.*

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3. The applicant/claimant had no control over the fixing of the date for the hearing."

[11] The affidavit filed in support[1] of the 2nd application states, inter alia that:

> *"…*
> *4. I am informed by Deborah Claxton that she served a copy of the said Notice of Application on the defendant*
> *5. It is my further information and belief that the date set for the application to be heard came and passed before the mandatory fourteen (14) days had elapsed.*
> *6. It is my understanding and belief from Counsel having conduct in this matter and from knowledge of documents served at these law offices that the respondent Kevin Horstwood has not filed or served on these law offices, any affidavit evidence in reply to the application for summary judgment within the time limited for his so doing."*

[12] These documents appear to provide the reason why the 1st application did not proceed as scheduled on the 3rd Feb 2012. A date of 2nd March 2012 next appears as the hearing date of the 1st application.

[13] On 29th Feb 2012 the respondent/claimant filed an affidavit of service wherein it was stated that the deponent Deborah Claxton had served a copy of the notice of application and an affidavit in support of the application on the applicant/defendant on 20th Feb 2012. As with the affidavit of service referred to above at paragraph 5 above, the deponent stated that she had served the notice personally on the applicant/defendant and that he was outside the precincts of the prison and in the presence of a police officer at such time.

[14] From the foregoing, it is evident that the service of the notice of application on 20th February 2012 was to provide the applicant/defendant with the new hearing date of the 1st application which was to be 2nd March 2012.

[1] Affidavit in support filed on 10th February 2012

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[15] On 2nd March 2012, the 1st application again came up before Thomas J. The claimant and his attorney were present. The defendant was not present. Up to this time the applicant/defendant had filed a defence to the claim on 5th December 2011 but had filed no affidavit in response or any reply to the first application. The Learned Judge "*Upon hearing the Applicant/Claimant and upon reading the Application and Affidavit in Support of Application for Summary Judgment and Upon hearing counsel for the Applicant/Claimant"* made the following order:

> *" 1. That the claimant, Adam Bilzerian is the owner of all the issued and outstanding shares of Caribbean Building Systems (St. Kitts) Ltd.*
> *2. That the defendant, Kevin Horstwood is not a shareholder nor does he hold any position in Caribbean Building Systems (ST. Kitts) Ltd.*
> *3. That the defendant, Kevin Horstwood is not a shareholder nor does he hold any position in Lemon Grove Co. Ltd.*
> *4. The defendant, Kevin Horstwood is restrained by himself, his agents or assigns from in any way interfering in the running or the affairs of either Caribbean Building Systems (St. Kitts) Ltd. or Lemon Grove Co. Ltd."*

[16] On 7th November 2013, the applicant/defendant filed a notice of application to set aside summary judgment and for leave to file and serve a defence out of time.

[17] The grounds of the application were as follows:

> *"1. The Applicant /Defendant is currently incarcerated at Her Majesty's Prison and was so in December 2011, shortly after the filing of Claim by the Respondent/Claimant, and the Defence by the Applicant/Defendant.*
> *2. The Applicant/Defendant was unable to obtain legal representation in the matter and sought represent himself. Based on the Defence and Counterclaim filed in the matter, it shows that the Applicant/Defendant had no legal representation as the filed defence was not in accordance with Rule 10.5 of the Eastern Caribbean Supreme Court Civil Procedure Rule 2000. The Defendant has found counsel who is willing to represent him in the matter.*

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3. *The Applicant/Defendant was not able to attend court for the hearing of the application by the Claimant/Respondent for Summary Judgment in the claim contrary to natural justice. The Claimant/Respondent served the application on the Applicant/Defendant personally in prison instead of the Superintendent of Prisons in accordance with the Prison Act and its regulations. Further, the Claimant/Respondent failed to obtain a court order for the Applicant/Defendant to be present at the hearing of the application thus depriving the Applicant/Defendant of being present at the hearing. It is contended that the Claimant /Respondent used the incarceration of the Defendant/Applicant for his benefit.*

4. *The Order made in the matter has sought to make the Claimant/Respondent the owner of shares in Caribbean Building System (St. Kitts) Ltd. A separate legal entity to the Applicant/Defendant who is not a party to the proceedings. It is contented that such an order is fatal in law as a final order cannot be made against a third party without them being a party to the proceedings and having the ability to defend themselves. Caribbean Building Systems (St. Kitts) Ltd. And its subsidiary company Lemon Grove Company Limited should have been made a party to the proceedings and given the right to defend themselves in the matter.*

5. *The Order made in the matter removed the Applicant/Defendant as a shareholder and a director in Caribbean Building Systems (St. Kitts) Ltd. A separate legal entity to the Applicant/Defendant which is not a party to the proceedings. It is contended that such an order is fatal in law as an order cannot be made against a third party without giving the affected party an opportunity to be heard in his/her defence. The removal of the Applicant/Defendant as a shareholder and a director in Caribbean Building Systems (St. Kitts) Ltd. Is governed by the Companies Act of 1996 and Articles and Memorandum of Association of the company. At all material times the loan, which form the basis of the claim, was solely between the Applicant/Defendant and the Claimant/Respondent.*

6. *The Order made in the matter restraining the Applicant/defendant whether by himself, his agent or assigns from in any way interfering in the running of the affairs of either Caribbean Building Systems (St. Kitts.) Ltd. Or Lemon Grove Co. Ltd. and granting all of the issue and share in both companies to the Claimant/Respondent, when both companies are not a party to the claim is fatal in law as both companies a separate legal*

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entities to the Applicant/Defendant and should have been a party to the proceedings and be given the right to defendant themselves in the matter.

7. *At the time of the Summary Judgment the Defendant/Applicant was incarcerated and not allowed to attend the trial.*
8. *The Applicant/Defendant has a reasonable prospect of defending and succeeding in the case and in particular the orders affecting the companies."*

[18] On 5th December 2013, the applicant/defendant filed a notice of discontinuance of the application to set aside summary judgment and for leave to file and serve a defence out of time. The court's file indicates that on 13th June 2014, Ramdhani J.(Ag) granted the applicant/defendant leave to re-instate the application for which the notice of discontinuance of 7th November 2013 had been filed.

[19] On 6th November 2014, the applicant/defendant filed an amended notice of application to set aside summary judgment which added some fourteen (14) further grounds as well as a supplemental affidavit in support of the amended application to set aside the order of summary judgment. The court notes that these added grounds do not relate to the hearing on the 2nd March 2012 but deal instead more with issues relating to the applicant/defendant's intended defence of the claim. The applicant/defendant also filed a draft defence with the amended notice of application in addition to filing a number of supplemental affidavits in support of the amended application to set aside the order for summary judgment of 15th April 2015, 6th January 2015 and 20th May 2015 and 14th July 2015.

[20] The respondent/claimant opposed these applications on the following grounds which can be summarized as follows[2]:

[2] See Respondent's Preliminary objections of law to the notice of amended application to set aside summary judgment and for leave to file and serve defence out of time - filed on 11th December 2014.

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1. Inordinate delay. An application to set aside an order made in the absence of a party is governed by Rule 11.18(2) of the CPR…Even if one took the position that the final judgment was not served on the applicant until the April 9, 2013 hearing, the application is more than 18 months out of time.

2. It is not the form of service but the substance of the service that governs. It cannot be argued by the applicant/defendant that he was not served with the final judgment… Rule 6.2(a) and Part 5.3…

3. Non-attendance at the hearing of an application does not bar the court from hearing the application. Mr. Horstwood's absence from the March 2, 2012 hearing is not grounds to set aside the final judgment. Rule 11.17of the CPR.

4. The application to set aside the final judgment amounts to an improper attempt to re-litigate the issues. A final judgment can be appealed within 45 days as a matter of right but it cannot be set aside almost three years later by a simple application.

5. The prejudice to the respondent if the order were to be set aside is exceptionally high. The respondent has been operating on the basis of that the final judgment is in effect since March 2012.

6. No opposition to the application for summary judgment was ever filed.

7. The summary judgment was awarded on the merits of the cases and not based on a respondent's non-appearance.

[21] In support of these objections the respondent/claimant referenced to the court a number of cases including:

> *"Grafton Isaacs Appellant v Emery Robertson Respondent, PRIVY Council, 13 June 1984, [1984] 3 W. L. R. 705; [1985] A. C. 97 (citing Lord Diplock in Isaacs v Robertson (1984) 43 W. I. R. PC at 128-130));*

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Henderson v Henderson (1843) 67 ER 313; Swain v Hillman and Gay [2001] 1 ALL ER 91."

[22] The issue for the court's determination is whether the court has the jurisdiction to set aside the order for summary judgment. The starting point must be whether a judge can set aside a judgment made in error (whether of law or fact) by a judge of concomitant jurisdiction. In **Lcymon Strachan v. The Gleaner Company & Anors** Lord Millett at paragraph 32 stated:

> *.. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court* of *unlimited jurisdiction, that is to say, it has jurisdiction to determine the limit of its own jurisdiction. From time to time, a judge of the Supreme Court will make an error as to the extent of his jurisdiction.. But whenever a judge makes an order he must he taken implicitly to have decided that he has jurisdiction to make it. If he is wrong he makes an error whether of law or fact which can he corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of coordinate jurisdiction have power to correct it.*[3]

[23] It is trite law that a court of concurrent or parallel jurisdiction does not have the authority to and cannot exercise an appellate jurisdiction to dismiss the final judgment of another judge that has been determined on the merits of the case. The only recourse of the defendant who is aggrieved by the decision is to appeal and that final judgment stands unless and until it has been reversed on appeal.[4]

[24] The court notes that the Learned Judge at the hearing of this application for summary judgment on 2nd March 2013, had before him the statement of claim, defence and counterclaim, reply and defence to the counterclaim filed in the matter as well as the application for summary judgment and affidavit in support thereof. There was also before the learned trial judge two affidavits of service

[3] Privy Council Appeal No. 22 of 2004

[4] Privy Council Appeal No. 22 of 2004 – Leymon Strachan v The Gleaner Company Ltd et al.; SLUHCV 2008/0438 - Marie Clarke-Johney v Evariste Ambrose

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evidencing service on the applicant/defendant of the first application and the dates of hearing for the said application.

[25] The applicant/defendant seeks to have the Order for summary judgment set aside on the ground that the hearing was contrary to natural justice as he was not present at the hearing and that the order is fatal in law for various reasons. These are not procedural irregularities which could cause a court of parallel jurisdiction, to move under rule 26.9(3) to put matters right, or to determine whether or not these were valid complaints of procedural errors in relation to the making of an order. Instead this was a court of coordinate jurisdiction making a final determination on a matter on its merits.[5] It is clear that this court has no jurisdiction to set aside the order of Thomas J of the 2nd March 2013.

[26] The application for an order to set aside the judgment of Thomas J. of the 2nd of March 2013 is dismissed.

[27] The second limb of the application, leave to file a defence out of time, contingent upon the outcome of the first limb accordingly falls away and no order is made.

[28] The court makes no order as to costs.

Marlene I. Carter
Resident Judge

[5] Cage St. Lucia Ltd. v Treasure Bay (St. Lucia) Ltd et al. [SLUHCVAP2013/0031] Court of Appeal Digest, St Lucia, 26th February 2014

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