

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2016/CLE/GEN/00618

CARLA CARTWRIGHT

Plaintiff

VS

JAMAL SHARIEF
T/A BAHAMA HUMIDOR

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Attorney Murrio Ducille for the Plaintiff
Attorney Wilner Deleveaux for the Defendant

Date of Hearings: 8th July, 2021
19th July, 2021

DECISION

1. By Summons filed July 15th, 2021, the Plaintiff seeks to move the Court, pursuant to Order 19, rule 19(1),(a), (b), (c), and (d) of the Rules of the Supreme Court 1978, and the inherent jurisdiction of the court, seeking to strike out the Defendant's Defence and Counterclaim, and for costs of and occasioned by this application.
2. To place this application in context, the substantive action was commenced by Writ of Summons filed 2nd May 2015. No appearances were entered, and no defence filed. Consequently, judgment in default of defence was entered on 26th May, 2015. That judgment was set aside in November, 2016, and leave was granted to file a defence. A Defence and Counterclaim were subsequently filed.
3. At a case management hearing on 13th May 2018, the court gave directions for the conduct of the proceedings, including directions with respect to the filing of Lists of Documents by 31st May 2018, Bundles of Documents by 31st July 2018, Witness Statements by 30th September 2018, and Statement of Agreed Facts and Issues by 31st October 2018. Trial was fixed to commence on 24th November 2020.
4. It must be noted that in December 2018, the firm of Cassar & Company was given leave to withdraw as attorneys for the defendant, as it was indicated that the defendant was not cooperating. In any event, neither party complied with the Case Management Order. However, on 18th September 2020, the Plaintiff filed a List of Documents, witness statements, and a Statement of Facts and Issues. A trial bundle has also been prepared and provided. The Plaintiff was therefore ready for

trial which, as has already been indicated, had been fixed to commence on 24th November 2020.

5. At a Pre-Trial Review on 29th September, 2020, the defendant did not appear, and it was noted he had not been personally served with notice of that hearing date. The court then extended the time for complying with the Case Management Order to 31st October 2020. However, prior to the trial date, the Learned Judge recused herself, and the matter was apparently re-assigned.
6. The matter again came before the court on 15th February 2021. The defendant again did not appear, although it was indicated that he had been provided with the details of the ZOOM hearing. The Court then noted that there had been no compliance with the Case Management Order, despite the dates being extended, and ordered that unless the defendant filed his List of Documents by 1st March, 2021, the Defence and Counterclaim would be struck out.
7. On the next adjourned date of 5th March, 2021, the defendant again did not appear. Counsel for the Plaintiff indicated to the Court that the defendant had been personally advised of the date of the hearing of 5th March, and the contents of the Unless Order, but had refused to accept a copy. An affidavit to that effect was provided to the Court. The Court then ordered that the Defence and Counterclaim be struck out. The defendant apparently arrive at court shortly after the hearing, and was apprised of what had transpired. He was further advised to seek assistance at the Legal Aid Clinic.

8. Thereafter, the matter again came before the court of 20th April 2021 on the hearing of a Summons for Judgment in Default, with Attorney Wilver Deleveaux appearing on behalf of the defendant. Mr. Deleveaux sought and obtained an adjournment on the basis that he had recently been instructed, and was also given leave to seek relief from sanction. That application was heard on 7th May 2021, when the court explained that the Defence and Counterclaim had been struck out for failure to comply with the Unless Order. The Court then granted relief from sanctions, restored the Defence and Counterclaim, and extended the time for compliance with the Unless Order by filing the List of Documents to 28th May 2021, with the trial now fixed to commence on 16th July 2021, and a pre-trial review set for 8th July 2021. On that date, it was noted that, again, the defendant had failed to comply with the Order, and had not filed a List of Documents. Counsel for the Plaintiff therefore moved the court to strike out the Defence and Counterclaim. That application was heard on 19th July 2021.
9. The Plaintiff has moved the court pursuant to Order 31A Rule 19. This is clearly incorrect, as the correct rule is 20 (1) (a), which provides as follows:
- 20. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court –**
- (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
10. It is clear that the Defendant has not complied with the Unless Order, as the List of Documents has never been filed. Counsel for the Plaintiff

submits that the conduct of the Defendant is contumelious, and that he displays willful non-compliance. Counsel for the Defendant, on the other hand, submits that he has an arguable defence, as there was no intention to enter into a legal agreement in this matter. Counsel also sought to excuse the failure to comply by stating that he had been unable to get certain documents from previous counsel, and suggested that if no List of Documents was provided, the Defendant should simply not be permitted to rely on any documents at trial.

11. The correct approach to the question of sanctions as a result of a failure to comply with an Unless Order was set out in the case of **HYTEC INFORMATION SYSTEMS LIMITED v. COUNCIL OF CITY OF COVENTRY [1996] EWCA Civ 1099 (4th December, 1996)**, where Lord Woolf MR said as follows:

1. **An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;**
2. **Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;**
3. **This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;**
4. **It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;**

- 5. A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;**
 - 6. The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;**
 - 7. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two;**
12. In applying this reasoning to the facts of this case, I note that the Defence and Counterclaim had previously been struck out for failure to comply with the Unless Order, and that even before the making of that Order, the Defendant had failed to comply with a Case Management Order which directed that the List of Documents be filed by 31st May 2018. Time for compliance was extended on 29th September 2020 to 31st October 2020, but again there was no compliance. The Court then initially made an Unless Order on 15th February 2021, which again was not complied with, resulting in the Defence and Counterclaim being struck out. They were restored, and the time for compliance was

extended to 28th May 2021. Almost two months later, on 7th July 2021, there was still no compliance.

13. Counsel for the Defendant submits that he has an arguable defence. While such a submission might assist where it is clear that the defence is bound to succeed, and it would therefore be in the interests of justice to allow the defence to proceed, it is my view that the defence in this case does not rise to that level, and is, at best, arguable.
14. The second submission of the Defendant is that he should simply not be permitted to rely on any documents, having not filed the required list. In my view, the purpose of the List of Documents is to begin the process of discovery, which is essential to the avoidance of trial by ambush and the pursuit of the interests of justice. This submission also really amounts to a plea that a lesser sanction be imposed.
15. As has been stated, the breach of the Unless Order is clear. In considering whether a sanction is appropriate, I have had regard to the decision of **Hytex**, and to the indication that ***An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;*** Indeed, in the instant case, the Defendant was already given a second chance. Lord Woolf also opines that ***"Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed; and This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;"***

16. It is also clear that "**A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.**" In an attempt to explain the breach, counsel stated at bar that he had been unable to obtain documents from previous counsel for the Defendant. However, it must be noted that the previous attorney sought and was granted leave to withdraw since 2018, citing a lack of cooperation from his client. There has also been no indication of what these documents are, and no application to extend the time for compliance, though present counsel made the application for relief from sanction. In the circumstances, I am not satisfied that the failure to comply with the order was caused by anything beyond the control of the Defendant.
17. In my view, the breach in the instant case is exacerbated by the fact that relief from sanction had already been granted, and yet again there has been a failure to comply with the Unless Order of the Court. No compelling argument has been advanced to exonerate the failure. I therefore conclude that the appropriate course in this case is to accede to the application to strike out the Defence and Counterclaim filed on 29th November 2016. The Defence and Counterclaim are therefore struck out, with costs to the Plaintiff.

Dated this 18th day of August, A.D., 2021



Neil Brathwaite

Justice