

EASTERN CARIBBEAN SUPREME COURT

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2015**

CLAIM NO. SKBHCV2012/0339

BETWEEN:

VINCENT BUCKLEY

Claimant/Respondent

and

ELDORA HODGE

Defendant/Applicant

Appearances:

Ms. Angelina Gracy Sookoo for the Claimant/Respondent
Mr. Nassibou Butler for the Defendant/Applicant

2015: June 11th

Ruling on Application for Relief from Sanctions

- [1] **CARTER J.:** On the 11th of June 2015, I delivered my ruling on the application for relief from sanctions. I now provide the reasons for my ruling.
- [2] By notice of application filed on the 17th July 2014, the applicant sought relief from sanctions and an order granting an extension of time to file witness statements, the time for filing of such witness statements having expired. The application was supported by the affidavit of Tamoya Herbert, clerk at the law firm of the applicant's solicitors.
- [3] The Civil Procedure Rules 2000 (CPR) 26:8(1) states that:
*"An application for relief from any sanction imposed for a failure to comply with any rule, order or directions must be –
(a) made promptly; and*

(b) supported by evidence on affidavit.”

[4] The CPR further states at 26:8(2) that:

“The Court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.”

[5] By Order on Case Management Conference of Master Actie (Ag.) dated the 13th May 2014, the Master gave directions to the parties. Of relevance on this application are the following clauses of the order:

“

1. *There shall be standard disclosure on or before the 27th day of May 2014.*
2. *The parties are to meet to settle the documents to be used at the trial of this matter and the claimant to file a list of the documents on or before the 30th day of May 2014.*
3. *That the parties do file and serve witness statements on or before the 13th day of June 2014.*
4. *Parties may apply for further directions and orders, such application to be made on or before the 20th day of June 2014.*
5. *Pre trial memorandum to be filed and served on or before the 30th June 2014.*
6. *Pre-Trial Review to be held on the 11th July 2014.*

...”

[6] At the pre-trial review hearing on the 11th July 2014, Counsel for the claimant raised an objection with regard to the failure of the defendant to file her witness statement or witness summaries. The court then gave directions for filing of the instant application and subsequently for the filing of submissions.

[7] The grounds of the application for relief from sanctions and for an order granting an extension of time to file witness statements were set out and included as follows:

- “2. The Applicant/Defendant’s non compliance with the Order relates to the fact that the Applicant/Defendant left the Island of St. Kitts for urgent medical attention and the Applicant/Defendant’s sudden and unexpected departure and absence resulted in the breakdown of communication between the Applicant/Defendant and her Counsel who only became*

aware of her absence after he had made several phone calls, a visit to her home and several inquiries of several persons of her whereabouts. It was never the intention of the Applicant/Defendant not to comply as ordered.

4. *The Applicant/Defendant is ready and willing to remedy her failure to comply with Order of the Court.*
5. *Respondent/Claimant will not be prejudiced by the extension of time to allow compliance.*
6. *No trial date has been set for this matter to be heard and therefore the parties would be in good time to meet any such date.*
7. *To date the Applicant/Defendant has generally complied with all orders and directions of this Honourable Court.”*

[8] Having considered the application and affidavit in support, the affidavit in opposition filed by the respondent, as well as the submissions of both parties, the court makes the following conclusions:

Promptitude:

1. The application for relief was filed on the 17th July 2014, some thirty three (33) days after the date for filing and service of witness statements set by the Master. The court notes here, as above, that on the 11th of July at the pre-trial review, it was only when Counsel for the claimant raised the issue that the applicant sought leave of the court to bring the present application. It troubles this Court greatly that Counsel for the applicant did not, without being prompted, seek leave to make the instant application. This is of some relevance and affects the court's further analysis of the factors below. However, the court does not find that the thirty three (33) day lapse in and of itself, shows a lack of promptitude on the part of the applicant.

Failure Not Intentional:

2. The applicant states that the failure to comply with the Master's order to file witness statements was not intentional. In the affidavit in support of the application, it is stated by the deponent that she was informed that the defendant had left the jurisdiction in order to seek urgent medical attention. At paragraph 17 of the affidavit in support of the application, the deponent states that: *“Counsel for the applicant/Defendant informed me that on the night of the*

14th July 2014 was the first time since her departure from St. Kitts that he was able to communicate with the Applicant/Defendant.”¹ This is almost (1) month after the defendant’s witness statement should have been filed, three (3) days after the date fixed for the pre-trial review in this matter. As stated above, it troubles the court that in such a circumstance that Counsel, having not been in contact with the applicant, did not make an application such as the instant one now before the court, before the date for pre-trial review and certainly without having to be prompted to do so by opposing Counsel. However, the court must bear in mind that Counsel could not be expected to act without instructions. These facts speak to a disregard by the applicant of the need to adhere to the timelines set by this Court and indeed the Case Management Order. However, these are not sufficient for the court to find that the failure to file the witness statements was intentional.

Good Explanation for Failure Offered by the Applicant:

3. What is a good explanation for failure to comply with the court order?² In the instant case it is a bold but bald assertion offered by the applicant that the applicant left the jurisdiction unexpectedly to seek urgent medical attention. The court notes that the deponent does not state the source of this information, only that “*Counsel made several inquiries of several persons and was informed that the applicant/defendant had left the Island of St. Kitts suddenly in order to seek urgent medical attention.*”³
4. There is no evidence or further explanation of the particulars of the urgent medical condition which necessitated the applicant’s abrupt departure from the jurisdiction, and neither are there details of the dates of departure or return or of the dates upon which inquiries were made by the deponent. It is evident however that the applicant did not inform her attorney that she was leaving the jurisdiction, that her attorney was unable to contact her prior to the date set for

¹ Affidavit in support filed on 17th July 2014

² See Sylmord Trade Inc v Inteco Beteiligungs AG and Goldgar et v Baird, BVIHCMAP2013/0003

³ Affidavit in support filed on 17th July 2014

the filing of the witness statements and did not in fact do so until after the date of the pre-trial review which itself was approximately one (1) month after the date for filing of the said witness statements. The court notes that the applicant was present at the Case Management Conference and would have been aware that these relevant dates were set.

5. Having considered this evidence, the court considers it unsatisfactory in the extreme. This is not a good explanation for the failure to file the witness statements as required by CPR 26.8 (2). In **Prudence Robinson and Sagicor General Insurance Inc. (formerly Barbados Fire and Commercial Insurance Company Inc.)**,⁴ the Court of Appeal found that the trial judge in that case who had complained that the affidavit in support of an application for relief from sanctions and for extension of time to file a witness summary merely contained bald assertions, that he *"did not pay proper regard to the inadequacy of the affidavit evidence in satisfying himself that there was a good explanation for the delay in filing the witness summary. Having made the finding that the respondent had relied on bald assertions to support its application for relief from sanctions, the judge erred in granting the application"*, per Baptiste J.A. Having concluded that there were *"critical questions"* which had to be addressed in the affidavit evidence but were not, the court found that *"it cannot be said that there was a good explanation for the failure."* This Court will not fall into a similar error in the decidedly analogous circumstances in this case.
6. The applicant's submission is that even if the reason for the delay is not a good one that the court still has to consider all the circumstances of the case in light of the overriding objective. The court is not persuaded that this is a proper statement of the law.⁵ The applicant must satisfy all of the

⁴ SLUHCVP2013/0009

⁵ Sandra Ann-Marie George v Nigel Don-Juan Glasgow, SVGHCVAP2013/0003 per Blenman JA.; See also Ormiston Ken Boyea et al v East Caribbean Flour Mills Limited SVGHCVAP2004/0003 (delivered 16th September 2004, unreported)

preconditions.⁶ The applicant has failed to satisfy the court with regard to CPR 26.8 (2) (b).

8. The court will state here that it is satisfied that no fault can rest with the applicant's attorney. Clearly he prepared the witness statement as instructed but was unable to contact his client for her to sign same or indeed to get instructions from her with regard to filing of a witness summary, before the date stipulated in the Case Management Order.

Compliance with Relevant Rules, etc.

9. The court will not go on to consider whether the applicant has generally complied with all orders. While the applicant in submissions in support of this application seeks to bring such matters before the court as well as the respondent's failure to meet required and or directed timelines, these are not relevant considerations unless the applicant satisfies the preconditions of CPR 26:8 (2).⁷

[9] The court's order on the application is as follows:

1. The applicant has not satisfied the court that the requirements set out in CPR 26:8(1) and (2)(b) have been met. The court accordingly orders that the application for relief from sanctions and for time to file and serve the witness statements of the applicant is refused.
2. Costs of the application to the claimant, to be costs in the cause.
3. The matter will be set down for further pre-trial review 24th July 2015.

Marlene I. Carter
Resident Judge

⁶ Ibid, p 5

⁷Karen Tesheira (The Executrix of the Estate of Russell Tesheira) and Gulf View Medical Centre et al. TT High Court, Claim no. CV2009-02051.