

IN THE SUPREME COURT OF BELIZE, A.D. 2017
(CIVIL)

CLAIM No. 789 of 2017

BETWEEN:-

WILBERT LANZA

CLAIMANT

AND

HECTOR TORRES

DEFENDANT

Before: The Hon. Mde. Justice Griffith
Date of Hearing: 25th September, 2018
Appearances: Mr. Leo Bradley for the Claimant, absent; Mr. Hurl Hamilton for the Defendant, absent; no appearance of the parties.

Civil Procedure – Failure to Comply with Case Management Order – Application for Relief from Sanctions – Extension of time to Comply with Case Management Order - Non appearance of Counsel or Parties – Striking out of Claim.

DECISION

Introduction

1. This matter concerns a claim for damages for personal injuries which was filed on the 27th December, 2017, arising out of a road traffic accident on 11th March, 2017. Both parties were represented by Counsel. The Defence was filed on 3rd March, 2018 and the matter listed for case management for 13th April, 2018. On 13th April, 2018 the case management conference was adjourned to 11th May, 2018 at the behest of Counsel for the Claimant, in order to enable amendments to the Claim. In particular, Counsel for the Claimant was allowed the adjournment to facilitate compliance with CPR Rule 8.9(3), namely, the inclusion of a medical report, the claim being one for damages for personal injuries. At the adjourned case management conference on the 11th May, 2018 Counsel for the Claimant was absent but had notified the Court via correspondence, of illness. The Court issued case management directions for filing of standard disclosure, exchange of witness statements and an agreed statement of facts and issues. The Order fixed the 6th July, 2018 for pre-trial review and the 25th July, 2018 for trial.

At the time of the adjourned case management conference on 11th May, 2018 Counsel for the Claimant had made no amendments to the Claim and had not complied with Rule 8.9(3). The case management conference having been held, the Court ordered that the Claimant would not be allowed to amend the claim or produce medical evidence at the trial.

2. On the 6th July, 2018, the date fixed for pre-trial review, Counsel for the Claimant was absent but was assisted by Counsel holding brief. The Defendant had complied with all case management directions of 11th May, 2018 however there had been no compliance by the Claimant. On the 6th July, 2018 Counsel holding brief indicated that there had been filed (on the 5th July, 2018 but not yet before the Court on the 6th July, 2018), the Claimant's list of documents. The time for filing of disclosure was the 31st May, 2018 which meant that the filing of 5th July, 2018 was approximately 5 weeks out of time. Also filed on behalf of the Claimant on the 5th July, 2018 but not yet before the Court on the 6th July, 2018, was an Application for Relief from Sanctions. Given the non-compliance by the Claimant, the trial date of 25th July, 2018 was vacated pending the outcome of the Application for Relief. Counsel for the Defendant opposed the Application for Relief and was granted permission to file a response to the Application. The response was filed and the Application for Relief was scheduled for 25th July, 2018.
3. On the 25th July, 2018, the Court declined to hear the Application for Relief on the basis that the Application as filed was for want of a better description simply unfit to be presented to a court of law, much less entertained for hearing. The Application was clearly drafted in a hurry as it was riddled with errors as well as contained irrelevant and extraneous content left over from an unrelated application presumably used as a template. As a result of the adjournment arising from the unacceptable state of the Application, costs in the sum of \$600 were ordered in favour of the Defendant to be paid on or before the 31st August, 2018. The Court ordered that the Application for Relief be amended and supported by additional or further affidavits; a response if any to be filed; as well as sanction of dismissal for failure to comply with the order to file the amended application or payment of costs.

4. The amended Application was filed and fixed for hearing on 25th September, 2018. On 25th September, 2018 neither Counsel was present but Counsel for the Claimant by letter dated the 19th September, 2018, received by the Court on the 24th September, 2018 and messages received also on the 24th September, 2018, sought to be excused as a result of a commitment to attend a meeting on the morning of the 25th September, 2018. No one appeared to hold brief for either counsel, neither party appeared. By this time, the Claimant had never been present for any hearing of the proceedings to date. In all the circumstances of non-compliance and the opportunity extended by the Court to Counsel for the Claimant to amend the original application for relief instead of dismissing it outright, the Court considered the absence of Counsel without arrangements made for another Counsel to address the court on his behalf, to be unacceptable. The Court therefore considered the application in the absence of both counsel, and having found the Application wanting, dismissed both the Application and the Claim. The Court's brief reasons for doing so follow.

Consideration

5. This is a claim for damages for personal injuries. The Claim in the first instance did not comply with Rule 8.9(3) which required the attachment of a medical report along with the statement of claim. Despite the Court granting the Claimant the opportunity to comply with Rule 8.9(3), no report was provided and the Claimant was from the second date for the case management conference, precluded from producing medical evidence at the trial due to such non-compliance. This is one context within which the Claimant's Application for Relief fell to be considered. Additionally, the procedural history of the proceedings as outlined above, is the further context within which the Claimant's Application for Relief fell to be considered. With respect to the Application for Relief however, technically speaking, there was no sanction for non-compliance imposed by the case management order. However, the time for compliance with all orders having expired, it was still necessary as provided in Rule 27.8(4)(b), for the Claimant to apply for an extension of time to vary the case management timetable. The Application is therefore treated as one to extend time to vary the case management table.

6. The benefit to the Claimant of this view is that the strict framework of an application for relief from sanctions is somewhat lessened in favour of an application for extension of time to comply with the case management orders. The Court adverts also to its general power to extend time as provided by Rule 26.1(2)(c). Unlike the strict parameters of Rule 26.8, there are no grounds specified in the Rules, upon which the Court is to exercise its general discretion to extend time. There have been established by case law however, what was considered 'judge made grounds'¹, which governed the exercise of the Court's discretion to extend time, prior to the new CPR. These grounds are still relevant to the exercise of the Court's general discretion to extend time as part of its case management powers. In this regard, the application to extend time must be (i) made without delay and if there was delay there should be good reason for the delay, (ii) the applicant must have a reasonable prospect of success in his/her claim, (iii) there must be a good explanation for the failure to comply with whatever rule or order was not complied with, and (iv) there must be consideration of prejudice to the other side.²
7. These factors will be considered respectively with reference to the evidence put forward in support of the Application. The Claimant filed three affidavits in support of his Application and one affidavit was also filed by counsel for the Claimant. The first factor for consideration is that of delay in filing the Application which in its original albeit untenable form, was filed on 5th July, 2018. This amounted to some two to five weeks after the deadlines for compliance with the respective case management directions, but in any event was after time had passed for compliance with each of the directions. In circumstances where none of the directions for filing had been complied with and the order had been made since 11th May, 2018, the filing of the application, unfit as it was, is not considered prompt, but when considering that the time for compliance with the last case management direction was 25th June, 2018, the Application was not unduly delayed.

¹ **Nevis Island Administration v La Copropriete Du Navire J31 Civ. App. No. 7 of 2005 per Barrow JA**

² **Bennett & Bennett v Williams [2013] JMJC Civ 194**

It is considered that there was delay, particularly since the time for compliance with all of the directions had passed, but that the delay is not unduly unreasonable.

8. The reason for the failure to comply with the case management order therefore now falls to be considered. The first of the three affidavits filed by the Claimant on 5th July, 2018 underscored the fact that the Claimant had never attended a single hearing in the proceedings. For example, in paragraph 4 of that affidavit, the Claimant stated that his attorney had been attending hearings including a preliminary case management on 13th April, 2018 and at that hearing the case management was adjourned to 11th May, 2018. This account is not a complete reflection of the proceeding. At the first case management conference it was Counsel for the Claimant who required the adjournment to facilitate an amendment of the claim, particularly to comply with Rule 8.9(3). The Claimant's first affidavit in support of this Application also states at paragraph 5, that on the 11th May, 2018, (the date of the second case management hearing), the Claimant travelled to Belize City (he resides in Santa Elena, Cayo) and learnt that his attorney was ill and he was advised that in all likelihood the matter would be adjourned. Unfortunately for the Claimant, this information which he says was relayed to him by his attorney was inaccurate and on 11th May, 2018, the case management conference was held as scheduled and the case management orders made on that day. The Claimant's first affidavit continues by outlining that from the 19th May, 2018 he returned overseas for continued medical treatment for the injuries received in the accident, was away until the end of June, 2018 and during that time was unable to communicate with his attorney.
9. The affidavit also stated that the Claimant had not yet made contact with witnesses and other persons in order to prepare their witness statements. It was stated that a draft witness statement was appended to the affidavit, however there was no such statement attached. The second affidavit filed by the Claimant on the 20th July, 2018 alleged that he was still seeking medical attention for the injuries he received in the accident and had been ordered on bed rest for the entire month of July, 2018. A third affidavit was filed by the Claimant on the 10th August, 2018 (after the Court's order to amend the defective application ahead of hearing in September, 2018), however this affidavit was a replica of

the first affidavit of 5th July, 2018 with the exception that it then attached the draft witness statement which was referred to but not attached in the first affidavit. The last affidavit for consideration which was filed by counsel for the Claimant outlines Counsel's difficulties in communicating with his client; his client's displeasure with his handling of the case, so much so that Counsel assumed his services to have been terminated. These affidavits unfortunately did little to advance any assertion of there being a good reason for the failure to comply with the case management orders. The Court's consideration of the facts deposed to in these affidavits is informed by a number of judicial authorities, for example - **Attorney-General v Universal Projects Ltd.**³ In considering the question of what amounted to a good explanation, Lord Dyson stated that where there was "*real or substantial fault on the part of the Defendant, there is not a good explanation for the breach*"⁴

10. Further, in **Vasquez v Belize Western Energy Ltd.**⁵ in considering the question of good explanation with respect to setting aside a default judgment, Legall J opined that the defendant's explanation demonstrated some 'negligence' which could not be considered to amount to a good explanation. This Court in **Lindsay Garbutt v Maheia's United Concrete and Construction Supplies Ltd.**⁶, after examining a number of authorities, including those referred to above, concluded that⁷ situations arising from intentional acts of a defendant, inattention, inefficiency or negligence, do not amount to a good explanation. With respect to the explanations proffered by the Claimant for failure to comply with the case management orders, the affidavits in the Court's view establish a lack of preparation in filing and proceeding with the claim as well as unsatisfactory arrangements between attorney and client. In light of all of these authorities, it is not considered that the situation outlined in the affidavits filed in support of the Application, amount to a good reason for failing to comply with the case management orders.

³ [2011] UKPC 37

⁴ Ibid @ para 23

⁵ BZ 2009 SC 7

⁶ Belize Supreme Court Claim No. 621 of 2017

⁷ Ibid, @ paras 22-27.

With respect to the question of the Claimant's prospect of success, it is to be recalled that the claim is one for personal injuries and the Claimant has already been precluded from relying on medical evidence due to non-compliance with Rule 8.9(3), even after being given an opportunity to remedy same. Based on the foregoing, the application for relief from sanctions, which the Court regards as an application for extension of time to comply with the case management order of 11th May, 2018, is dismissed. As a consequence of the refusal of any extension of time for the Claimant to comply with the case management orders, the claim has no reasonable prospect of success and is accordingly struck out.

Disposition

11. The Application filed for Relief from Sanctions is disposed of in the following manner:-
 - (i) There being no sanction for non-compliance specified in the Court's case management order of 11th May, 2018, the application filed by the Claimant for relief from sanctions is treated as an application for extension of time to comply with the said order;
 - (ii) The Claimant has failed to provide a good explanation for failing to comply with the case management orders and as such the application is dismissed;
 - (iii) Upon the dismissal of the Claimant's application the claim has no reasonable prospect of success and the claim is struck out;
 - (iv) Given the absence of Counsel for the Defendant, there is no order as to costs.

Dated this 12th day of October, 2018.

Shona O. Griffith
Supreme Court Judge.