

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2018/0527

BETWEEN:

VANESSA NICHOLAS

Claimant

and

[1] STEVEN LEACH

[2] LARA-LYN VAN BRUWAENE

Defendants

Appearances:

Mr. Kyle Kentish, Counsel for the Claimant

Mrs. Andrea Roberts-Nicholas, Counsel for the Defendants

2021: July 19;
September 21st.

DECISION

- [1] **GARDNER-HIPPOLYTE, M.:** In summary, this is an application filed on the 7th April, 2021 by the Claimant who seeks: (a) to set aside a judgement entered on the 3rd December, 2020; (b) an extension of time to deem as validly filed the witness statement of Vanessa Nicholas filed on the 17th November, 2020; and (c) relief from sanctions.

Background

- [2] The Claimant and the first Defendant were in a motorcycle collision, the second Defendant is the owner of the motorcycle that was driven by the first Defendant. The Claimant sued the Defendants for special damages, damages, interest and costs. After a failed attempt at mediation, the Parties were given trial directions on the 29th October, 2019 (herein after referred to as CMC directions). The directions indicated the time by which standard disclosure was to have taken place; when witness statements were to have been filed and it gave a date for further case management. On the return date of 27th January, 2020 both Parties applied to the Court for extensions of time to comply with the 1st CMC directions. The first Defendant also filed an application to strike out the proceedings. Leave was granted to the Claimant to file an affidavit in response to the striking out application and the Parties were directed to file submissions on or before the 3rd March, 2020.

- [3] The matter was set down for 7th April, 2020 for further CMC, however there was no hearing on that day. The matter next came up for hearing on the 16th June, 2020; leave was granted to the Claimant to serve submissions in relation to the striking out application on or before the 19th June, 2020 and the matter was adjourned. On the return date of 14th July, 2020 it was adjourned to September 2020 for the hearing of the striking out application and/or further case management conference.
- [4] On the 16th September, 2020 the Court order reflects that the strike out application was withdrawn and new case management directions (hereinafter referred to as the 2nd CMC directions) were given. The 2nd CMC directions required the Parties to file and serve their witness statements on or before the 13th November, 2020. The learned Master also gave an unless order and indicated that non-compliance with the filing of the witness statements would result in the statement of case being struck out.
- [5] Without applying to extend the time to do so, the Claimant filed the witness statement of Vanessa Nicholas on the 17th November, 2020 four days out of time. On the 24th November, 2020 the Defendants filed a request for judgment and an affidavit in support. On the 30th November, 2020 Ms. Juliette L. Dunnah, the clerk in the Chambers of Messrs Lake & Kentish, without applying for relief from sanction and for an extension of time, filed an affidavit setting out briefly in 10 paragraphs why the witness statement of Vanessa Nicholas was filed late, (hereinafter referred to as the 1st affidavit).
- [6] When the matter came up for hearing on the 3rd December, 2020 the learned Master granted the request for judgment, striking out the Claimant's statement of case since the witness statement was not filed in time, and costs were also granted in favour of the Defendants. The case now concluded pursuant to 26.5 of the CPR. It was then scheduled for the costs hearing on the 15th March, 2021.
- [7] On the 14th December, 2020 the Claimant filed an application for relief from sanctions and deeming of the witness statement of Vanessa Nicholas properly filed (hereinafter referred to as the 1st application). The Claimant relied on the 1st affidavit of the clerk filed on the 30th November, 2020. On the 8th January, 2021 the Claimant filed an affidavit in support of the application for the extension of time to comply (hereinafter referred to as the 2nd affidavit). This affidavit has 3 paragraphs.
- [8] On the 15th March, 2021 the learned Master indicated that the application filed 14th December, 2020 had defects as it needed to be made pursuant to CPR 26.6(3) and therefore granted until the 19th March, 2021 to correct the defects. The Claimant was also ordered to file submissions on or before the 30th March, 2021.
- [9] On the 7th April, 2021 the Claimant filed an amended notice of application (herein after referred to as 2nd application) and this time referred the Court to CPR 26.6(3) and 26.8. The submissions to the application were also filed on the 7th April, 2021. The documents were subsequently served

on the Defendants on the 8th April, 2021. The Defendants complied with the Court order and filed their affidavit and submissions on the 14th April, 2021.

- [10] Having set out in detail the chronology I will now go on to the substance of the setting aside application; relief from sanctions application along with an extension of time to deem a witness statement properly filed.

The Applicable Law

Civil Procedure Rule 26.5

- [11] If a party does not comply with the unless order, any other party may ask for judgment to be entered. The Defendants applied under CPR 26.5 for judgment to be entered after the Claimant failed to comply with an unless order.

- [12] Under section 26.5(4) the request must –

- (i) Certify that the right to enter judgment has arisen because the court's order was not complied with;
- (ii) Prove the service of the unless order; and
- (iii) State the facts which entitle the party to judgment.

- [13] Judgment was entered for the Defendants in the order of 3rd December, 2020 reflecting that the Claimant's statement of case was struck out pursuant to the unless order. Judgment was also entered for assessed costs in favour of the Defendants -CPR 26.5(7).

Civil Procedure Rule 26.6

- [14] CPR 26.6 sets out the procedure to be followed for a party to apply to set aside a judgment after striking out. It states –

- (1) A party against whom the court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the court to set it aside.
- (2) If the right to enter judgment had not arisen at the time when judgment was entered, the court must set it aside.
- (3) If the application to set it aside is made for any other reason, rule 26.8 (relief from sanctions) applies.

- [15] I accept the Claimant's submission that the Court has the jurisdiction to hear and determine if the judgment should be set aside even though this is a Court of concurrent jurisdiction.¹

¹ Mathew Thomas v Dr Ralph Gonsalves SVGHCVP 2014/0009

- [16] The Claimant applied pursuant to CPR 26.6(3) which states that “**if the application to set aside is made for any other reason, rule 26.8 (relief from sanctions) applies.**” (My Emphasis)

CPR 26.8 – Relief from Sanctions

- [17] The 1st application (albeit defective) was made 31 days after the required 13th November, 2020 filing date for the witness statement. The 2nd application was filed 145 days after the said filing date.
- [18] CPR 26.8 requires a party to systematically lay before the Court sufficient evidence that would allow the Court to conclude that relief from sanctions should be granted. It is well settled that “the burden to satisfy the court remains squarely on the shoulders of the defaulting party and it behoves a defaulting party not to view this obligation as trifling or treat it lightly or otherwise to assume or expect that any accommodation will be forth coming...”²
- [19] CPR 26.8 “may be contextually understood to comprise three components”³. CPR 26.8 (1) requires the party to apply promptly and to support the application with affidavit. The Claimant did not apply promptly but rule 26.8 “does not direct the court to have regard to whether or not the application has been made promptly in considering whether to grant relief...”⁴ Therefore, I find CPR 26.8(1) has been satisfied.
- [20] CPR 26.8(2) requires the applicant to satisfy the Court of three conditions for the relief to be granted. The Court will examine each head in relation to the affidavits supplied by the Claimant.

The Failure to Comply was not Intentional

- [21] The application was made 31 days after the date given by the Court for the filing of the witness statements, however the Claimant had already filed on the 17th November, 2020 the said witness statement. Therefore, whilst the Claimant was four days late, the effect of the unless order was automatic.
- [22] The 1st affidavit in support of the application was filed on the 30th November, 2020 and the clerk of the Claimant’s attorney stated that the reason for the delay was because the Claimant “is elderly and was suffering with serious medical issues.”⁵ “On the 13th November, 2020 the Claimant’s niece came to chambers and was given the witness statement.”⁶ The witness statement was returned on the 16th November, 2020 and was subsequently filed on the 17th November, 2020 along with the written submissions.

² Issa Nicholas Limited v Time Bourke Holdings Limited GDAHCVAP 2015/0029 as per Pereira CJ at Paragraph 13.

³ Ibid at paragraph 8

⁴ Irma Paulette Robert v Cyrus Faulkner et al SLUHCVP 2007/29

⁵ Paragraph 3 of the affidavit of Juliette L Dunnah filed 30th November 2020.

⁶ Paragraph 6 ibid

- [23] At paragraph 9 of the 1st affidavit the clerk states that she “believes the circumstances outlined the failure to file the witness statement within the prescribed time was neither contumelious nor deliberate.” Upon review of both the affidavits it can be ascertained that there is nothing on the face of it that says it is scornful or insulting, however both affidavits are very brief in the reasons for failure to comply. The 1st affidavit briefly states that the Claimant is ill but does not indicate the details of the said illness and how this has impacted the filing.
- [24] It is noted that from the 29th April, 2019 to 15th March, 2021 there were 10 Court appearances. The Court’s record reflects that the Claimant was absent on 8 of those occasions, of which the Court recorded 4 of them being with excuse/illness. In the circumstances and bearing in mind the overriding objective the Court will use the broad statement in the affidavit of suffering with medical issues and ill as the basis for the inferring that the failure to comply was not intentional.

There is a Good Explanation for the Failure

- [25] The 1st affidavit lists the following reasons as the explanation for the failure to comply:
- (a) “Para 3 – The Claimant was not able to file and serve the witness statements on the 13th of November, 2020 as she is elderly and was suffering with serious medical issues.
 - (b) Para 4 – On the 10th November, 2020 the Claimant was instructed to come to the chambers of Messrs. Lake & Kentish in relation to her witness statement.
 - (c) Para 5 – The Chambers were informed that she could not come as she was still ill.
 - (d) Para 6 – On the 13th November, 2020 the Claimant’s niece came to Chambers and was given the witness statement to take to the Claimant for the Claimant to sign as the Claimant was still ill.
 - (e) Para 7 – the witness statement was returned by the Claimant’s niece late in the afternoon on Monday 16th November, 2020.”
- [26] The Court is guided by the learning from **Issa Nicholas**⁷ “that the evidence adduced ...must be cogent in the sense that it must be set out with sufficient particularity so as to satisfy the court that these three preconditions have been met.” Further “the court is not permitted to guess and supply the omissions in the application...”⁸
- [27] The 1st affidavit from the clerk of the Claimant’s attorney set out very briefly the reasons for the failure. The explanation is so broad that the Court is left wondering what happened from the 16th September, 2020 to the 13th November, 2021. What is the illness and/or medical issues that the Claimant suffers, how many attempts were made to facilitate the witness statement and what were the reasons? This was the second time the Court extended the time for the witness statements to be filed. An unless order with very serious consequences was issued. Whilst the Court is sympathetic that the Claimant is/was ill, more evidence is required to be led to allow the Court to properly determine if there is a good explanation for the failure to comply.

⁷ Ferdinand Frampton v Ian Pinard et al DOMHCVAP 2005/0015 As per Barrow J at para 19 referred to by the Chief Justice at paragraph 9 of Issa Nicholas Limited v Time Bourke Holdings Limited GDAHCVAP 2015/0029

⁸ Ibid at para 17

[28] Accordingly, it cannot be said that there is a good explanation for the failure.

General Compliance with all other Relevant Rules, Practice Directions, Orders and Directions

[29] A review of the Court orders and record reflects that the Claimant did not comply with the 1st CMC directions. An application for an extension of time and relief from sanctions was filed and was subsequently granted. In the 2nd CMC order the Court choose to include an unless order for the filing of the witness statements.

[30] In paragraphs 2 to 3 above the Claimant in the Court order of 27th January, 2020 was ordered to file and serve submissions on or before the 3rd March, 2020. The Claimant did not comply and in the Court order of 16th June, 2020 the learned Master extended the time to the 19th June, 2020.

[31] In the two affidavits of the clerk from the Chambers of the Claimant no reference is made to the evidence the Court can rely on to examine this general compliance. Therefore, reliance is placed primarily on the Court's record, which indicates the two failures to file the witness statements.

[32] Accordingly, it cannot be said that there is general compliance with all other relevant rules, practice directions, orders and directions.

Conclusion

[33] Only if all three conditions in CPR 26.8(2) are satisfied can I then go on to consider CPR 26.8(3).⁹ Having reviewed the evidence to support the three conditions I find that I am handicapped based on the information provided for the Claimant to obtain relief. Accordingly, the application fails on conditions 26.8(2)(b) and (c).

[34] For the above mentioned reasons the Order of the Court is as follows:

1. The Claimant's application to have the judgment set aside, for relief from sanctions and an extension of time to have the witness statement deemed properly filed is refused;
2. The Claimant having been unsuccessful in the application shall pay costs to the Defendant in the sum of \$750.00 to be paid on or before the 29th October, 2021;
3. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

By the Court
Registrar

⁹ Robin Mark Darby v LIAT (1974) ANUHCVP 2012/0002

