Sup. Ct - Master - Summons to Set Aside Interlocutory Judgment — Effect of delay in making application — Payment made to Bailiff by defendant - Judgment Debtors Summons and Summons to Examine subsequently taken out. whether defendant has arguable case — whether applicant has good and sufficient reason to have judgment interlocutory set aside. Summons dismissed [Cases referred to (6 cases)]

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R028/1992

BETWEEN	**GEORGE REEVES**	**PLAINTIFF**
A N D	**FRED J. SMITH**	**DEFENDANT**

Mrs. Georgia Gibson-Henlin appears for Applicant/Defendant instructed by Gaynair & Frazer

Dr. Adolph Edwards instructed by Gaynair & Frazer appears for Plaintiff

SUMMONS TO SET ASIDE INTERLOCUTORY JUDGMENT

Heard: 15.6.94, 22.6.94, 13.7.94 and 25.7.94

Master (Ag.)

This Summons to set aside interlocutory Judgment is brought in the following circumstances: -

A Writ of Summons filed by the Plaintiff George Reeves against the Defendant Fred Smith on the 21st of February, 1992 claiming to recover Thirteen Thousand United States Dollars (US$13,000.00) for rental of premises situated at Queens Drive, Montego Bay, being rental claimed from March, 1991 to February, 1992. Appearance was entered on behalf of the Defendant on the 26th of May, 1992 and Judgment in default was perfected on the 12th October, 1992. Thereafter, a writ of seizure and sale was issued on the 7th of December, 1992 and the sum of $81,000.00 (Jamaican currency) paid by the Defendant through his attorney-at-law in St. James pursuant to that writ. Judgment debtor Summons and Summons to examine were taken out on the Plaintiff's behalf on the 4th and 7th of March, 1994 respectively. On the 14th of April, 1994 notice of change of attorney was filed and this Summons to set aside interlocutory Judgment was taken out.

The Defendant places reliance on his affidavits sworn to on the 22nd of April, 1994 and on the 10th of June, 1994 and also on an affidavit sworn to by Dennis Drummond. The Defendant states in his affidavit dated the 22nd of April, 1994 at para. 2 that having been served Writ of Summons and Statement of Claim he instructed Counsel and heard nothing further about the matter until July 1993 when the Bailiff attended upon him. Through his attorney-at-law he paid the Bailiff $81,000.00 and heard nothing more until Judgment Debtor Summons and Summons to examine were served on him whereupon he has consulted new Counsel and seeks to have the interlocutory Judgment set aside. At paragraph 13 of his affidavit sworn to on 22.4.94 he states:

> "that I am not liable to pay the Plaintiff any or any sum claimed as the said lease was lawfully terminated from and since 1991 which said termination was accepted by the Plaintiff."

In this regard the relevant paragraphs of the affidavit of Dennis Drummond sworn to on the 10th of June are as follows:

> "(2) that I know the Plaintiff and the Defendant herein.
>
> (3) that the Defendant had asked me to stay in premises situate at 28 Queen's Drive, Montego Bay in the parish of St. James which he had leased from the the Plaintiff sometime in 1991.
>
> (4) that in or about February or March of 1992 in my presence the Defendant indicated to the Plaintiff that he intended to quit and deliver up possession of the premises within a month's time.
>
> (5) that the Defendant agreed and then asked me to remain in the premises in order to protect it because he was leaving the island shortly.
>
> (6) that I left the premises on or about the 28th day of February, 1994 at the request of the Plaintiff by delivering the keys to him."

Counsel for the Defendant submitted that notwithstanding the delay in bringing this application or the payment made to the Bailiff in connection with the suit Judgment ought to be set aside to enable the matter to proceed to trial. She placed reliance on the case of Evans v Bartland 1937 A.C. P. 473 in stating that

notwithstanding that some action has been taken by the Defendant to sanction the Judgment that would not preclude him from having it set aside nor was the fact that he had access to an attorney-at-law relevant, the crucial and relevant issue being whether the lease was lawfully terminated by the Defendant and whether the Plaintiff had taken possession of the premises. She further submitted that delay by itself is not enough for a Court to refuse to set aside Judgment. She relied on the case of Manteca Warehouse vs. Anthony Chin-Quee et al that delay ought not to prevent a litigant from having his day in Court.

In his submissions Counsel for the Plaintiff urged the Court to take into consideration the history and circumstances of the matter. He placed reliance on and referred to the affidavit of Vernal Ewart sworn to on the 19th of May, 1994 as to the conduct of the Defendant when the Bailiff attended on him in order to execute the Writ of Seizure and sale.

In submitting that the proposed defence is a sham he made reference to para. 9 of Mr. Smith's affidavit sworn to on the 10th of June, 1994 para. 9 of which states:

> "that in relation to the affidavit of Mr. Vernal Ewart it is true that I made several promises to pay him money but in doing so I was not admitting liability"

and para 10 which states:

> "that further to matters referred to in paragraph 9 of this affidavit I promised Mr. Ewart that I would pay him the sums herein because he was always coming to my business place with his assistant Mr. Smythe who was always making up a lot of noise and creating a scene and I therefore promised to pay in order to get rid of them"

He admitted the evidence of Vernal Ewart at paragraph 10 of his affidavit that on one such visit in connection with the attempted seizure of a Mercedez Benz motor car at his premises -

> "that he remarked that he was amused and was just watching us seize his friend's motor car."

In asking the Court to find that the proposed defence is a sham the Plaintiff's attorney-at-law placed reliance on para. 4 of the affidavit of Dennis Drummond

and submitted that the Defendant is putting forward a defence after a period of two years. In considering the principles governing the setting aside of a Judgment in default I bear in mind the direction of Lord Atkin where he says at P. 480 of his Judgment in the case of Evans v. Bartland -

> "the principle obviously is that unless and until the Court has pronounced a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coescive power where that has only been obtained by a failure to follow any of the rules of procedure"

and also the principles laid down in the case of Mantera Warehouse Ltd. vs. Anthony Chin-Que et al in respect of delay. I am mindful of the fact that Defendant need only show that he has an arguable case.

In this suit money has been through the Defendant's attorney-at-law pursuant to a Judgment of the Court. No sufficient reason has been given for the delay in seeking to have the Judgment set aside in circumstances where admittedly the Bailiff has attended on the Defendant in connection therewith on several occasions. In the Defendant's affidavit sworn to on the 22nd of April, 1994 there is no mention made as to why money was paid in respect of the Judgment and as to why several promises were made given that the Defendant states at para. 14 of that affidavit -

> "that at all maternal times I intend to defend this suit brought against me".

In her submissions before the Court on the 15th of June, 1994 the Defendant's Counsel on reading the affidavit of Dennis Drummond at paras. 4 and 5 indicated that the word 'defendant' at para. 5 of the affidavit must be read as a typographical error.

Thereafter Counsel for the Plaintiff made his submissions and in doing so made reference to and relied on paragraph 4 of the affidavit of Dennis Drummond that it was about in February or March 1992 that the Defendant indicated to the Plaintiff that he intended to quit and deliver up possession of the premises and that this supported the Plaintiff's case.

When the hearing resumed on the 22nd of June 1994 the Court on objection being taken by the Plaintiff's Counsel refused in the circumstances to allow oral evidence to be given by Drummond to contradict para. 4 of his affidavit as being a typographical error bearing in mind that the Defendant himself was present when Dennis Drummond's affidavit was read, that leave was not then sought to adduce evidence to correct it and that Plaintiff's Counsel had already concluded his submissions and placed reliance on that paragraph.

In deciding whether or not the Defendant has an arguable case which should proceed to trial, after consideration of the submissions of his Counsel and the evidence presented the Court considered that on a Judgment being regularly obtained against him he has paid money pursuant to that Judgment. His evidence that he had done so in circumstances where he was not admitting liability was only forthcoming after Vernal Ewart had sworn to an affidavit as to the circumstances in which payment was made and further promises made to pay.

The Defendant's subsequent amusement at the activities of the Bailiff and his assistant and his failure to take any action in (circumstances where he had access to an attorney-at-law and he himself is aware that he is not liable to pay) until Judgment Debtor Summons and Summons to examine are served on him are all indications that this Defendant has no good or arguable defence to put forward.

In his affidavit the Defendant alludes to a vague termination of the lease agreement "from and since 1991" while the evidence of his witness at para. 4 of his relatively short affidavit is consistent with the Plaintiff's case where rental is claimed from March 1991 to February 1992.

I find that this applicant has no good or sufficient reason to have the Judgment in default set aside. I find that his failure to take steps before he did in seeking to have the Judgment set aside and his payment of money in respect of that Judgment is due to the fact that he has no arguable defence. I do not accept that in the circumstances of this case the Defendant at all maternal times intended to defend the suit. I am driven to that conclusion on the evidence presented.

He has only come to seek the Court's intervention when faced with the full consequences of the Judgment as a result of Judgment Debtor summons and Summons to examine being served on him.

For these reasons the Summons to set aside interlocutory Judgment is dismissed with costs to the Plaintiff to be agreed or taxed.

Cases referred to

(1) Evans v Bartlam (1937) A.C. 473

(2) Mantoa Warehouse v Attorney Gen-Queensland