

17/02/05 ✓

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 71 OF 2002

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.(Ag.)**

BETWEEN	OSWALD MEDLEY	APPELLANT
AND	VALENTINE FAGAN	1ST RESPONDENT
AND	SANDRA GAYLE	2ND RESPONDENT

Mr. Rudolph Francis for the appellant.

No appearance on behalf of the respondents.

April 17 and 18, 2007

PANTON, J.A.

1. This is an appeal in which the appellant has, up to the very last minute, ignored the rules and orders of the Court, as it was during the hearing of the appeal that the skeleton arguments were filed.

2. The appeal is against the judgment of Paulette Williams, J. (Ag.) delivered on May 31, 2002. At that time, the learned judge dismissed the appellant's action for want of prosecution, and also the appellant's application for an order

to extend the time within which to apply to have the action set down for assessment of damages.

3. The statement of claim averred that the appellant was injured by the negligence of the respondents while he walked on the sidewalk along Red Hills Road, St. Andrew. The second respondent had been driving a motor car owned by the first respondent. The second respondent lost control of the vehicle which then collided with the plaintiff who sustained injuries as a result.

4. The applicant issued his writ on December 7, 1993. His statement of claim is dated 19th May, 1994. On the 1st December, 1994, the Master gave leave for the writ and statement of claim to be served on the respondents by registered post. On the 10th February, 1995, appearance was entered on behalf of the respondents. No defence was filed, and on the 28th May, 1998, an order was made for the appellant to proceed to assessment of damages.

5. The matter remained in limbo, and on 7th December, 2000, the respondents filed a summons to dismiss the action for want of prosecution. The representation for the respondents had by then changed. The respondents complained that the delay by the appellant in acting on the order made on the 28th May, 1998, was inordinate and inexcusable, and this delay would result in extreme prejudice to them. The appellant in response stated that during the

very month in which the order to assess damages was made, he “started experiencing bouts of pain from the centre of the base of my neck, up the centre and sides of my neck to the back of my head, and extending into my shoulders”.

6. Having informed his attorney-at-law of this “new development” (p.20, para.10 of the record), a decision was taken to have the appellant referred to a consultant neurosurgeon. In para. 14 of his affidavit, the appellant states:

“That the delay in pursuing my claim in this action against the defendants is not due to any fault on my part, but to the development of a neurological condition, which if can be linked to the injuries I received in the accident will require an amendment of my statement of claim before the notice of assessment is heard. I intend to pursue my claim against the defendants with the utmost diligence”.

7. The learned judge was obviously not impressed by the appellant’s reason for the delay and so granted the respondents’ request that the action be dismissed for want of prosecution. We inquired of Mr. Rudolph Francis, the appellant’s attorney-at-law, as to the status of the medical report on the condition of the appellant. His response was that it had not yet come to hand. We note that the appellant in para. 10 of his affidavit stated that he had been seen by Dr. Randolph Cheeks, consultant neurosurgeon. Up to the hearing of this appeal, the appellant has not been able to say:

- (a) whether he will be getting a report which he would use to amend his statement of claim; or

(b) when he would be in a position to proceed with the assessment.

8. In our view, the learned judge was correct when she dismissed the action for want of prosecution. A party cannot be allowed to file an action and leave it idle in the Courts. Further, when Court orders are made, they are to be complied with. In the instant situation, although no link has been established between the accident and the development of a neurological condition in the appellant, he refused to proceed with the assessment. There is no basis on which we could say other than that the delay was inordinate and inexcusable, and that the respondents would indeed suffer serious prejudice.

9. For completeness, we should add that we find no merit in the appellant's complaint (Ground 1) that the learned judge should not have relied on the affidavit of the attorney-at-law who "first represented the defendants". It is significant that no argument was advanced in the skeleton arguments in support of this ground. It is quite clear that the attorney-at-law was seized of the facts, and had the authority to make the affidavit.

10. In the circumstances, the appeal is dismissed. Costs of the appeal are awarded to the respondents, such costs to be agreed or taxed.

HARRIS, J.A.:

I agree.

DUKHARAN, J.A. (Ag.):

I AGREE.

PANTON, P.:

ORDER:

The appeal is dismissed. Costs of the appeal are awarded to the respondents to be agreed or taxed.