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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

ORAL JUDGMENT

SUIT NO. C.L. B. 139 OF 1995

BETWEEN	CALVIN BROWN	PLAINTIFF
A N D	TANKWELD CONSTRUCTION CO. LTD.	DEFENDANT

Mr. E. Witter for Plaintiff.

Mr. J. Graham for Defendant/Applicant

Summons to set aside Judgment.

Heard: 19.5.98, 16.2.99, 4.10.99, 7.10.99

Marsh, J.

BACKGROUND:

By specially endorsed Writ of Summons and Statement of Claim dated 13th April, 1995, the Plaintiff claimed damages from the Defendant for negligence or alternatively for breach or breaches of statutory duty. The allegations are that on or about the 28th day of October, 1992 the Plaintiff in the course of his employment was in the act of repairing a welding plant at Bondbrook Wharf in the parish of Portland when he was injured as a result of the fan striking his hand and as a consequence he suffered injuries.

Appearance was entered on Defendant's behalf on the 1st day of June 1995. A defence was not filed within the specified time and consequently Interlocutory Judgment in default of defence was entered against the Defendant on the 13th day of October, 1995.

On October 30, 1996, Plaintiff filed a Summons to set aside the Judgment and for leave to file Defence out of time.

The summons came up for hearing on the following dates:

1. 5.2.97 - it was adjourned sine die with costs awarded to the Plaintiff.
2. 23.7.97 - it was adjourned to the 21st day of October, 1997 on the request of the Plaintiff's Attorneys-at-Law.
3. 21.10.97 - Adjourned sine die with consent of the parties.
4. 19.11.97 - Adjourned sine die by consent of the parties.
5. 14.1.98 - Application struck out as there was no representation for the Defendant/Applicant.

Between 13th day of October, 1995 and the 30th October, 1996, on the 4th day of October, 1996 to be precise, an order was made for Plaintiff to proceed to Assessment of Damages. The Plaintiff and Defendant were represented when this order was made, by Miss Jacqueline Cummings and Mr. Hector Robinson respectively.

Notice of Assessment of Damages was filed on 1st day of May, 1996 and hearing was fixed for the 5th day of November, 1996. This notice was served on the Defendant's Attorneys-at-Law on the 6th day of August, 1996.

By letter dated the 10th day of October, 1996 Defendant's Attorneys were written to, advising of the dates fixed for hearing of the Assessment of Damages and requesting their consent to the admission into evidence of a Medical Report relative to the injuries to the Plaintiff.

No reply was had from the Defendant's Attorney-at-Law. Consequently a Notice of intention to tender in evidence the said Medical report was served on Defendant's Attorneys-at-Law on October 23, 1996.

By letter dated 24th October, 1996 Defendant's Attorneys-at-Law deigned to communicate with Plaintiff's Attorneys-at-Law.

The first, brief letter was in these terms:-

"We have received instructions to file a defence out of time in this matter. Our instructions show that your client is partly to be blamed for the accident.

Can we agree to vacate the date for the Assessment until our application is heard?".

Some twelve (12) days after, when the Assessment of Damages came up for hearing on November 5, 1995 upon the application of the Defendant's Attorneys-at-Law, the said Assessment was adjourned sine die with the days costs awarded to Plaintiff.

On the 11th day of November, 1996 a notice of Assessment of Damages was filed by Plaintiff's Attorneys-at-Law and this was fixed for hearing on 17th day of February, 1997. This was served on the Defendant's Attorneys-at-Law on 14th January, 1997.

Next day, 15th day of January, 1997, the Plaintiff's Attorneys-at-Law were served with a Summons to set aside Judgment in default of Defence dated 30th October, 1996 which summons was supported by an Affidavit of Jerome Gayle also dated 30th October, 1996.

It is this summons to set aside the Default Judgment which was struck out on the 14th day of January, 1998.

The Notice of Assessment of Damages was relisted and fixed for hearing on April 23, 1998. It was served upon Defendant's Attorneys-at-Law on 12th March, 1998.

On the 23rd day of April 1998 the said notice was again adjourned to the following day after the Court was advised that Defendant was taking steps to set aside Default Judgment.

On April 24th, 1998 a little under two hours before Court was scheduled to start, the Plaintiff's Attorneys-at-Law were served with a Summons to set aside Judgment, dated the 23rd day of April, 1998 and set for hearing on the 19th day of May, 1998.

> It is this Summons to set aside Judgment and for leave to file defence out of time that this Judgment relates.

Lord Atkin expressed himself in " Evans v. Bartlam (1937) AC 473 at 30, thus

> "Unless and until the Court has pronounced a Judgment upon the merits or by consent, it is to have the power to remove the expression of its cohesive power where that has only been obtained by a failure to follow any of the rules of procedure".

The Interlocutory Judgment in default of defence obtained by the Plaintiff in the instant case is a regular judgment and may only be set aside if the Defendant shows ground as to why the discretion of the Court should be exercised in its favour.

Lord Wright in Evans v. Bartlam (Supra)said this "the primary consideration, is whether he has merits to which the Court should pay heed, if merits are shown the Court will not prima facie desire to let a Judgment pass on which there is no proper adjudication".

In the case of Ladup Limited v. Sin(unreported) but referred to by Dillon L.J. in "Van etal v. Awford etal. (Court of Appeal)(Civil Division) The Times 23 April 1986, Lord Justice May said at Page 10 of his Judgment

> "Although in these cases where an application is made to set aside Judgment obtained by default, it is frequently said that not merely must a defence on the merit be shown, but also a reasonable explanation for the delay and default, I think that the passages to which I have (do) referred from the speeches in Evans v. Bartlam, make it quite clear that it is the first, the defence on the merit, which is of the prime importance, at least in the case of an interlocutory judgment and that the question of delay is a matter which falls to be dealt with only secondary".

> Dunn L.J. concurred by expressing similar sentiments at page 12 when he opened. In application to set aside a judgment I entirely agree with my Lord that the primary consideration is whether there is a defence on the merit and the Judge should have considered the first before considering the question of delay".

What does a "defence on the merit means?

As Lord Deaning Master of the Rowls put it in the case of **Burns v Kondel Lloyds Law Report 1971 VOL 1 at page 555.** "That does not mean that the Defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue. In an accident case, it is sufficient if he shows that there is a triable issue of contributory negligence. A plea of contributory negligence, if successful may reduce the damages greatly".

The Defendants has strongly urged that it has a defence which discloses triable issues. The particulars of breach of Statutory duties aver as forms "Causing and/or permitting the Plaintiff to work in conditions which are in breach of Section 84 and Section 49 of the Building Operations and work of Engineering Construction (Safety Health and Welfare) Regulations.

Mr. Graham for the Defendant submitted that the Regulations referred to above are made under the Factories Act and that it is misconcede as none of the work done by Defendant's Company could cause it to be categorized a factory. So far as the judgment exist, based on these sections of of the Regulations, it is misconceived. Section 49 Supra deals with "lifting appliances" such as pullies and cranes.

The statement of claim averred that the Plaintiff was "engaged in the act of repairing a welding plant.....when he was injured as a result of the fan striking his hand.....".

Dr. Mena's medical report suggested that Plaintiff had stated that he received his injuries when "his right hand had been caught in a fan belt whilst at work".

The proposed Defence as exhibited, prima facie disclosed several issues of law and fact.

I am therefore constrained to accept that Defendant has raised triable issue in that proposed defence.

Defendant's attorney in his effort to explain the delay in filing a defence within the time specified by law stated simply

"That we were not put in a position to file a defence within the time specified by law, hence Interlocutory Judgment in default of defence was entered against the defendant on the 13th day of October, 1995. Mr. Noel Gayle, and engineer employed at the material time to the Defendant's Company, in an affidavit stated that the Plaintiff had "Shortly after the accident" advised him how he could have received his injuries and that at the time "the motor on the welding plant was in motion".

This information led Mr. Gayle to come to conclusion at paragraph 6 and 7 of his affidavit that the Plaintiff was the author of his own wrong. If the Defendant was in possession of all this information from its engineer, why was it necessary to have waited until one year and seventeen days after Judgment in default was entered against defendant to stir itself into action?.

Jerome Gayle, managing director of defendant company ascribed the delay in filing defence to the fact that the Plaintiff's supervisor, at the time of the accident and who knew the circumstances of the accident had left defendant's employment and had only recently been located. This was in his affidavit sworn to on 23rd April, 1998. However, in his affidavit sworn to on October 30, 1996, Jerome Gayle made the same statement that the plaintiff's supervisor who knew of the circumstances of the accident had left Defendant's employment and it was only possible despite numerous efforts, to have located him "within the last two weeks". This to my mind tells against the Defendant. The sincerity of June Gayle's affidavits, especially on the matter of the absent supervisor is sadly lacking.

I cannot therefore accept that the Defendant supplied a satisfactory explanation for its delay in filing the Summons.

Despite the fact that the first summons to set aside default judgment was filed some one year and 17 days after judgment was in fact entered, after several dates before the Court, it had to be struck out.

Mr. Graham's explanation was that "Because of an oversight in my office the matter was not brought to my attention nor was the matter noted in the firm's Court diary, and no Attorney-at-Law from my office attended Court on that date to represent the Defendant. "This explanation is essentially unimpressive.

Without reciting the details of the Defendant's conduct in this case, I find it reprehensible that after the Judgment was entered on the 13th October 1995, Defendant continued in stupor; when an order was made on the 4th October 1996, Defendant remained asleep. Notice of Assessment of Damages was filed on 1st May 1996 and fixed for hearing on the 5th November 1996 - this notice was served on Defendant's Attorneys-at-Law on 6th August 1996. This failed to arouse the Defendant.

Plaintiff's Attorneys' letter to Defendant's Attorneys-at-Law dated the 10th of October, 1996 seeking their consent to Doctor Mena's medical report being tendered by consent at the hearing of the Assessment was ignored. Consequently Plaintiff's Attorneys decided to and did serve a notice of intention tendered in evidence the said medical report. This was on October 23, 1996. On the application of the Defendant's Attorneys-at-Law the Assessment of Damages was adjourned sine die on the 5th day of November, 1996.

Another Notice of Assessment was served on January 14, 1997 on Defendant's Attorneys-at-Law and this was fixed for hearing on the 17th day of February, 1997.

Next day, January 15, 1997, Defendant's Attorneys-at-Law served another summons to set aside Judgment in Default of Defence, which summons was dated April 30, 1996 and which was supported by Jerome Gayle's affidavit sworn to on the same dates. This summons, set for hearing on the 5th day of February 1997, was that day adjourned sine die on Defendant's application, with the days costs awarded to Plaintiff. After the re-issued summons to set aside the Default Judgment was struck out on the 14th January, 1998, due to the non-attendance of Defendant's Attorneys-at-Law at Court, the Plaintiff continued in his effort to have the said Assessment of Damages proceed. This was fixed for hearing on the 23rd April, 1998, and served on Defendant's Attorneys-at-Law on March 12, 1998.

On the proposed date for the hearing 23rd April, 1998, Mr. John Graham for the Defendant succeeded in causing the matter to be adjourned to the following day 24th April 1998 - the Court having been advised that steps were being taken by the Defendant to set aside the Default Judgment.

The Plaintiff's Attorneys-at-Law were served with a Summons to set aside Default Judgment, dated 23rd April, 1998, which service was effected at 8:25 a.m. on the 24th day of April 1998. This was set for hearing on May 7, 1998.

"This question of undue delay by a defendant in bringing his application is always relevant" for Patterson J.A. in Smith v. Reeces SCCA NO. 94/94. By parity of reasoning where delay is occasioned by the machination of the defence, as in the instant case, then it may be a powerful indicator that the Defendant did not intend to defend and has acted without bonafides.

Pearson J, in Heigh v. Heigh Chancery Division Volume XXX1 asp. 482,

> "I have the strongest disinclination, as I believe every other Judge has, that any case should be decided otherwise that upon it merits. But this order would introduced to prevent plaintiffs and defendants from delaying causes by their negligence or wilfulness".

The instant case is a study of defendant's efforts on delaying this particular cause.

I must therefore in assessing the Justice of this case take into account the Defendant's conduct, the absence of bonafides and the use made of the process of this Court to frustrate the plaintiff's effort at reaping the Judgment he obtained on October 13, 1995.

Consequently I dismiss this Summons with costs to the Plaintiff to be agreed or if not to be taxed.

Leave to appeal granted.