

SAINT VINCENT AND THE GRENADINES

SUIT NO.: 108 OF 1995



BETWEEN:

LUENDA BILLINGY

PLAINTIFF

AND

MARK SMITH

DEFENDANT

Mr. E. Robertson for the plaintiff

Mr. G. Bollers for the defendant

April 3, 8 1998

April 22, 1998

#### RULING

BAPTISTE J.

This is an application by the defendant by way of summons for an order to stay execution on a consent judgement dated 16th July, 1996 until final determination of High Court Suit Number 87 of 1998.

The ground of the application is that the defendant has instituted the proceedings in Suit No. 87 of 1998 to set aside the consent judgment as he was induced by the plaintiff to settle her claim for the amount set out in the judgment by fraud and misrepresentation. The application which is made under Order 66 rule 11 of the Rules of the Supreme Court, is supported by the affidavits of the defendant and Keith Boyea sworn to and filed on the 20th February, 1998 and 18th March, 1998 respectively.

Order 66 rule 11 states:

"Without prejudice to order 68 rule 1, a party against whom a judgment has been given or an Order made may apply to the court for a stay of execution of the judgement or order or other relief on the ground of matters which have occurred since the date of the judgement

or order, and the court may by order grant such relief, and on such terms, as it thinks just."

The facts of the case so far as material are as follows: By a specially endorsed writ of summons filed at the High Court Registry, on March 29, 1995, the plaintiff commenced proceedings against the defendant for personal injuries which arose out of an accident on the 16th of July, 1993.

The defendant's insurance company Caribbean Insurance Company Limited assumed responsibility for his defence, and on the 16th July, 1996 a consent judgement was entered for the plaintiff in the sum of \$55,000.00 and \$5,000.00 costs.

The insurance company paid the plaintiff the sum of \$25,000.00 and \$5,000.00 costs to her solicitor. These sums were paid on the 23rd and 24th of July, 1996 respectively. The remainder of the judgment debt is still to be satisfied.

The defendant is resisting further payment and has also applied to the High Court to set aside the consent judgement, both on the ground of fraud.

In paragraph 4 of the affidavit of Mark Smith it is stated inter alia:

"I am informed by Mr. Boyea and verily believe the same to be true that upon investigating the authenticity of the medical documents obtained in the United States, it was discovered that the defendant's medical expenses had been paid by Medicare in the United States of America and her hospitalisation was in no way related to the accident."

That is refuted by the plaintiff in paragraph 1 (f) of her affidavit sworn to on March 10, 1998 and filed on 11th March, 1998.

Keith Boyea, manager of Beacon Insurance Company Limited formerly Caribbean Insurance Company Limited in his affidavit filed on 18th of March, 1998 stated in paragraph 9 the following:

"My company has discovered from the hospital, where the Plaintiff claims that she was treated, that her medical bills were paid by her medical insurance and not by her as she claimed. Furthermore by letter dated 20th March, 1995, Mr. Arthur Williams wrote a letter to the Defendant which was copied to me alleging that the Plaintiff had not been able to return to work until 1st November, 1993. Annexed to that letter is a letter from one Lucille Benson a Personnel Consultant for the City of New York in which she claims that the Plaintiff's health insurance had

been cancelled since July 16th, 1993" (copies of the said letters are exhibited herewith and marked "KB2" and "KB3" respectively).

In paragraph 10 of his affidavit Keith Boyea states:

"Upon investigation with U.S. Health Care, it was discovered that the Plaintiff was medically covered from 19th October, 1993, to 1st April, 1994 which meant that she was employed during the period when she claims not to have worked. In the premises the Plaintiff has clearly lied when she claimed to be entitled to special damages of some \$14,366.00 for loss of earnings."

Mr. Boyea states in paragraph 11:

"Based on misrepresentations made by the Plaintiff, my company was induced to consent to paying to her a sum representing \$36,229.25 for loss of wages and reimbursements of medical expenses none of which she had spent or loss..."

The plaintiff filed an affidavit in reply to the affidavit of Mark Smith, on the 11th March, 1998.

When the summons came up for hearing learned counsel for the plaintiff Mr. Robertson stated that he was taking some preliminary objections to the application. Mr. Robertson's submissions can be summarised thus:

- (1) The action is barred by laches, acquiescence and lapse of time.
  - (2) There is no material before the court to enable the exercise of a discretion to grant a stay.
  - (3) Section 16 of the Motor Vehicles Insurance (Third Party Risks) Act Chapter 356 delimits the time within which the insurance company ought to exercise their option as to whether they should challenge the judgment.
- The defendant is therefore barred from bringing the action.

In dealing with the submission of Mr. Robertson with respect to the Motor Vehicles Insurance (Third Party Risks) Act Cap 356, Mr. G. Bollers counsel for the defendant submitted that there is no provision of section 16 which is applicable to the instant case. I have perused section 16 and I am in agreement with Mr. Bollers. I therefore hold that section 16 is not applicable to the facts and circumstances of the present case.

I now deal with the question of laches, acquiescence and lapse of time.

Mr. Robertson on behalf of the plaintiff contends that the application is too late. Counsel submitted that if judgment is being challenged or stay is applied for, the application should be made promptly. Counsel also submitted that the application should be made within a reasonable time.

Mr. Bollers submitted that in order for there to be acquiescence the plaintiff had to do some positive act. Counsel further submitted that acquiescence does not arise in the instant case and the only principle which has any merit is the question of delay.

According to *Halsbury's Laws of England* 4th ed. para. 1473 - "The term acquiescence is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time, and in that sense acquiescence is an element in laches."

In my judgment, in that sense acquiescence does not arise in the instant case.

"In determining whether there has been such a delay as to amount to laches, the chief points to be considered are:

- (1) acquiescence on the plaintiff's part and
- (2) any change of position that has accrued on the defendant's part."

"The chief element in laches is acquiescence. Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them." (See *Halsbury's Laws of England* 4th ed. para 1477 and 1478).

The consent judgment was entered on the 16th day of July, 1996. The application to set it aside was filed on the 20th of February, 1998, that's nineteen months later. No reason has been advanced for the delay. According to the affidavit of Keith Boyea, shortly after July 24, 1996 the plaintiff returned to his office demanding the rest of her money. He informed her that the company had discovered through its investigations that at the time of the accident her claim for loss of earnings was bogus and she had not paid medical bills in the United States.

Further he also questioned the authenticity of the bills from the United States. Armed with that information, it is rather surprising, to say the least, that the defendant waited until the 20th of February, 1998 to apply for a stay of execution.

I note that in paragraph 1 (e) of her affidavit, the plaintiff stated that since obtaining judgment she was never informed by the Defendant nor his Insurance Company that they were challenging the judgment on any grounds.

Mr. Bollers submitted that delay is an equitable defence and he who comes to equity must do equity and he who comes to equity must come with clean hands. In his submission, the plaintiff's hands are unclean. The plaintiff therefore cannot raise the equitable defence. The uncleanness alleged on the part of the plaintiff is the suppression of material facts which formed the basis of a consent judgement. The plaintiff is seeking to enforce that judgement.

I note that the allegation of uncleanness forms the subject matter of Suit No. 87 of 1988, and also grounds the application for stay in the instant matter. I am not in the circumstances able to

hold that the plaintiff's hands are unclean. In my judgment of lapse of time and delay would operate to thwart the defendant's application.

Mr. Robertson submitted that unless there is material before the court to enable the court to exercise its discretion, the application should be refused. Learned counsel stated that in the affidavit of Mr. Boyea and in the exhibits there is nothing from the United States of America. There is no letter or correspondence to ground the allegation of fraud. Counsel also stated that if there is no material there is nothing on which the court could exercise its judicial discretion.

In dealing with that submission Mr. Bollers stated that the defendant entered into a consent judgment in the belief that the plaintiff had undertaken expenses which subsequently it turned out that she had not undertaken. The defendant he submitted was induced to consent to the judgement, when the plaintiff knew that she had not undertaken or paid these expenses.

Mr. Bollers referred to paragraph 9 of the affidavit of Mr. Boyea (referred to earlier) and also to the affidavit of the plaintiff. Counsel submitted that nowhere in her affidavit is she saying that the statements in the affidavits of Mr. Smith and Mr. Boyea are not true. Counsel asked: Why is there no averment by her to these specific allegations?

Counsel concluded that the mere fact that the plaintiff has not positively denied these allegations on oath, must lead the court to conclude that they must have some proof.

The question whether or not to grant a stay is entirely within the discretion of the court. The court cannot however exercise its discretion in vacuo. There must be material before the court upon which the court can act to enable it to exercise its discretion. I have considered the affidavits filed on behalf of the defendant in support of the application. I have also considered the plaintiff's affidavit. In my judgment the affidavits filed on behalf of the defendant do not provide the kind of material upon which the court can act to enable it in the exercise of its discretion to grant a stay.

Mr. Robertson referred to order 66 rule 11 and stated that the matters in which the defendant's are contending are matters which were within the competence of their counsel to ascertain all facts and circumstances before coming to the consent judgment.

In my judgment I hold that there is not sufficient material before the court to enable it to exercise its discretion to grant a stay. Further there are no special circumstances existing in the instant case which warrant the grant of a stay. In the any event the defendant is debarred by lapse of time and delay. In the circumstances it is ordered that the defendant's application for a stay of execution is dismissed with cost to the plaintiff.

  
Davidson Kelvin Baptiste  
High Court Judge (Ag.)