EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SKBHCV2013/0222

BETWEEN:

HAZEL ROSS-ROBINSON

Respondent/Claimant

and

[1] GRAYDON WALKER
[2] SANDRA WALKER

Applicants/1st and 2nd Defendants

[3] ST. KITTS ELECTRICITY COMPANY LIMITED

Defendant

Appearances:
Considered on the written submissions of:
Ms. Kimloy Walker for the Applicant
Ms. Angelina Gracy Sookoo for the Respondent

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2017: September 29; November 21:
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RULING

Introductory and Brief Background

[1] **LANNS, J. [AG]:** This is an application by the 1st and 2nd defendants Graydon Walker and Sandra Walker for an extension of time within which to file witness statements and for relief from sanctions. The applicants also ask the court to deem their witness statements filed on the 5th May 2017, as having been properly filed.

[2] On the 16th August 2013, the claimant instituted proceedings against the defendants for damages for trespass to land.

[3] At a case management conference held on the 3rd February 2017, Ward J. QC ordered the parties to file and exchange witness statements on or before 28th March 2017. The order was entered on the 22nd February 2017.

[4] By agreement dated and filed on the 24th March 2017, the parties agreed to extend the time for filing and exchanging witness statements to 28th April 2017. The claimant filed her witness statements in an envelope in a timely manner and gave notice of such filing. But the 1st and 2nd defendants failed to file their witness statements within the time agreed between them. The 1st and 2nd defendants filed and served their five witness statements on the 5th May 2017 – seven days after the agreed extension of time.

[5] Rule 29.11 provides in essence that if a witness statement is not served within the time specified, the witness may not be called at the trial unless the court grants permission and the court may not grant permission at the trial unless the party seeking permission has a good reason for not previously seeking relief from sanctions under Rule 26.8.

[6] The first and second defendants' application was filed on the 5th May 2017 along with the witness statements in respect of all the witnesses upon whose evidence they intend to rely. The application is supported by the affidavit of Tarika Rogers, (Ms. Rogers) a legal secretary in the law firm of Grant, Powell & Co. The application is vigorously opposed.

Applicable Rules

[7] CPR 26.8 empowers the court to grant relief from sanctions; it sets out the circumstances in which relief may be granted and the matters which the court must take into consideration in determining whether to grant relief:

> "26.8 (1) An application for relief from sanction imposed for failure to comply with any rule or order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by affidavit evidence
>
> (2) The Court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;
(b) there is a good explanation for the failure; and
(c) the party in default has generally complied with all other relevant rules, practice directions, orders and direction

(3) In considering whether to grant relief, the court must have regard to:

(a) the effect which the granting of relief or not would have on each party;
(b) The interest of the administration of justice;
(c) whether the failure to comply was due to the party or the party's legal practitioner;
(d) whether the failure to comply has been or can be remedied within a reasonable time; and
(e) whether the trial date or any likely trial date can still be met if relief is granted

Promptitude

[8] No issue has been taken with the issue of promptitude. As previously stated, the first and second defendants' application was filed on the 5th May 2017, 7 days after the agreed time expired. Learned counsel for the respondent/claimant concedes that the application was made promptly. Even if the application was not filed promptly, the CPR does not create a sanction for failing to make an application for relief from sanctions promptly. Any sanction would have had to be created by court order or other rule.

Whether the Applicants' Failure to File Their Witness Statements by the Agreed Date of 28th April 2017 was Intentional; and
Whether there was a Good Reason for the Delay in Filing the Witness Statements

[9] In paragraphs 8 to 10 of her affidavit in support of the application for relief from sanctions, Ms. Rogers seeks to explain the reason for the applicants' failure to file and serve the witness statements by the agreed date of 28th April 2017[1]. Ms. Rogers deposed in relevant parts:

[1] The date agreed by the parities

"7 The applicant's counsel Grant Powell and Co were (sic) aware of the deadline and acted as expeditiously as possible in the circumstances by working with … clients to obtain copies of the required documents'"

"8 The applicants' non-compliance with the order was no fault of their own and was by no means intentional."

"9 … [O]f the five witnesses, more than half of them were unavoidably overseas outside the jurisdiction for extended periods attending to personal and business matters unbeknownst to the Applicants Counsel and they were unable to provide in short order further details in the preparation of the respective Witness Statements."

"10 …[A]dditional instructions were required from the Applicants to provide information about new events which had occurred as a result of the temporary injunction granted on August 7 2013 . …"

[10] Learned counsel for the respondent/claimant contends that the evidence contained in the supporting affidavit of Ms. Rogers falls woefully short of what is required for the granting of relief .from sanctions. Counsel submitted that the affidavit evidence consists of bald and unparticularised statements, and fails to detail the steps taken to comply or account for the time involved. Counsel then referred to the affidavit in opposition of the claimant, setting out what she saw to be the inadequacies in the application, and how she would be affected and prejudiced if the application were granted.

. [11] Learned counsel for the applicant, in her written submissions on this issue rehearsed paragraphs 8 to 10 of the affidavit of Ms. Rogers. and suggested that any prejudice suffered by the claimant can be compensated for by a costs order. Counsel submitted that the applicants have adequately offered reasons for the delay in filing and serving the witness statements. Counsel cited several authorities to support her argument that the court ought to allow the application.

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Discussion and Disposition on Whether the Failure to Comply was Intentional; and Whether there was a Good Reason for the Delay in Filing the Witness Statements

[12] The contents of the affidavit in support do not reveal that the applicants had intentionally failed to file their witness statements out of time. That said, it does not reveal that the failure was not intentional either. It simply says "the applicants' non-compliance with the order was no fault of their own and was by no means intentional."

[13] In relation to the issue of whether there is a good explanation for the delay in filing the witness statements, the affidavit evidence, to my mind, puts the blame squarely at the feet of the applicants, where it says that more than half of the witnesses were out of the jurisdiction attending to personal and business matters, unbeknownst to counsel. The affidavit failed to state who comprise "more than half". Does more than half include the applicants themselves? If so, when did they leave the jurisdiction, and when did they return? Did they try to contact counsel while they were away? If the applicants were in the jurisdiction, why were they not available for preparation of their witness statement? Why was there no witness summaries filed in relation to the other witnesses who were unavailable? It is not enough merely to say more than half of the witnesses were out of the jurisdiction attending to personal and other business; one must go on state, among other things, whether the applicants themselves were out of the jurisdiction; what steps, if any were taken to make contact with all potential witnesses, and what steps were taken by the applicants showing involvement in their case.

[14] Justice Barrow [Ag] (as he then was) in the case of **St Bernard v The Attorney General of Grenada et al**[2] stated that

> "The excuse that Chambers have been unable to contact clients contains the premise that it is the duty of chambers to contact the client, but there is no duty on the client to contact chambers. That premise is false. When a litigant is going to become unreachable at his previous address or by previous methods, the litigant has a duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer. The client needs at all times to be involved with the litigation."

[15] I adopt that statement.

[16] Inferentially, the applicants themselves were out of the jurisdiction unbeknownst to their counsel. If this were not so, their witness statements would/should have been filed before the 5th May, 2017. But they were filed together with the other three witness statements, suggesting that they

[2] Grenada High Court Civil Suit No 84 of 1999

themselves were unavailable. If I am wrong in my suggestion that they were unavailable, then it is because the affidavit evidence is inadequate and or unparticularised and lends itself to speculation, when it should properly explain the unavailability of the applicants and their witnesses to prepare and sign their witness statements. Obviously, the applicants were also unavailable to prepare and sign the affidavit in support of their application. This task was left to the legal secretary who has no intimate knowledge of the facts and circumstances surrounding the unavailability of the witnesses, and would not be in a position to make more than bald statements. There are critical questions to be answered in the affidavit, and bald statements will not suffice to grant relief from sanctions. As Baptiste J.A. stated in **Prudence Robinson v Sagicor General Insurance Inc**[3] reliance on bald assertions is inimical to the grant of relief.

[17] For the foregoing reasons, I do not find that the applicants have offered a good explanation for their failure to file the witness statements in a timely manner. The applicants rely on bald assertions, in their application for extension of time and for relief from sanctions. The affidavit in support is hollow and needs fleshing out. The affidavit does not permit the court to test the credibility of the factual assertions made therein. In the words of Edwards JA in **Anthony Clyne**, the explanation given in this case is not full, and is devoid of important factual elements.

[18] I adopt the statement of Saunders JA in the St Kitts case of **Avril Francis v St Kitts-Nevis Finance Company Limited**[4]**,** St Christopher and Nevis Civil Appeal No. 21 of 2003, delivered November 4, 2003:

> "The court has to be careful not to set precedents which may have the effect of allowing these rules to be interpreted in a manner that carries us back to the lax ways that built up under the old rules. Under these new rules, the Court places a premium on timeliness, on professionalism, on efficiency, on cogent reasons being advanced for failure to adhere to time standards…"

Other Relevant Conditions

[19] There are other relevant conditions which CPR 26.8 requires the court to take into consideration. I note that the supporting affidavit does not seek to address the other factors raised in CPR 26.8 (3); so the court is not in a position to .properly exercise its discretion in relation to those other relevant conditions.

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[3] SLUHCVAP2013/0009, paragraph 7

[4] St Christopher and Nevis Civil Appeal No 21 of 2003, delivered November 4, 2003

[20] I note however, that the affidavit does not say expressly whether or not the noncompliance was due to the applicants or their legal practitioner, but I think I have already alluded to that issue. I note too that the applicants have already filed and served all five witness statements; and that the trial date can still be met. But these factors are not in and of themselves determinative of the issue as to whether the application should be granted.

[21] Further, it is to be noted that the applicants have not addressed whether they have generally complied with all other all other relevant rules, practice directions, orders and directions. The respondents in in their affidavit in opposition pointed out that the applicants have not generally complied with all other relevant rules, practice directions, orders and directions. They point to the order of Ramdhani J.[Ag] dated 18th August 2014, wherein he ordered costs of $6000.00 to the respondents/claimants. They say that the applicants failed to pay the costs as ordered with the result that they had to file a judgment summons on 31st December 2015 to secure payment of such costs, which were eventually paid in January 2016, some 18 months after the costs order was made. There is no challenge to this complaint.

[22] Prejudice: The respondent in her opposing affidavit says that she will suffer prejudice if the application were granted. The applicants are of the view that any prejudice can be compensated for in costs. This can hardly be said to be a good submission when they themselves have already breached a costs order of the court. In any event, the court has already found that the content of the affidavit in support show no sufficient reason for the delay in filing the witness statements, and that is determinative of the application. The court cannot go on to determine prejudice where the affidavit evidence is deficient.

Conclusion

[23] The inescapable conclusion is that there is no or no sufficient evidence to satisfy me that there is a good explanation for extending the time within which to file witness statements and for relief from sanctions. In the absence of evidence, I must proceed on the footing that the applicants disregarded the time limit for filing the witness statements, were not sufficiently involved in their case, failed to invoke CPR 29.6 and file witness summaries as may be required; or seek to agree a further extension of time within which to file witness statements.

[24] The application for relief from sanction is therefore denied. Costs shall be costs in the cause.

Pearletta E. Lanns
H.C.J. [Ag]

By the Court

Registrar