

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 2383 of 1997

BETWEEN

MATTHEW MALONEY  
(the legal personal representative of  
GEORGE BISHOP, deceased)

Plaintiff

AND

CONRAD FRASER  
JOSEPH SEBASTIEN  
JEFFREY SHADE  
JENNIFER ST ROSE  
PAULINE THOMAS  
EVANS KESHWAR

Defendants



Before The Hon. Madam Justice C. Pemberton

Appearances:

For the Plaintiff: Ms. N. D. Alfonso

For the Defendants: Mr P. Dass

2005: September 19<sup>th</sup>

2005: October 10<sup>th</sup>

2005: October 28<sup>th</sup>

2006: January 18<sup>th</sup>

## DECISION

### [1] **BACKGROUND**

- George Bishop commenced these proceedings on 29<sup>th</sup> September 1997 by way of Writ of Summons and Statement of Claim against several Defendants, one of which was Mr Conrad Fraser. Mr Bishop was the paper title owner of the lands. Mr Fraser and others were in occupation. Mr Bishop asserted in his Statement of Claim that Mr Fraser's entry and occupation was by virtue of a yearly tenancy "which expired by effusion of time on 31<sup>st</sup> December 1987".
- [2] It appears that Mr Fraser was served with the papers but did nothing to defend the claim. On 21<sup>st</sup> January 1998 Mr Bishop secured a default judgment against the Defendants. Unfortunately, Mr Bishop left this earth on 13<sup>th</sup> February 2000. By his will he left Mr Maloney as his heir, who in an attempt to secure his inheritance sought and was granted permission to continue prosecution of this action.
- [3] Mr Fraser approached the court claiming that he was never served with the proceedings and so he had no knowledge of them. He first became aware in 2002 when Mr Maloney's then attorneys wrote to him informing him of the judgment and order for possession. He instructed his attorneys to respond by letters. This flow of correspondence continued until October 2004 when he took action against Matthew Maloney seeking a declaration of his tenancy. He discontinued that action, although he does not state when. Mrs Nyree D. Alfonso produced a copy of Notice of Discontinuance filed 14<sup>th</sup> April 2005.
- [4] This Summons was filed on 15<sup>th</sup> April 2005. Mr Fraser seeks from the court an order to set aside the judgment in default of appearance entered on 21<sup>st</sup> January 1998. The summons is supported by his affidavit.

[5] **ISSUES**

The issues which arise for determination are as follows:

- (1) Effect of non-compliance with Order 13 Rule 4 (2) RSC 1975
- (2) Whether Mr Fraser should be allowed to defend this matter given the history of this matter.

[6] **EFFECT OF NON-COMPLIANCE WITH ORDER 13 RULE 4 (2)**

Mr Maloney's position is that the irregularity complained of does not entitle the Defendant to have the default judgment set aside as of right. The Court must be approached to exercise its discretion in the Defendant's favour. The bases for the exercise of the Court's discretion are:

- (a) No one has been prejudiced by the Defendant's tardiness; or
- (b) That such prejudice as has been sustained can be cured by an appropriate order for costs; or
- (c) That to allow the judgment to stand would be oppressive.

The Defendant has not satisfied any of the requirements and so the judgment ought not to be set aside.

[7] Mr Fraser relied on **PEACHY PROPERTY CORPORATION LIMITED v ROBINSON & ANOR.**<sup>1</sup> to submit that non-compliance with Order 13 Rule 4 (2) was fatal. The judgment should be set aside *ex debitis justitiae*.

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<sup>1</sup> [1966] 2 AllER 981

[8] **ANALYSIS**

**LAW**

Order 13 Rule 4 (2) is clear. Except by leave of the court, a Plaintiff shall not be entitled to enter judgment in default of appearance unless he produces a Certificate by his solicitor stating that his right to possession is not subject to any statutory restriction. It is clear from a perusal of the court files that this was not done.

[9] Order 2 deals with the effect of non-compliance with the Rules.

(1) (i) Where ..... at any stage in the course of ..... any proceedings there has, by reason of anything ..... **left undone**, been a **failure to comply** with the requirements of these..... Rules of court, whether in respect of time, place, **manner**, form or content **or in any other respect**, the failure shall be treated as an **irregularity** and shall **not nullify** the .... **Judgment** ..... therein.

(ii) Subject to paragraph 3, the Court may, on the ground that there has been such a failure as is mentioned in paragraph 1 and on such terms as to costs, or otherwise as it thinks just, set aside either wholly or in part ..... The judgment ..... therein ..... and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(iii) .....

(2) (i) An application to set aside for irregularity ..... any judgment ... shall not be allowed unless it is made within a reasonable time and before the party applying has taken a fresh step **after** becoming aware of the irregularity.

[10] When one reads Order 2 Rule 1 (1), it is clear that a failure to comply with Order 13 Rule 4 (2) is to be treated as an irregularity and as such does not nullify the judgment entered on the Plaintiff's behalf.

[11] It is therefore not automatic that the judgment be treated as one to be set aside *ex debito justitiae* as advanced by Mr. Dass. Further **PEACHY** can be distinguished from the case at bar on the ground that in that case, there was non-compliance with a Statute which required that there be a court determination before a default judgment could be entered. This is not the case here.

[12] Rule 1 (2) however gives the court power to set aside the judgment for such irregularity. Mr Dass advanced that I must have regard to three factors stated above, to wit:

- (1) No prejudice to the Plaintiff;
- (2) If any, an Order for costs can cure the prejudice;
- (3) If judgment stands it would be oppressive.

I shall also take into account here Rule 2 (2) timelines of the application and that the party applying has taken no fresh step after becoming aware of the irregularity.

[13] There is no evidence before this court that Mr Fraser mounted his application on the irregularity of the judgment obtained under Order 13 Rule 4 (2). The first time that this issue was raised was in his Written Submissions. In fact his focus for setting aside this judgment lay in paragraph 4 of his affidavit in which he states that he was not served with the Writ of Summons. That in itself is an irregularity which can be cured under Order 2 Rule 1.

[14] Mr Fraser stated that he first became aware of the default judgment by way of correspondence dated 23<sup>rd</sup> May 2002, from Messrs B.D. Camejo and Company, Attorneys-at-Law. Therefore, the question is in 2002 when Mr Fraser first became aware of the action and judgment, why did he not seek to set aside the order? Instead he asked his attorneys to write a letter, which did not speak with any conviction to setting aside this judgment. I do not accept that negotiations for sale is a sufficient excuse. In addition if this were the case, then why did Mr Fraser institute a fresh action against Mr Maloney in 2004? Why did he not make his application to set aside the judgment then?

[15] I do not find that Mr Fraser has satisfied the requirement in Order 2 Rule 2 (1). I do not feel that I can entertain his application to set aside the judgment obtained on the ground of irregularity. Mr Fraser sat on his rights far too long. To grant him that relief would prejudice Mr Maloney to an extent which costs cannot compensate him. Mr Fraser has led no evidence for my consideration that to allow the judgment to stand will be an oppression to him. His desire to purchase is simply not enough.

[16] In the circumstances, I now make the following Order:

- (1) **That the Summons filed 15<sup>th</sup> April 2005 be and is hereby dismissed.**
- (2) **That the Defendant do pay the Plaintiff's costs of the Summons certified fit for Counsel to be taxed in default of agreement.**
- (3) **That pursuant to Order 2 Rule (1) the judgment though irregular do stand.**

I gratefully acknowledge Counsel's assistance.

CHARMAINE PEMBERTON  
HIGH COURT JUDGE