Smellie J.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 333/90

1-11-93

Harwood Jackson
d/b/a Harwood Excavating Ltd.

v.

Wayne Kirby
Real Time Investments Inc.
Great Cayman Development

ORDER

Mr. O'Riordan for defendants/applicants
Mr. McField for plaintiff/respondent

Schofield J.

This suit was filed on 5th September, 1990. An amended writ, putting right the name of the third defendant, was filed on 28th September, 1990. The defence of the three defendants and the counterclaim of the third defendant was filed on 12th October, 1990, by their then attorneys-at-law, Messrs. Hunter and Hunter.

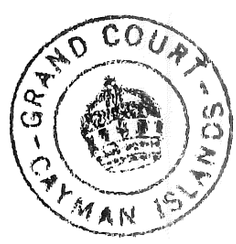
The matter was first set down for trial on 2nd March, 1992, but it was taken out of the list because, it is apparent from file records, negotiations were taking place between the parties. It was next listed for 21st December, 1992, and judgment was given for the plaintiff and the counterclaim was dismissed. The defendants did not appear on that date and the Court heard evidence from the plaintiff in support of his claim. This application, filed on 23rd August, 1993, seeks an order that the judgment on the claim and counterclaim be set aside.

The defendant's attorney has been unable to point me to any authority on the matter but asks me to adopt the same test on this application made under section 59 of the Judicature Law as I would apply on an application to set aside a summary judgment without trial. I would agree that the position of a defendant who has judgment entered against him for failure to attend at the trial of the action is analogous to the position of a defendant

who has judgment entered against him because he fails to enter an appearance in the suit save that some weight must be attached to the fact that in the former case pre-trial issues have been determined and the discovery process undertaken and that some evidence has been heard and determined upon by the Court.

One matter which has exercised my mind on this application is that the defendants may not have personally had actual notice of the date of hearing. Section 59 of the Judicature Law requires the Court to be satisfied that there was due notice served of the day of hearing before proceeding in the absence of a defendant. Messrs. Hunter and Hunter were originally the attorneys of record for the three defendants. Notice of the hearing of the action was served upon them at 11:10 a.m. on 16th November, 1992. By coincidence on that very morning Mrs. Messer of that firm applied to me for an order that Messrs. Hunter and Hunter had ceased to act as attorneys for the defendants and for leave to be removed from the Court record. I granted the application. It is probable that by the time the notice of hearing was served Messrs. Hunter and Hunter had been granted their order for leave to come off the Court record. Were the defendants properly served in these circumstances where their former attorneys were served on their behalf? The answer is provided by Rule 59 (1) of the Grand Court (Civil Procedure) Rules which reads:

> " 59. (1) Where for any reason a change occurs in the attorney-at-law representing a party in any cause such attorney shall be deemed still to be representing such party until a notice of change is filed in the office of the Clerk of the Court and copies thereof are served upon all interested parties."



The order that Messrs. Hunter and Hunter have leave to come off the record was made on the morning of 16th November, 1992. The written order was not filed with the Clerk of the Court until 26th November, ten days after service of the notice of hearing. We do not know on what day such order was served on the plaintiffs attorney, but it is inconceivable that it was served before 11:10 a.m. on the 16th November, 1992. So the defendants

were properly served according to the Rules of Court. Be that as it may it is still a factor to be put in the balance on this application that they may not actually have known of the hearing date. They maintain they did not, but for reasons which will become apparent I am not convinced I can rely upon everything their deponent, who is the first defendant, says. It is possible that Messrs. Hunter and Hunter did not pass on the notice of hearing to the defendants even though they were still deemed to be on record when they received it. But the firm is a reputable firm on this Island not known for breaching its duty to its clients.

There is no doubt that the pleadings disclose triable issues. The plaintiff does not argue otherwise. What he says is that a determination has been made on those pleadings and in all the circumstances of this case it would be unjust for the issues to be re-opened now.

The summons to set aside the judgment was filed on 23rd August, 1993, some eight months after the judgment was entered. Messrs. Orren Merren came on the record on the 10th August, 1993, and from the minutes of orders on the file it is clear that the defendants revived interest in the case a little before that date. This, says the defendants' attorney, does not represent inordinate delay. It is significant, however, that the defendants' interest was revived only when process to execute the judgment was in place. Furthermore, the defendants were not asleep only from the date of judgment; they were asleep from March, 1992, for well over a year. The March 1992 hearing date was ineffective because the parties were in the process of negotiations. But on the first defendant's own admission he made a payment to this attorneys towards fees in February or March, 1992, and did not contact them again until the October of that year when, he says, he was told over the telephone that only $100 in fees was outstanding. I have difficulty accepting that part of the first defendant's affidavit. It is clear from Mrs.

Messer's affidavit of 27th October, 1992, filed on her application to come off the record, that much more than $100 was outstanding and that the first defendant knew that there was a larger balance. This is demonstrated by his own letter attached to Mrs. Messer's affidavit and by his own expression of surprise as deposed to in his affidavit filed in support of this application. If in October, 1992, he was prepared to pursue this suit (and it must not be forgotten that he was the plaintiff in a counterclaim, not just a defendant to an action) why did he not go further than speak to an accounts clerk at Messrs. Hunter and Hunter, which clerk he says, gave him obviously erroneous information the erroneousness of which was know to him? The answer must be that the defendants were not seriously pursuing this suit in October, 1992. Mrs. Messer deposed that from March, 1992 to October, 1992, her firm tried to contact the first defendant and they were unsuccessful. In truth the defendants slept on the action for more than a year when they knew it should be alive and active.

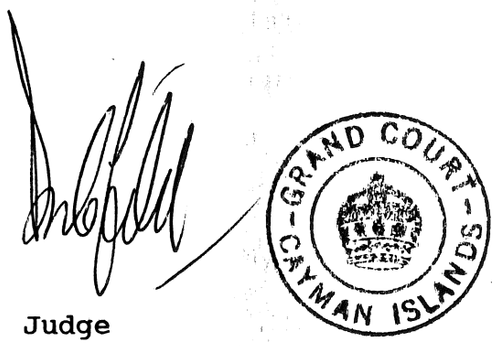
The plaintiff is prejudiced by all the delays. He would be prejudiced by a setting aside of the judgment. He has been held out of his money which he has claimed by an action filed in this Court three years ago. He has maintained throughout that he is entitled to judgment and has pursued the proceedings properly and in a timely manner. He has, according to the record, behaved in these proceedings impeccably and expeditiously. He has a judgment properly obtained. He has incurred expense in pursuing these proceedings and taxed costs will not compensate him for his actual outlay. It is a fact that in this jurisdiction even a successful party who is awarded costs is never fully compensated.

I do not accept the first defendant's assertion that he contacted Messrs. Hunter and Hunter in October, 1992. I find difficulty in accepting the first defendant's assertion in paragraph 3 of his affidavit that Mr. David Ritch of Messrs. Ritch and Connolly, who represented him before action was filed,

referred him to Messrs. Hunter and Hunter because he, Mr. Ritch, did not involve himself in this kind of work. Anyone practising in these Courts knows that Messrs. Ritch and Connolly do undertake civil litigation of this kind. It is a small point but is another example of the defendant's disingenuousness. If a party seeks that this Court should exercise its discretion in his favour then that party must be open and frank with the Court.

I consider that is the factor which tips the scales in the plaintiff's favour. I do not accept that the defendants have properly pursued their defence and counterclaim and I have little faith in the reasons they give for the delays which lay at their door. I have no faith that if I grant the application sought that they will pursue these proceedings with any more vigour than they have demonstrated in the past. My decision would be otherwise if I accepted that it was merely the defendants' impecuniosity which led to the delays. The first defendant says he was in funds in October, 1992. If that was the case there was no reason why, with even the slightest diligence, he was not in a position to instruct Messrs. Hunter and Hunter to defend the claim and pursue the counterclaim at the December 1992 hearing.

The application is dismissed with costs to the plaintiff.



Judge

Dated this 1st November, 1993