

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2012/CLE/gen/00374

BETWEEN

MARLON INGRAHAM

Plaintiff

AND

AETOS HOLDING LIMITED
(WENDY'S RESTAURANT)

First Defendant

AND

MARIO SEYMOUR

Second Defendant

Before: The Hon. Madam Justice Carla Card-Stubbs

Appearances: Mr. Anthony Newbold for the Plaintiff and Mrs. Nadia Wright for the Defendants

Hearing Date: November 17th, 2022 and November 24th, 2022

Application to strike out Statement of Claim - Order 18 and Order 19 of the Rules of the Supreme Court (R.S.C. 1978, as amended) – Inordinate and inexcusable delay – Prejudice to the Defendants

JUDGMENT

Introduction

1. This is an application by the First and Second Defendant to strike out the Plaintiff's action. For the reasons that follow, this Court accedes to the application and makes the Order below.

Background

2. By Summons filed August 20, 2021, the First and Second Defendants applied to strike out the Plaintiff's action. The application was made pursuant to Order 18 and Order 19 of the Rules of the Supreme Court (R.S.C. 1978, as amended) ('RSC') and/or, alternatively, under the inherent jurisdiction of the Court. The application was supported by the Affidavit of Denise-la Newbold, filed on the same date.
3. By way of a generally Indorsed Writ of Summons filed 19th March 2012, the Plaintiff alleged that on September 9, 2009, the Plaintiff, a public health officer, while at Town Center Mall in commission of his employment duties, was struck by a 2003 Isuzu Truck ('the vehicle') as a result of the Second Defendant's negligent driving. The First Defendant is described in the Writ of Summons as a company operating in Nassau, Bahamas and as the owner of the vehicle. The Second Defendant is described as the agent/servant of the First Defendant. The Plaintiff alleges that he suffered injuries as a result of the Defendants' negligence and Claims damages.
4. The Plaintiff's Affidavit of Service, filed April 27, 2012, aver that service of the Writ was effected on the Defendants on April 20, 2012.
5. The First and Second Defendants filed a Notice of Appearance on April 30, 2012. The Defendant's Affidavit of Service, filed May 9, 2012, aver service effected on the Plaintiff on May 2, 2012.
6. Nothing further was filed until a Notice of Change of Attorney was filed on July 2, 2021 on behalf of the First and Second Defendants. A Notice of Intention to Proceed was also filed on July 2, 2021 on behalf of the First and Second Defendants. The Defendants' Affidavit of Service, filed July 13, 2021, aver service of the Notice of Intention to Proceed on the Plaintiff on July 6, 2021.
7. Thereafter, the Plaintiff filed a Statement of Claim on August 6, 2021. The Affidavit in support of the Defendants' application to strike out avers that the Statement of Claim was served on the Defendants on August 13, 2021.
8. Subsequent to the filing and service of the Statement of Claim, the Defendants filed the application now before the Court.
9. The Defendants' application, as framed, is for:
 - ...an Order that the action be struck out and the proceedings dismissed pursuant to the following Rules of the Supreme Court:
 - (i) Order 18 rule 1 as the Plaintiff failed to file a Statement of Claim 14 days after the filing of the Generally Indorsed Writ filed on March 19, 2012;
 - (ii) Order 19 rule 1;
 - (iii) Order 18 Rule 1 (c) and (d) and/or
 - (iv) Alternatively under the inherent jurisdiction of the Court
 - And for an Order that the Plaintiff pays the Defendant's costs of this application and of these proceedings.

It is accepted that there is an error on the Summons and that it should have read Order 18 Rule 19, 1 (c) and (d). The Defendants made submissions on those grounds and there was no objection by the Plaintiff.

10. The Defendants' case is that the Plaintiff did not file or serve the Statement of Claim within the time prescribed by the rules, that the Plaintiff did not have the Court's leave to file and serve the Statement of Claim out of time, that the Plaintiff "did not make any effort to progress these proceedings since the filing of the Generally Indorsed Writ of Summons filed on March 19, 2012 and that "any further proceeding would be an abuse of the process of the Court".

Issues

11. The issues before this Court are whether there are sufficient grounds, and whether the Court's discretion should be exercised, to strike out the Plaintiff's action and to have the Plaintiff's Claim dismissed as prayed.

Law and Discussion

12. The RSC gives a Court wide discretion in these matters. However, it is a discretion to be exercised judiciously because, on the striking out of an action, a litigant by virtue of such an order is deprived of the opportunity to have his Claim adjudicated on the merits. At the same time, a litigant who approaches the Court to adjudicate his matter, ought to proceed with diligence to the adjudication table because it is he who has brought another party to the forum. That other party also deserves to have the matter determined in accordance with due process, in observance of the rules of Court and in a timely manner.
13. The RSC provides the timeline for the service of the Statement of Claim and the possible consequences of non-compliance.
14. **Order 18 rule 1** of the RSC states:-

"Unless the Court gives leave to the contrary or a Statement of Claim is indorsed on the writ, the plaintiff must serve a Statement of Claim on the defendant or, if there are two or more defendants, on each defendant, and must do so either when the writ, or notice of the writ, is served on that defendant or at any time after service of the writ or notice but before the expiration of 14 days after that defendant enters an appearance."

15. Non-compliance with Order 18, rule 1, could result in the dismissal of the Plaintiff's action. **Order 19 Rule 1** of the RSC provides:-

"Where the plaintiff is required by these rules to serve a Statement of Claim on a defendant and he fails to serve it on him, the defendant may, after the expiration of the period fixed by or under the Rules for service of the Statement of Claim, apply to the Court for an order to dismiss the action, and the Court may by order dismiss the action or make such other order on such terms as it thinks just."

16. The rules also vest the Court with powers to strike out any pleading on any one of several grounds. **Order 18, rule 19(1)** provides: -

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

- 1. (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- 2. (b) it is scandalous, frivolous or vexatious; or*
- 3. (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- 4. (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. [emphasis supplied]*

17. Of course, the Court also has powers to allow for an extension of time within which to comply with the rules and, in certain circumstances, parties may agree an extension of time by written agreement. **Order 3, rule 4** provides: -

4.(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

18. It is to be noted that where a party wishes to take a step in a matter after a year or more of inactivity, the rules outline the procedure to be observed. **Order 3 rule 5** of the RSC provides:-

“Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month’s notice of his intention to proceed. a summons on which no order was made is not a proceeding for the purpose of this rule.

19. The Defendants relied on the cases of *Camille Patricia Thompson (Administratrix of the Estate of Karlene Whyte) et al v Gavin Whyte* [2022]JMCC COMM 18 and the cases cited therein, notably *Annodeus Entertainment Ltd v Gibson* (2000) Times, 3 March, [2000] Lexis Citation 2664, [2000] All ER (D) 115 and *Birkett (Appellant) v James (Respondent)* [1978] A.C. 297.

20. In *Annodeus Entertainment Ltd v Gibson* , the Claimants successfully appealed to the Court of Appeal from an order that the Claimants' action be dismissed on the grounds of delay in prosecution. In coming to his determination to allow the appeal in part, Neuberger J found that to order a dismissal of proceedings after a 10 months’ delay was “too heavy a sanction” and that there were sanctions under the new Civil Procedure

Rules that were more appropriate in the circumstances. The action had commenced, and pleadings closed, under the previous Rules of the Supreme Court 1965. Neuberger, J opined that the following are the factors relevant to the exercise of a Court's discretion:

"...it appears to me that it is normally relevant to consider the following factors. First, the length of the delay; secondly, any excuses put forward for the delay; thirdly, the degree to which the Claimant has failed to observe the rules of Court or any Court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the Claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case."

21. In *Birkett v James*, Lord Diplock considered the principles relevant for the exercise of the inherent jurisdiction of the Court. [1978] A.C. 297 at 319

"The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

22. The Defendants also relied on *Heather Reid v Smellie and Thayne*, [2004] HCV 01625 of the Supreme Court of Judicature of Jamaica. In that case, the judge had to determine an application to strike out based on an abuse of process or inordinate delay under the Civil Procedure Rules. However, E.J. Brown, J. (Ag.) gave a useful analysis of those terms based on cases decided under the Rules of the Supreme Court, similar to the ones under consideration here. In that case there was a delay of 4 years since an adjourned Case Management Date. The judge considered that while the adjourned date was to be fixed by the Registrar, the parties shared the responsibility in seeking a new date. The judge also noted that the cause of action arose in 1998 and that the Claim form was filed in 2004 (2 months shy of the expiry of the limitation period). At the time of the application to strike out, eleven years had elapsed since the cause of action arose. The judge considered that 13 years would elapse (from the date that the cause of action arose) and, in all the circumstances, found (at paragraph 37) that *"the palpable inordinate and inexcusable delay has precipitated a substantial risk of a fair trial being impossible."*

23. The Defendants also relied on the case of *Goode Concrete v Cement Roadstone Holdings PLC and Anor* [2022] IEHC 189 as authority that there ought to be strict compliance with Order 3 rule 5. This Court found no guidance in that case save for the fact that a part of the history of the matter therein was that a motion, issued without a Notice of Intention to Proceed having been served, was struck out.

The Defendants' Submissions

24. The Defendants laid over written submissions via a first set of submissions and supplemental submissions. Those were expanded in oral submissions. The Defendants submitted that

1. The Plaintiff's Statement of Claim was filed on July 6, 2021, having filed a generally indorsed writ on March 19, 2012, without leave of the Court and without filing a Notice of Intention to Proceed and that the improper filing is a nullity.
2. There should be strict compliance with the requirement to file a Notice of Intention to Proceed.
3. There has been an inordinate delay in the prosecution of this matter. It has been 13 years from the date of the cause of action.
4. The delay is inexcusable and that Counsel for the Plaintiff is partly culpable for the delay. The Defendants referred to the duties placed on Counsel under the Legal Profession Act.
5. The Defendants are likely to be seriously prejudiced by the delay. It would be difficult and prejudicial to the Defendants to ask them to find witnesses to defend a matter from 2009. It will prejudice the Defendants' ability to properly defend the case in written defence or at trial. The First Defendant would have difficulties locating the Second Defendant, driver of the vehicle, who was an employee at the time of the accident. The Defendants fear an unjust outcome by reason of the delay. If the matter went to trial it would be 14 or 15 years from the event.

The Plaintiff's Submissions

25. The Plaintiff made oral submissions in response to the Defendants' written and oral submissions. The Plaintiff submitted that:

1. This action was not an abuse of process where there was no intention of taking the case any further. Otherwise, the Plaintiff would not appear in Court on the current application.
2. Passage of time is only one element for the Court's consideration. The Plaintiff's Counsel juxtaposed what was said to be the indigent position of the Plaintiff as against the well-resourced position of the Defendants who should be able to go to their records to get the information needed to defend the matter. Counsel submitted that these are "equitable considerations" for allowing the Plaintiff to be heard.
3. The issue in the suit is a simple one.
4. Police records were available and that in all the circumstances the Defendants would not be prejudiced in mounting a Defence and that *"it is not prejudicial if the 2nd Defendant drove the car, knocked this man down, and was subsequently charged for reckless driving by the police."*
5. The Plaintiff moved residence and Counsel did not know or hear from the Plaintiff, nor did he know where the Plaintiff was, in order to secure instructions.

Court's Analysis and Reasoning

26. It is useful for this Court to note that this application was heard in two sittings. On the first occasion when the matter was heard on November 17, 2022, Counsel for the Plaintiff indicated that he had not lodged skeleton arguments or submissions in response to that served on him by the Defendants. He indicated that he had difficulty locating the Plaintiff and that he had last seen his client "last year". He also indicated that he had no further instructions from the client to proceed but that the non-attendance of his client did not mean that there was no justifiable reason for the delay. He noted that he relied on clients to come in to instruct him and so had not sought his client out but now wished an opportunity to locate him. This Court then adjourned the further hearing of the matter. The Court's Order included leave to allow the Plaintiff's Counsel an opportunity to locate his client and to file and serve an Affidavit in response to the Application of the Defendants to strike out the proceedings. The Court granted leave to the Defendants to file a supplemental Affidavit in response. The Order also provided for final submissions to be presented by the parties at the adjourned hearing.
27. On the adjourned hearing date, November 24, 2022, Counsel for the Plaintiff had neither lodged written submissions nor filed an Affidavit. Instead, Marlon Ingraham, Plaintiff was present and Counsel for the Plaintiff asked the Court to accept an unfiled and unsigned Affidavit with Counsel's undertaking to file same. It became clear that Counsel for the Plaintiff had not complied with the Court's order.
28. Counsel explained that the reason that the Affidavit was unexecuted was that they had only recently located the Plaintiff who did not make it into his office to sign the Affidavit in time for the hearing. The Affidavit purported to be an Affidavit in response to the Defendants' application and was eventually filed on November 28, 2022. The contents of the unfiled Affidavit were received with the leave of the Court. Counsel was to file the Affidavit later the following day, viz November 25, 2022. As it transpired, the Affidavit was not filed until November 28, 2022. The filed Affidavit is undated. The Affidavit sought to recount the Plaintiff's version of the events of September 9, 2009 (the date that the cause of action is said to have arisen). The Plaintiff indicated that he had one address at the time of the accident and had since had various addresses but that his "circumstances has [sic] changed and I am now settled". At paragraph 7, he avers, "Through a boyhood friend, my lawyer was able to reach me and I have given him certain instructions relative to my case." He goes on in the Affidavit to ask the Court to hear the matter on the merits and states that the Defendant ought to "step up and say why they are not responsible".
29. Curiously, Counsel for the Plaintiff did not attempt to represent to the Court that the reasons outlined in the Affidavit amounted to good or excusable reasons for the delay. Counsel left it to the Court to determine whether it was persuaded by the explanation given.
30. In response to the Court's enquiry as to why No Notice of Intention to Proceed had been filed, Counsel for the Plaintiff indicated that, being a creature of instructions, he could not do so without further instructions. There was also no explanation as to why the Statement of Claim was filed absent an application for an extension of time within which to file. In response to Defendant Counsel's suggestion that he had certain duties as Counsel and was partly to be blamed for the delay, Counsel for the Plaintiff

maintained that it was not his duty “to go out and find people”. Counsel for the Plaintiff also submitted that there had been ongoing difficulties with getting instructions from the Plaintiff and with locating the Plaintiff.

31. In this case, the Writ of Summons was filed on March 19, 2012 – some 2 ½ years after the accident that gave rise to the Claim. The Writ was served on April 20, 2012 and the Defendant entered a Notice of Appearance on April 30, 2012. Nothing further was done until the Defendants filed a Notice of Change of Attorney on July 2, 2021 and a Notice of Intention to Proceed, also on July 2, 2021. On August 6, 2021, the Plaintiff filed a Statement of Claim. No Notice of Intention to proceed was filed nor was there an application for leave to file the Statement of Claim out of time – some 9 years after the institution of legal proceedings. On the failure to observe the procedural rules regulating the timeline for service of the Statement of Claim, Counsel for the Plaintiff submitted that they were not observed because of the difficulties of obtaining instructions from his client. It is unclear to this Court, how Counsel would have obtained instructions from his client to file the Statement of Claim and not instructions of the client’s desire to proceed.
32. The Defendants filed a Summons to strike out the pleadings on August 20, 2021 and served that on the Plaintiff on August 24, 2021. That summons was first listed and called for hearing on November 17, 2022 – over one year after the summons had been filed. At the date of the first hearing, the Plaintiff had not filed any response to the Summons. Counsel for the Plaintiff appeared and indicated that he had not been in touch with his client. What is more, he submitted that it was not his job to find the client. In his words, *“It is not my business to go out and find people, but in the interest of moving this matter ahead, I undertook and promised the Court that I would see to it that we make attempts through someone to find him.”*
33. On the occasion of the adjournment and continuation of the hearing, Counsel for the Plaintiff had still not filed and served a response to the application. However, the Plaintiff was present. Counsel explained that the Plaintiff had only just made his way to his office and had not executed the Affidavit in response. Counsel undertook to file the Affidavit. A perusal of the Affidavit reveals that there is no explanation for the delay save that the Plaintiff had changed addresses.
34. The evidence in this case is that the Plaintiff has been dilatory in his conduct. This Plaintiff has not, and there is no indication that he will, pursued his matter with diligence. In fact, the evidence is to the contrary. It is clear that the Plaintiff, who has brought the Defendant to Court, only acted in response to the Defendant’s filings. The Plaintiff and his Counsel have not been in communication with each other and, it appears, neither of them was sufficiently concerned so as to seek out the other in order to pursue this matter in a timely fashion or at all. A perusal of the Affidavit of the Plaintiff filed on November 28, 2022, reveals that there is no explanation for the delay save that the Plaintiff had changed addresses. The Plaintiff has not averred that he could not be found nor that he was in a location such that his whereabouts were not ascertainable. That Plaintiff’s Counsel could establish connection with his client at the eleventh hour is, to my mind, evidence that similar steps could have been taken years ago. It demonstrates that there is no excuse for the proffered breakdown in communication that is said to be the genesis of the delay. In the absence of a plausible

explanation or a good reason, I find that there has been inordinate and inexcusable delay in the pursuit of this action.

35. The delay is solely attributable to the Plaintiff. The Plaintiff in this action failed to apply for leave from the Court after the time prescribed by the RSC had passed. The Plaintiff in contravention of the procedure under the RSC, without any further action, served the Statement of Claim on the Defendants almost nine (9) years after the action had been filed. The rules of procedure were flouted to get to the point of filing a Statement of Claim. No leave was sought at any stage of these proceedings to file and serve the Statement of Claim out of time. No Notice of Intention to Proceed was ever filed on behalf of the Plaintiff. When met with the threat of strike out proceedings, the Plaintiff took no step to respond until the last minute, despite the directions and leave granted by the Court.
36. Rules of Court and directions of the Court serve to ensure that litigants know the rules of play and are on a level playing field. The rules attempt to establish certainty in civil proceedings. The rules prescribe timelines to assist with this certainty. The established timelines also represent an effort to have litigants take necessary procedural steps in a timely manner. Litigants are expected to be diligent and a person who initiates an action in the Supreme Court must proceed in a timely manner towards resolution of the matter. In this case, the evidence is that the Plaintiff has flouted the rules of Court, giving no indication that such disregard would end. The Plaintiff has inexcusably been non-compliant with the rules. To allow the Plaintiff to proceed to trial in these circumstances would be to create uncertainty and to endorse the inexplicable behavior of the Plaintiff to the detriment of a fair trial.
37. It is this Court's opinion that the inordinate delay, which is attributable to the Plaintiff, creates a substantial risk that any trial will be unfair and that the inordinate delay will cause serious prejudice to the Defendants as between themselves and the Plaintiff. It cannot be gainsaid that lengthy delays often cause lapses in memory which results in the unreliability of witness testimony. Delay often renders the procurement of relevant documents difficult. In this case, the cause of action stems from a traffic accident some 14 years ago. Any trial outcome will turn not merely on documentary evidence, if any, but on the credibility of any witnesses called, if witnesses can be found. The Defendants are the driver of the vehicle and his corporate employer. Counsel for the Defendant has submitted that it will be difficult to locate the driver. That has not been controverted. The Plaintiff submitted that because the First Defendant is a company, it ought to have documents that it can rely on. To my mind, it is a wrong premise to assert that because the Defendant is a company, it would have what it needs at its fingertips. The Plaintiff submitted that there is a police record since the Second Defendant was charged in the incident. There is no evidence of that before the Court and there was no assertion that there was a trial following upon that charge with an available record of the parties' accounts of the events. It would also be incorrect to assume that a Defendant would accept a police report adverse to it without more and that a Defendant would choose to use such a report to formulate their Defence.
38. Having sued the Defendants in 2012, the Plaintiff ought to have pursued his matter diligently in making his case known to the Defendants who could then go about their preparation for meeting the Plaintiff's case. A Plaintiff ought not to be able to ignore timelines and hold his hand until he determines that he is ready to move while a

Defendant loses the opportunity to gather his witnesses and documents and make relevant records of those matters needed for a Defence. Further, in the instant case, what the Defendant was served with on April 20, 2012 was a generally indorsed writ with general allegations (filed March 19, 2012). Not until some 9 years after suit and some 12 years after the incident, when the Statement of Claim was filed (August 6, 2021) and served (August 13, 2021), were the Defendants fixed with details of the allegations of the Plaintiff.

39. A fair trial is a trial that is fair to the parties involved. I am satisfied that in this case to proceed to a trial in these circumstances – a trial which would take place more than 14 years after the incident complained of – will prejudice the Defendant in the mounting of their case.

Conclusions and Decisions

40. It is this Court's finding in this matter that
- a) There has been an inordinate delay,
 - b) The delay is inexcusable,
 - c) The delay is solely attributable to the Plaintiff,
 - d) The Plaintiff flouted and disregarded the Rules of Court,
 - e) The Plaintiff exhibited further dilatory conduct and disregard for the directions of the Court leading up to the hearing of the strike out application and
 - f) The Defendants are likely to be seriously prejudiced by the delay.
41. The Court is satisfied that the applicable test for striking out has been met by the Defendants. Any recent step taken by the Plaintiff in this matter was triggered by the Defendant's action or by direction of the Court. What is more, in taking such steps the Plaintiff flouted and ignored the rules of procedure as well as the directions of the Court.
42. After a nine-year delay in taking a further step, neither the Plaintiff nor his Counsel appeared resolute to propel this matter forward. A Defendant ought not to be forced in these circumstances to wait to see whether the Plaintiff and his Counsel will be able to convene and confer in order to progress this matter. The delay is extreme, it is inordinate and it is inexcusable. This Court is convinced that the delay in this instance will prejudice the Defendants in their defence of this matter.
43. This is a proper case for the termination of the proceedings by acceding to the Defendants' request to strike out.
44. For the reasons outlined above, the Court accedes to the strike out application of the Defendants.

Order

45. The order and directions of this Court are as follows.

1. The Statement of Claim is struck out.
2. The Plaintiff's action is dismissed.
3. Costs to the Defendants to be taxed if not agreed.

Dated this 19th day of October 2023

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs, J.', with a stylized flourish at the end.

Carla D. Card-Stubbs, J