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FILED

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00306 OF 2005

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| BETWEEN | EDMORE SMITH | CLAIMANT |
| AND | GEORGE COOPER | DEFENDANT |

IN CHAMBERS

Akin Adaramaja for the claimant

Defendant unrepresented and absent

January 8, March 24 and May 6, 2009

APPLICATION TO RESTORE CASE TO CAUSE LIST - RULES 11.18
AND 27.8 (4), (5) OF THE CIVIL PROCEDURE RULES - WHETHER
NOTICE OF ORDER IS SAME AS SERVICE OF THE ORDER

SYKES J.

1. This is an application by Mr. Edmore Smith to restore his matter to the cause list after it was struck out on December 15, 2006. On March 24, 2009, I had dismissed the application but before the order was perfected I realised that I had misapplied rule 11.8. I therefore changed the order and granted the application.

The facts

2. By a fixed date claim form, Mr. Smith brought an action against Mr. Cooper, the defendant, claiming the sum of \$465,000 which he alleges Mr. Cooper owed him. He also claims interest at the rate of 12% per annum until payment. Mr. Smith says that this sum is due under a contract and the sum claimed is the sum agreed, in the contract, by the parties.

3. The claim was filed on February 2, 2005 supported by an affidavit filed the same date. The fixed date claim form and affidavit were served on April 20, 2005. The matter came on for case management on October 24, 2005, before Sykes J. On that date, the defendant was present and he was represented by counsel but no acknowledgement of service had been filed. At the case management conference, a number of orders was made. These were:
 - (1) the fixed date claim form was ordered to be treated as a claim form;

 - (2) the defendant to file an acknowledgement of service on or before November 18, 2005;

 - (3) the claimant to file particulars of claim on or before December 2, 2005;

(4) defendant to file defence if so advised on or before December 23, 2005;

(5) case management conference to be held on March 13, 2006 at 3:00 p.m.;

(6) claimant's attorney to file and service this order.

4. There is no record of what happened on March 13 which was the next date the matter was scheduled to be before the court.
5. The next recorded date the matter was before the court was May 8, 2006 when it came before Sykes J. Mr. Adaramaja appeared for Mr. Smith. He was instructed by Mr. Smith's then attorney, Mr. Vernon Ricketts. On that date, the defendant was absent and unrepresented. The defendant had not filed an acknowledgment of service or defence.
6. A number of orders was made on May 8, 2006, of which the most relevant was this: *Unless the defendant files acknowledgment of service and defence not later than 3:00 p.m. on June 8, 2006, then judgment to be entered for the claimant in the sum of \$465,000.00 together with interest at 12% per annum from March 13, 2003 until payment.*
7. The matter was adjourned for case management on October 31, 2006 at 11:00 a.m. On October 31, 2006, the matter came before Beckford

J. The defendant was absent and not represented. Her Ladyship ordered that the matter be adjourned to December 15, 2006, before Sykes J. I should point out that when the matter came before Beckford J., Mr. Smith's first attorney was disbarred, and Mr. Adaramaja who appeared before her Ladyship was not properly on the record since no notice of change of attorney had been filed. According to the record, the notice of change of attorney was filed on November 7, 2006.

8. When the matter came up on December 15, neither party nor any representative, legal or otherwise, appeared. The matter was dealt with by Brooks J. His Lordship struck out the claim. It was also ordered that the Registrar should "inform the claimant of this order by letter posted no later than 31st December 2006." The minute of order of December 15 also reads, in part, "Mr. Adaramaja should have filed a notice of change of attorney and serve same on defence. No evidence of compliance ..."
9. This minute needs some explanation. I have already stated that the notice of change of attorney was filed on November 7, 2006. If this is so, how then could the minute of order read in the manner I have indicated? A possible explanation is that the notice of change of attorney was not on the file when the matter came before Brooks J. on December 15. Regrettably, I must admit that it is not unusual for documents to be filed in the Civil Registry and up to several weeks after they are filed they are not on the file. This may be one of those

instances. Had the notice been on the file it is extremely unlikely that Brooks J. would have noted that Mr. Adaramaja had not filed and served the notice of change of attorney.

10. In support of his application Mr. Smith has filed an affidavit. Mr. Smith explains that on October 31, 2006, Beckford J. had adjourned the matter to December 15, to be dealt with by Sykes J. He says further that on December 15, 2006, he arrived at the court building before 9:00 a.m. and waited for his attorney, Mr. Adaramaja. He says that he saw Mr. Adaramaja a few minutes before 9:00 a.m. who told him that Sykes J. was not present on the building and the matter would therefore not be going on since he was the only judge who could deal with the matter. He was therefore left with the impression that the matter would not be dealt with at all on that date.

11. Mr. Smith frankly admitted that the notice informing him that Sykes J. would not be in chambers to deal with the matter also indicated that the matters would be dealt with by Brooks J. However, his lawyer formed the view that since Beckford J. on October 31 had adjourned the matter to December 15 to be dealt with by Sykes J. the matter would not be going on.

12. Mr. Smith continues his affidavit by stating that Mr. Adaramaja told him that he (the attorney) on returning to his chambers on January 15, 2007, after the Christmas, saw a letter from the Registrar advising that the matter was struck out on December 15, 2006. This

letter was sent pursuant to Brooks J.'s order of December 15. The letter was sent by Registered mail on December 28, 2006.

The application

13. On February 6, 2007, Mr. Smith filed his application to restore the claim to the cause list. It is this application that is being heard. Mr. Adaramaja stated that the applicable rule is rule 27.8 (4) and (5) but I do not agree. Rule 27.8 (4) states that the court may adjourn a case management conference or pretrial review to a fixed date and may exercise any of its case management powers, or powers in relation to costs. Rule 27.8 (5) provides the court with the power to strike out the claim or defence, as the case may be, if the party does not attend.

14. Those rules do not say anything about the power of the court, if the court makes an order in the absence of a party. The rule that does this is rule 11.18 which states:

- (1) *A party who was not present when an order was made may apply to set aside that order.*
- (2) *The application must be made not more than 14 days after the date on which the order was served on the applicant.*
- (3) *The application to set aside the order must be supported by evidence on affidavit showing -*
 - (a) *a good reason for failing to attend the hearing; and*

(b) that it is likely that had the applicant attended some other order might have been made.

15. Mr. Smith was not present when the order was made. He has filed an affidavit explaining his absence before Brooks J. on December 15, 2006. The affidavit, the contents of which have already been summarised above, in my view, has shown that had he been present another order might have been made. The remaining question is whether he has made his application "not more than 14 days after the date on which the order was served on the applicant"

16. The error I had made was that I was treating the Registrar's notice of the order as the service of the order. I do not think this is correct. The rule requires the order to be served on the applicant and in this case the order was not served. What was sent to the claimant was a letter indicating that an order had been made. The letter, as helpful as it is, is not by definition, the order of the court.

17. There is nothing that prevents an applicant applying to set aside an order which he knows has been made but has not yet been served. The measure of time under rule 11.8 begins when the order is served and not when notice of the order comes to the attention of the affected person.

18. When Mr. Adaramaja received notice of the order, as distinct from the order itself, he was entitled to apply to have the order set aside

under rule 11.8 even though he was not served with the order. What the rule does is set a time limit within which the application is to be made once the order is served. If a party can make the application to set aside the order once he has been served it is difficult to see why such an application cannot be made if one has knowledge of the order but has not been served with it.

19. Application granted.