EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: SVGHCV2010/0031 and 0032

Between

Marvin Mulcaire

Claimant

and

Michelle Fife
Bansil Kennedy

Defendants

Appearances:
Ms. Suzanne Commissiong of Counsel for the Claimant
Mrs. Kay Bacchus-Baptiste of Counsel for the Defendants

2018: November, 19th
2019: March 26th

JUDGMENT

[1] MOISE, M.: This is an application by the defendants to set aside a judgment entered in favour of the claimant on 27th March, 2018. The defendants also seek relief from any sanctions which may be imposed on them pursuant to rule 26.8 of the CPR for their failure to file witness statements as directed by the case management order of the master. In order to adequately address the issues raised in this application, it is important to highlight the procedural history of this matter and place into context the background upon which the judgment was entered in the first place.

[2] The claimant filed two actions against the defendants on 22nd January, 2010. In claim number 31 of 2010 the claimant claimed special and other damages for breach of a building contract which he claimed to have entered into with the defendants. In case number 32 of 2010 he claims damages for libel and slander. The cases had gone through the normal case management procedure and on 23rd June, 2011 case management directions were ordered by then acting Master Agnes Actie. By virtue of these directions the parties were to have filed witness statements by 6th September, 2011. The defendants never filed any witness statements.

[3] It is apparent from the record that the matter came up for a pre-trial review on 27th April, 2012 before Justice Gertel Thom (as she then was). All parties were represented by counsel. A new date was fixed for the trial and certain directions were given for the filing of core bundles. The matter next came before the court on 1st June, 2017 for a status hearing. On that date the defendants were absent but were none-the-less represented by counsel. Master Raulston Glasgow (as he was at the time) ordered that a new trial date be set. I note that at that point the defendants had remained in noncompliance with the case management directions and had filed no witness statements in the matter. That was 6 years after the case management directions were given.

[4] On 11th September, 2017 counsel then on record for the defendants filed an application to be removed from the record. The grounds upon which the application was based are worth some consideration. The application alleged that at that date counsel had no communication with the 2nd defendant and was unable to take any instructions regarding the filing of the witness statements. It is stated that witness statements were prepared and delivered to the 1st defendant personally in October, 2014 (I note that this would have been well beyond the time within which the witness statements were to have been filed in the first place). The application alleges that the 1st defendant failed and or refused to sign the witness statements and return them to chambers so that they can be filed. The application alleges that there had not been any communication with the 1st defendant for a period of 30 months leading up to the time of its filing date.

[5] On the court's file is an affidavit of service which states that this application was served on both defendants personally on 11th October, 2017. To date there has not been any response to the allegations raised in the affidavit accompanying that application. The matter then came up for hearing before then acting Master Jean Dyer on 17th October, 2017. The defendants were absent and the

matter was adjourned to 14th November, 2017. It would seem that the matter came for hearing on 22nd November, 2017 and that the 1st defendant was present at that hearing. She states in her affidavit in support of the current application, that she was unaware of the date and that she happened to have been in court for another matter. Despite this, it is worth repeating that the record reflects that the defendants would have been made aware of this application on 11th October, 2017. The application was then adjourned to 22nd January, 2018 in the presence of the 1st defendant. There is an affidavit of service on file dated 21st December, 2017 which states that the defendants were personally served notices of the hearing date scheduled for 22nd January, 2018. The 1st defendant was served on 13th December, 2017 and the 2nd defendant on 5th December, 2017.

[6] When the matter came up on 22nd January, 2017 the defendants were again absent with no excuse provided to the court. Being satisfied that the defendants were fully aware of the application and that the matter had been adjourned on three previous occasions to secure their attendance, the court granted leave for counsel to be removed from the record. The court also made an order adjourning the matter for the defendants to appear and to show cause as to why judgment should not now be entered against them for their non-compliance with the case management orders which, by that time, had been granted over 6 ½ years prior to that date. The matter was adjourned to 12th February, 2018.

[7] When the matter came up on 12th February, 2018 there was no court sitting due to the illness of the master and the matters on the court's list were adjourned to 27th March, 2018. On 27th March, 2018 the defendants were again absent. The court was informed by the clerk that the defendants were present on 12th February, 2018 when the matter was adjourned to that date. I note that the defendants have disputed the assertion that they were present and I will address this issue later in this judgment. At the hearing on 27th March, 2018 the court then entered judgment in favour of the claimant and gave directions for the assessment of damages. In its pre-amble the court noted that the orders were predicated upon the fact that ***"the 1st*** *defendant was present on 12th February,* ***2018 when the matter was further adjourned to today's date. There being no appearance today*** *and no attempt on the part of the defendants to comply with the case management orders of the court or to seek a relief fro****m sanctions."***

[8] On 3rd July, 2018 the defendants filed an application to set aside the judgment and sought an extension of time to comply with the case management directions ordered on 23rd June, 2011 as well as relief from sanctions. The court granted leave to the parties to file submissions on the application and the parties have duly complied.

The Court's Powers to Enter Judgment

[9] Given that the basis of the judgment entered against the defendants was their general noncompliance with case management directions, the applicable rule for consideration is rule 26.3 of the CPR. The rule states as follows:

> *In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –*
>
> *(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings.*

[10] From the onset it would seem that the premise for entering judgment for a party's noncompliance with case management directions was the striking out of the statement of case. In this instance although judgment had been entered for the defendants' noncompliance, it was not predicated upon the striking out of the defence. On that basis I am of the view that the order granting judgment in favour of the claimant was defective and ought to be set aside for this irregularity.

[11] However, this is not the end of the matter. Essentially the underlying purpose of the adjournment granted on 22nd January, 2018 was for the defendants to provide reasons for their persistent noncompliance with court orders for a period of in excess of 6 years. The defendants have now filed an application not only to have the judgment set aside but also for relief from sanctions and now seek leave to comply with the case management orders out of time. Insofar as that is the case the court now embarks on its initial premise, which is to assess the reasons for the defendants' failure to comply with the various court orders and whether the evidence presented in their application satisfied the court that they should be relieved from any sanctions and be granted an extension of time within which to comply with the various court orders.

[12] The court's power to grant relief from sanctions is contained in rule 26.8 of the CPR. The rule states as follows:

> *26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(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 directions.*

[13] I note from the onset that the defendants have certainly not made a prompt application for relief from sanctions. The order of the court was made in June, 2011 and there has simply not been compliance with the order in any form. The defendants' application was filed in June, 2018. This however, is not fatal to the application and I will proceed to address a number of issues therein as it relates to the request for relief from sanctions.

The grounds for the application

[14] The first issue raised by the defendants is that the cases against them had ''slipped through the cracks of the judicial system''. It is argued that after case management directions were given in 2011 the matter never came back up for hearing. The first defendant alleges that during that time the she was appointed to the ministry of foreign affairs as legal advisor, which necessitated her travels abroad on numerous occasions. The 2nd defendant, it is asserted, had overlapping health issues and was out of the jurisdiction for extended periods.

[15] From the onset I wish to state that I do not accept this as a ground on which the defendants can rely as an explanation for their failure to comply with court orders for such an extensive period of time.

Firstly, contrary to what has been submitted, the matter did come up before Thom J on a pre-trial review on 27th April, 2012, during which time the defendants were absent but represented by counsel. No adverse decision was made against the defendants for their noncompliance and Thom J gave certain directions which, to my mind, would have been a challenge to comply with unless the defendants had fully participated in the matter. In any event, even if the court were to accept that the matter had ‘‘slipped through the cracks of the judicial system’’ the evidence indicates that as far back as 1st June, 2017 attempts were being made by the court office to bring this matter back on track. Again the defendants were represented by counsel at the hearing before the master on that date. Further to this, as I have indicated above, there is affidavit evidence filed with the court which indicates that the defendants were personally served with an application by their own counsel to be removed from the record as far back as 11th October, 2017.

[16] Further, the 1st defendant was present on 22nd November, 2017 when the matter came up before the master. On that date she would have been fully aware that her counsel was attempting to remove himself from the record. The application by counsel was supported by affidavit evidence which indicated that an attempt had been made as far back as October, 2014 to have the witness statements filed but to no avail and that he had lost all communication with the defendants. Despite the defendants’ knowledge of this application there was no response to the allegations contained therein and no attempt to convince the court otherwise until such time as judgment had been served on them. A full 4 months elapsed between the hearing on 22nd November, 2017 and the date on which judgment was entered and the defendants filed no documentation with the court and made no attempts to properly participate in the just disposal of the matter. Nothing in these facts satisfy me that the failure to comply with the case management directions were not intentional.

[17] I do not accept the 1st defendant’s appointment to Ministry of Foreign affairs as a valid excuse as to why there had been noncompliance with the court orders. If her assertion is accurate then this appointment was made after the deadline to file witness statements had expired. In any event, the appointment to such a post does not render the court any less likely to hold the 1st defendant to the standards of compliance required from any litigant before the court. If anything, one would expect the holder of such a public office to ensure that there is compliance with the court orders and procedures. Litigants are under a duty to fully participate in the process so as to ensure that matters are dealt with expeditiously and public officials are not entitled to be treated any differently. Certainly, if the 1st

defendant was out of state for any period of time which rendered her incapable of complying with court orders, there are ample provisions in the rules which allow her to seek leave for an extension of time. She simply failed to comply in excess of 6 years and this is not acceptable.

[18] As it relates to the 2nd defendant I do not accept the reasons provided. Indeed if the 2nd defendant took ill and was to be absent from the jurisdiction for extended periods, then formal notification together with medical evidence ought to have been provided and an extension of time sought. There is simply no excuse for such an extensive disregard for the orders of the court. Even the chambers on record have sworn to affidavit evidence stating that there simply had been no communication with the defendants for such an extensive period of time.

[19] The defendants' second ground is that the notice of the hearing on 17th October, 2017 was short served. Indeed, the affidavit evidence suggests that they were served on 11th October, 2017, short of the time required under the rules. However, on that date the court made no adverse decisions against the defendants. What is important to note about this is that the defendants were made aware of the application on 11th October, 2017 and filed no objection or response to the issues raised therein. They would have also been aware of their noncompliance with the case management directions and made no attempts to rectify this situation. When the matter came up for hearing on 22nd November, 2017 the 1st defendant was present and the matter was again adjourned to 22nd January, 2018. The affidavit evidence states that they were indeed served notice of the November hearing date. To my mind, this amounts to a disregard of the court's process. Rule 1.3 of the CPR states that *it is the duty of the parties to help the court to further the overriding objective* and the defendants have simply failed in that regard.

[20] As I indicated above, the matter came up again for hearing on 22nd January, 2018 and neither defendant was present. The 1st defendant states that she was attending to another matter in another court. This is not a viable explanation. At that point she would have been fully aware of her noncompliance, given the content of the application of her own counsel to be removed from the record. I note again that by that date the matter has been consistently adjourned from June, 2017 in order to facilitate the defendants' participation in managing this case, despite the undue delay in bringing finality to this matter. By that date the defendants were in noncompliance with court orders dating back to 2011 and had filed no application in order to rectify this failure. It is difficult to see the

circumstances under which the court can rely on these facts to conclude that the defendants' noncompliance was not intentional.

[21] In their application the defendants assert that sometime in February, 2018 (no specific date given) they were finally able to take possession of their file from chambers who were previously on record. It is asserted that at that point they became aware of certain court dates and orders which were not complied with. It is argued that this was not communicated to the defendants and that they were never informed of the urgent need to apply for relief from sanctions. I express difficulty in accepting this as a viable explanation for the defendants' noncompliance. Firstly, by way of affidavit evidence, counsel on record for the defendants had asserted that attempts had been made to communicate with them and that in 2014 the witness statements were presented to the 1st defendant for signature. If indeed the defendants wished to dispute this evidence then there was notice of that application from 11th October, 2017 and ample opportunity to have this issue addressed at the hearing of that application. Secondly, despite the issues raised concerning the relationship between the defendants and their counsel, the court has stated on numerous occasions that the litigation is that of the parties and it is their duty to ensure that the case management directions are complied with. Given that the defendants were present when case management directions were given in June 2011, there has simply not been an adequate excuse provided for an almost 7 year delay in complying with the case management directions of the court and the persistent non appearance of the defendants at court hearings despite affidavit evidence of notices being served on them. This, to my mind, is gross disregard for the process of the court.

[22] I note further, if indeed as the 1st defendant alleges, that the file was handed over to her by counsel who previously represented her in February, 2018, there had in fact been no attempt to file any application to put this matter right until July of that year. I have great difficulty in concluding that the defendants have treated this matter and the court's process in general with anything less than disregard.

[23] For these reasons alone I find that the defendants have not satisfied me that the failure to file the witness statements was not intentional and certainly no reasonable explanation for that failure has been provided. Further, it can certainly not be said that the defendants have generally complied with all other relevant rules, practice directions, orders and directions. They have not turned up to court

when they have been served notices, failed to comply with case management directions for over 7 years and failed to seek relief from sanctions within a reasonable time. Given the compulsory provisions of Rule 26.8 of the CPR the application for relief from sanctions must certainly fail.

[24] The issue for consideration at this stage is whether the court ought to apply the ultimate sanction in striking out the defendants' statement of case. I have referred to the provisions of rule 26.3 of the CPR above and will not now repeat them. The court has often reminded itself that to strike out a statement of claim is a most draconian step which ought not to be taken lightly; especially in circumstances where the issue was initially raised on the court's own motion. However, this must be balanced against the need for the court to preserve the sanctity of its process, ensure that justice is done and that its resources are not wasted in circumstances where the parties have failed themselves to give due regard to the process. I refer, for example, to the case of *Jamaisha Wright v Fitzroy Glasgow*[1] where neither party complied with the case management orders of the court to the extent that witness statements were filed mere days before the trial date. Henry J was quite prepared to conclude that "s*uch willful disobedience to a court order must be visited with a suitable sanction. I am satisfied that this is a fit case to strike out the statement of case."* I share a similar sentiment in the present case. If ever there was an example of the complete disregard, not only of the case management directions, but of the process of the court in general, I find the circumstances of this case to be it. I am fully satisfied that this is a fit and proper case for the exercise of the most draconian power which the court has at its disposal.

[25] In the circumstances I make the following orders:

(1) The judgment entered on 27th March, 2018 is set aside for its irregularity;

(2) The application for relief from sanctions and for an extension of time to file witness statements in the matter is denied with costs to the claimant in the sum of $1,500.00;

(3) The statements of case of the defendants in case numbers 31 and 32 of 2010 are struck out;

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[1] SVGHCV2011/0117

(4) Judgment is entered for the claimant in case numbers 31 and 32 of 2010 for an amount to be decided by the court;

(5) The matter is to be relisted for directions on the assessment of damages before the master's court on a date to be set by the court office.

Ermin Moise
Master

By the Court

Registrar