

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2008/0009

BETWEEN:

ANTHONY CLYNE

Claimant

and

THE GUYANA AND TRINIDAD MUTUAL LIFE INSURANCE LIMITED

Defendant

Appearances:

Mrs. Celia Edwards, Q.C. and Ms. Karina Johnson for the Claimant
Ms. Dia Forrester for the Defendant

2010: March 16, 30

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RULING

- [1] **PRICE FINDLAY, J.:** This is an application by the Defendant in these proceedings under CPR 26.8 for relief from sanction and for permission to file a witness statement out of time.
- [2] This action began by way of Claim Form filed on the 7th January 2008 in which the Claimant claims the sum of \$18,392.15 together with interest.
- [3] The claim arises out of an accident in which the Claimant's vehicle was involved. A prior action brought by the third party in the collision resulted in a default judgment being entered against the Claimant. He now by way of this action seeks indemnity from the Defendant, his insurers.
- [4] The Defendant filed their defence on the 8th February 2008 and the Claimant filed a reply on the 9th April 2008.

- [5] By their Defence the Defendant alleges that the Claimant did not cooperate with them in that he failed to provide them with full details of the accident and that he failed to complete an accident claim form.
- [6] They further allege that the Claimant failed to give them written notice of the accident as he was required to do under Conditions "D" and "O" of the policy of insurance. They particularize their allegations by stating that the Claimant "failed to notify the Defendant of the accident immediately and failed to give full or any particulars thereof."
- [7] Of course, the Claimant denies this in his reply.
- [8] The Case Management Conference Order of April 16, 2008 stated that witness statements were to be filed in the matter on or before 30th September 2008.
- [9] The Defendant filed a witness summary on behalf of Cyril Phillip on the deadline of 30th September 2008, as well as the witness statement of Johnson Cornwall.
- [10] By way of application dated October 10, 2008 the Claimant requested an extension of time to file and serve his witness statement as he was out of the jurisdiction at the time stated in the Case Management Order. The application was granted and the Claimant filed his witness statement on the 20th October 2008.
- [11] The Pretrial Review Order was filed on the 18th February 2009 with a trial window of May 2009.
- [12] Trial Bundle was filed on 1st April 2009 containing the filed witness statements. A Supplemental Trial Bundle was filed by the Defendant on 1st April 2009 which comprised of a reproduced copy of the Defendant's motor insurance policy.
- [13] The matter was set down for trial on 12th November 2009, but through circumstances not attributable to either party, the matter did not come on for hearing.

- [14] The application before the Court now was filed by the Defendant on the 11th November 2009 but was not heard before the 16th March 2010. The adjournment of the 12th November 2009 was not as a result of the application filed on the 11th November 2008 even though it might have had that effect had the substantive matter been heard on that day.
- [15] The application before the Court is accompanied by the affidavit of Mr. James Bristol of Counsel for the Defendant. He states that in preparation for trial on 12th November 2009 it was discovered that a statement of June Belmar-Church which was dated 11th January 2006 was in a file in a related matter, that is, Claim No. 2005/0346, **Thomas Baker v Anthony Clyne**.
- [16] Mr. Bristol asserts in his affidavit that no prejudice would be visited upon the Claimant by this statement, but its absence from trial would prejudice the Defendant greatly.
- [17] The Claimant has objected to the application. The thrust of the objection is that the Defendant having concentrated their defence on the Motor Vehicles Third Party Act, and having come to the realization that their case is now undermined by a previous judgment, is now seeking by way of this statement to change the direction of their defence and rely on lack of notification.
- [18] CPR 26.8 clearly sets out the criteria necessary to succeed in an application of this nature.
- [19] As stated by Michel, J. in **Brathwaite, Franklyn Brathwaite, Brathwaite & Brathwaite v Pivotte & Pivotte & The Beacon Insurance Co. Ltd.** GDAHCV2002/0502:-

"There are no special requirements under Rule 26.1(2)(k) for extending the time for compliance with an Order of the Court but, by virtue of Rule 27.8(4) a party applying to vary any date (as in the present case by extending it) must, if the date has already passed, apply for an extension of time and for relief from any sanction to which the party has become

subject under the rules. The sanctions applicable to the documents in issue here would be ... per Rule 29.11 in the case of witness statements sought to be filed.

[20] CPR 26.8, the relief from sanction rule, sets out three factors to be looked at by the Court in determining whether to give relief from sanction.

[21] CPR 26.8(1) states that the application ought to be made promptly and that it should be supported by affidavit evidence.

[22] CPR 26.8(2) says the Court may grant relief only if satisfied that: -

- (a) the failure 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.

[23] CPR 26.8(3) states:-

"In considering whether to grant relief, the court must have regard to –

- (a) the effect which the granting of the relief or not would have on each party;
- (b) the interests of the administration of justice
- (c) whether the failure to comply has been or can be remedied within a reasonable time;
- (d) whether the failure to comply was due to the party or the party's legal practitioner; and
- (e) whether the trial date or any likely trial date can still be met if relief is granted."

[24] The Court will now consider each of these factors in turn to decide whether the relief sought by the Defendant in this matter ought to be granted.

- [25] With respect to the factors in sub rule (1) the application in this matter was supported by the affidavit of James A. L. Bristol, and it was made promptly once the Defendant realized that the statement had not been filed. The determining factor in respect of promptness of the application is from the time of the discovery of the alleged error to the time the application was made.
- [26] With respect to the factors in sub rule (2), based on the evidence before the Court, I find that the failure to comply was not intentional.
- [27] Having considered the explanation given by the Defendant as to the reason for the delay, I find that there is some merit in it. The statement was not in the Defendant's possession in their offices but rather in the possession of their attorneys. The document in question was in a file in a related matter and not discovered until preparation for trial was underway. I also find that the Defendant has generally complied with the directions and orders of the Court.
- [28] In terms of CPR 26.8(3), I find that the effect of granting the relief sought would be of no prejudice to the Claimant in view of the fact that the Claimant makes reference to making a report to a female employee of the Defendant, this same employee whose statement it has sought to tender.
- [29] It is, I think, in the interest of justice for the Court to hear all the relevant evidence in the matter at trial.
- [30] While Learned Queen's Counsel was persuasive in her argument with respect to the timing of the application and whether the failure has been remedied within a reasonable time, it is the opinion of this Court that it has. The failure can be remedied within a reasonable time. The original trial date has been vacated and no new date has been set. The witness statement can, in the opinion of the Court, be filed and served in a reasonable time before the new trial date is set.
- [31] The failure here was one of the party's legal practitioner and not the Defendant. This is clear from the affidavit of James A. L. Bristol. The document was in the

possession of Counsel and not the Defendant and the failure to file the witness statement clearly falls to Counsel.

[32] The trial date or likely trial date is as of this ruling unknown. Counsel for the Claimant sought to argue that the initial date of trial would have been affected by this application had it not been vacated, but the vacating of that earlier date (12th November 2009) was not so affected. I do not believe that this part of the rule or any part of CPR 26.8 is intended to be applied retrospectively. The argument does not find favour with the Court.


[33] Counsel in the matter have been very helpful not only in their arguments but with the authorities they have provided. I was referred to the following authorities:

1. **Bradford Noel v First Caribbean International (Barbados) Ltd.** – Civil Appeal 22 of 2005 (Grenada)
2. **Donna Brathwaite, Jeremy Franklyn, Aria Brathwaite, Aaron Brathwaite & Alex Brathwaite v Richardson Pivotte, Anelicia Pivotte and the Beacon Insurance Co. Ltd.** – Claim No. GDAHCV2002/0502
3. **Irma Paulette Robert v Cyrus Faulkner and the Attorney General of St. Lucia** – Civil Appeal No. 29 of 2007.

[34] In the circumstances and for the reasons stated above, I will grant the application and order that the Defendant file the witness statement of June Belmar-Church.

[35] The witness statement is to be filed within seven (7) days of this Order.

[36] There will be no order as to costs.


Margaret Price Findlay
High Court Judge