

COMMONWEALTH OF THE BAHAMAS

2019/CLE/gen/000507

2021/CLE/gen/FP/00040

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN

NORRISHER SOPHIA NEWMAN

First Plaintiff

AND

NICKY NATASHA FEASTER

Second Plaintiff

AND

SHARON LINDA SMITH

Third Plaintiff

AND

CELIANN GRANT

Fourth Plaintiff

AND

GEORGE DELANCY

Fifth Plaintiff

AND

JERMAINE THOMPSON

Sixth Plaintiff

AND

CLEMENCIA DANIEL DAVIS

Seventh Plaintiff

AND

JOHJANE BRAYNEN

Eighth Plaintiff

AND

HATTIE CLARKE

Ninth Plaintiff

AND

APEX INTERNATIONAL MARKETING COMPANY LIMITED

Defendant

Before: The Honourable Madam Justice Ntshonda Tynes (Ag.)

Appearances: Mr. Osman Johnson for the Plaintiffs

Ms. Meryl Glinton for the Defendant

Hearing Dates: 22nd September, 2022 and 14th November, 2022 (Plaintiff's Submissions November, 2022; Defendant's Submissions 15th November, 2022)

DECISION

Tynes, J (Ag.)

1. This Decision relates to an application by the Defendant for an Order setting aside a Judgment in Default of Attendance at Case Management Conference. The application is made by Summons filed on the 6th May 2022 in which the Defendant also seeks an order staying the action pending the determination of the Defendant's application as well as an order extending the period for filing and serving a Defence.
2. At the hearing of the application the Court was advised that the parties had reached an agreed position regarding the staying of proceedings and the Court need not concern itself with that item of relief.
3. The main ground of the Defendant's application to set aside the Default Judgment is that it was irregularly entered, the Defendant not having been given adequate notice of the CMC as required by the Rules of the Supreme Court.

Background

4. The action was commenced by the Plaintiffs by way of a specially indorsed Writ of Summons filed on the 11th April, 2019 at the Supreme Court Registry in Nassau, New Providence, claiming, inter alia, damages for wrongful dismissal, unfair dismissal and various breaches of the Employment Act. The Plaintiffs have submitted that the Defendant's Memorandum of Appearance was filed "on or about" the 11th July, 2019. Attorneys from Graham Thompson appeared in the matter as Counsel for the Defendant on two occasions, the first, as early as the 7th November, 2019. By a Summons filed on

the 4th March, 2020 Graham Thompson made application for an Order that GT be removed as Counsel of record for the Defendant citing the failure of the Defendant to pay the second of two invoices remitted by GT for professional fees. That application was heard by Bowe-Darville, J who granted the Order as prayed on the 7th January, 2021. It does not appear that the Order was ever perfected.

5. By the 29th April, 2021 and at the request of Plaintiff Counsel the action was transferred to the Northern Judiciary.
6. A Notice of Referral to CMC prepared by the Supreme Court Registry and filed herein on the 6th May, 2021 gave notice of the CMC scheduled for the 22nd July, 2021. Even though GT had ceased to act for the Defendant since the 7th January, 2021, the Notice names and is addressed to GT as Counsel for the Defendant.
7. On the 15th July, 2021 the Plaintiffs served the Defendant's Registered Office, Stephen B. Wilchcombe & Co. with a copy of the Notice of Referral to CMC.
8. At the CMC hearing before Hanna-Adderley, J. on the 22nd July, 2021, no one appeared for the Defendant. As a consequence, Plaintiff Counsel made oral application pursuant to Order 31A rule 12(5)(b) of the Rules of the Supreme Court that Default Judgment be entered against the Defendant for non-attendance. Hanna-Adderley, J. adjourned the application for default judgment to the 3rd September, 2021. The Plaintiffs served the Defendant's Registered Office with notice of the 3rd September hearing before Hanna-Adderley, J.. Again, no one appeared for the Defendant on the 3rd September, 2021.
9. By a written Ruling dated the 21st January, 2022, Hanna-Adderley, J ordered that Judgment be entered against the Defendant for damages to be assessed for non-attendance at CMC.

10. It is that Default Judgment which the Defendant now seeks to have set aside.

The Law

11. Order 31A rule 8(2) of the RSC mandates that at the appropriate time the Registrar give to all parties *"not less than 14 days notice of the date, time and place of the case management conference"*. The provisions of Order 31A rule 8(3) of the RSC permit the judge to direct that shorter notice be given either if the parties agree or in urgent cases.
12. Where a defendant does not attend a CMC, the provisions of Order 31A rule 12(5)(b) of the RSC permit the court to enter judgment against that defendant in default of such attendance *"if the Court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules"*.

Analysis

13. There is no denying that in accordance with Order 31A rule 8(2) of the RSC the Defendant was entitled to receive 14 days notice of the 22nd July, 2021 CMC as no direction was made by Hanna-Adderley, J. that shorter notice of the CMC be given. In the circumstances, the Defendant, having been served via its Registered Office on the 15th July, 2021 did not receive the requisite 14 days notice and was therefore not served with notice of the CMC in accordance with the RSC.
14. It appears that the requirement that the Defendant be given 14 days notice of the CMC was not brought to the attention of the learned Judge at the time when the application was made. In fact, both in his oral and written submissions Plaintiff Counsel suggested that the parties were only entitled to 4 days notice of the CMC.

15. On page 2 at lines 2 through 8 of the Transcript of proceedings for the 22nd July, 2021, Plaintiff Counsel is recorded as saying “...*they [the Defendant] were served according to our Affidavit of Service, on 15th July, my Lady which is a week ago. It is within the, or outside of the deadline that is specified; I believe it is four days clear notice have to be given for Case Management. We have satisfied that requirement, and given that they were given proper notice...*” Additionally, at paragraphs 16 and 17 of the Plaintiff’s submissions in support of the application for default judgment, Plaintiff Counsel stated, “*A search for the Registered Office of the Defendant was conducted at the Registrar General’s Department and the Registered Office, situate at the chambers of Stephen B. Wilchcombe & Co. was physically served with the Plaintiffs’ Notice of Referral to Case Management Conference, filed herein on May 6th 2021, on July 15th 2021... [17.] The Plaintiffs attended at the said Case Management Conference on July 22nd 2021 at 12.00 p.m. and provided evidence to the Court that the Registered Office of the Defendant had been served with due Notice of the hearing....*” (sic)
16. I do not believe that Plaintiff Counsel intentionally sought to mislead the learned Judge. It appears that Plaintiff Counsel was under a mistaken belief as to the notice to be given the parties. Her Ladyship’s Ruling was therefore based on the incorrect belief that adequate notice had been given.
17. The result is that the Default Judgment entered for non-attendance at the CMC is irregular and ought to be set aside.

Costs

18. In determining the question of costs, I remind myself that the two fundamental principles on the issue are that costs are in the discretion of the court and that costs

generally follow the event. Based on the second principle the Defendant could ordinarily expect to be awarded the costs of its application, the default judgment being irregular.

19. However there are two factors in particular which should be given consideration with respect to the exercise of my discretion on the issue. The first is that according to Order 31A rule 8(2) of the RSC the obligation to give due notice of the CMC to the Defendant was the Registrar's and not the Plaintiffs'. While the Notice of Referral to CMC was prepared and filed in sufficient time, it was erroneously addressed to GT who had ceased to be Counsel for the Defendant some four months prior to the issuance of the Notice. This error directly resulted in late notice being given to the Defendant.
20. Secondly, the carefully worded Affidavit of Paris Jarrett, relied on by the Defendant in support of the application, does not give full and frank disclosure. It is virtually silent on the circumstances whereby the Defendant wound up unrepresented by the time of the CMC, circumstances which in my view are relevant to the issue of costs if not to the substantive application itself.
21. At paragraph 4 of her Affidavit filed on the 6th May, 2022, Mrs. Paris Jarrett, Vice President and Director of the Defendant, avers "*I only became aware of the [Default] Judgment... on or about 22nd March, 2022, when my husband, Emile Jarrett, President and Director of Apex, and I were served with a letter from [Plaintiff Counsel].*" Mrs. Jarrett goes on to say that she and her husband immediately sought legal advice from Ms. Meryl Glinton in relation to the contents of the letter. At paragraph 7 Mrs. Jarrett avers, "*Ms. Glinton inquired of us whether we had before then been served with any documents in relation to the claim, and we informed her that we had not.*" As a result,

the Jarretts were advised to contact the Defendant's Registered Office, Stephen B. Wilchcombe & Co..

22. At paragraph 8, Mrs Jarrett continues, "*I contacted Wilchcombe & Co. that same day and inquired about any documents served in relation to Apex. I was then informed by Mr. Stephen Wilchcombe that documents had been served on his chambers in relation to Apex, but that he was under the mistaken impression that my husband and I had moved, so he took no steps in relation to the documents.*" She avers that on the 24th March, 2022 she received from Wilchcombe's office several documents issued in the action including the Writ, Notice of Referral to CMC, the Ruling of Hanna-Adderley, J, and the Default Judgment.

23. At paragraphs 13 and 14, Ms. Jarrett states that sometime in late April or early May, 2022, "*After reviewing the Documents, Ms. Glinton informed my husband and I that this action appeared to have commenced in Nassau in 2019, and that the Ruling indicated that an appearance had previously been entered on behalf of Apex and later withdrawn, but that no defence had been filed. [14.] I do not recall this action or the issues therein being drawn to my attention in 2019.... I recall that in or about 2019 Apex routinely engaged the services of the law firm Graham Thompson for its legal advice and representation. Whilst I do not specifically recall so doing, it is likely that we would have referred any court documents served on Apex's registered office directly to Graham Thompson....*"(sic) At paragraph 16, she states, "*My husband and I were thus unaware as to the progress of this matter....*"

24. I must say that I find the Defendant's reliance on Mrs. Jarrett's personal lack of recollection of the action, without more, problematic. She may very well not recall the

action but nowhere in her Affidavit does Mrs. Jarrett mention whether or not she made an effort to find out from the Defendant's President, her husband Mr. Emile Jarrett, or any other of the Defendant's Officers or Directors, their own prior knowledge and/ or recollection of the action. She simply does not address the issue.

25. Given the Defendant's routine practice in 2019 of engaging GT for legal advice and representation, the Defendant upon learning of the Default Judgment should have been interested to find out what knowledge GT had of the proceedings and the circumstances in which Default Judgment was entered against the Defendant. Mrs. Jarrett makes no mention of anyone having reached out to GT on behalf of the Defendant. The court is left to speculate as to the reasons for Mrs. Jarrett's silence in this regard.
26. But the silence is particularly glaring given the evidence relied on by GT in support of its application to be removed as Counsel of record for the Defendant. The first invoice dated 1st August, 2019 exhibited to the Affidavit of Gabriel K. Brown sworn on the 4th March, 2020, records professional services provided by GT's then Partner Edward Marshall on the 9th July, 2019 as "*Reviewing and considering Writ of Summons provided by E. Jarrett; drafting and settling correspondence to O. Johnson requesting an extension of time to enter an Appearance; drafting and settling email correspondence to E. Jarrett and telephone conference further thereto; drafting and settling Appearance on behalf of Apex.*"
27. The second entry in the invoice relates to professional services on the 11th July, 2019. It states "*Conferring with E. Jarrett and P. Jarrett in connection with Action commenced Norrisher Newman et al and providing advice on next steps.*"

28. The Affidavit of Gabriel Brown also references three email correspondences having been sent from GT to Mr. Emile Jarrett between the 21st January, 2020 and the 11th February, 2020 with respect to GT's second invoice dated 12th December, 2019, GT's continued representation of the Defendant and GT's determination that it would no longer represent the Defendant due to unpaid professional fees.
29. Based on the evidence adduced by the Defendant's erstwhile attorneys, GT, it appears that it was Emile Jarrett who instructed GT and who was GT's main contact person for the Defendant. Yet the Defendant has refrained from disclosing Mr. Jarrett's personal knowledge of the matters relating to GT, in particular matters leading up to the removal of GT which in turn resulted in the Defendant being unrepresented in the months thereafter.

Conclusion

30. In light of all of the above, it is my order that the Default Judgment for non-appearance at CMC be set aside on the ground of irregularity and that the Defendant file and serve its Defence within fourteen days of the date hereof.
31. Each side shall bear their own costs of the application.

Dated this 9th day of January, A.D. 2023

**Ntshonda Tynes
Justice (Ag.)**