THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2015-04327

Between

ELIZABETH LEZAMA

Claimant

and

BING ZHANG ZHU also called ZHU BING ZHANG

Defendant

Before the Honourable Mr Justice James C Aboud

Representation:

- Ms Ngozi Ihezue for the claimant
- Mr John Heath instructed by Ms Niala Narine for the defendant

Date: 2 October 2017

REASONS FOR DECISION

[1] On 18 December 2015 the claimant filed an action against the defendant for personal injury arising out of a fall at the defendant's business premises.

[2] After efforts at encouraging a settlement, directions were given on 7 November 2016. These included discovery, the filing of an agreed bundle of documents and the filing of

witness statements. The witness statements were ordered to be filed and exchanged on 24 February 2017. Included in the direction for the filing of witness statements was the following sentence:

> "The failure to file witness statements on the stipulated date will attract the sanction set out in CPR Part 29.13."

[3] The claimant's attorney filed her client's witness statements on 20 February 2017. The defendant's attorney failed to file witness statements. On 14 March 2017 an application was filed by the defendant's attorney seeking relief from sanctions and an extension of time to file a witness statement. The application was opposed by the claimant's attorney.

[4] Directions were given for the exchange of written submissions and a date was set for the presentation of oral arguments on 17 July 2017.

[5] The reason given for the failure to file the witness statement is found in the defendant's instructing attorney's affidavit in support of the application. She says that she was present when the directions were given on 7 November 2016 and that she took a note of the timelines for the various events on her laptop computer. She says that she subsequently sent an email to her legal secretary, although she does not say when she sent the e-mail nor has she attached a copy of it.

[6] According to the instructing attorney, the emailing of court directions to her secretary is her "standard practice" and the reason why it is done is "so that same could be properly diarised." According to the defendant's instructing attorney "… due to an inadvertent administrative error, the direction [for filing witness statements] was not transcribed into my court diary" and the witness statements were therefore not filed.

[7] The defendant's discovery that the witness statements were not filed was made on 13 March 2017 inside court on the morning of the CMC that was fixed for giving final directions for evidential objections, pre-trial review, and trial. At that hearing, the defendant's instructing attorney indicated orally that she intended to file an application for relief from sanctions.

[8] During the hearing of the relief from sanctions application it was pointed out that the claimant's attorney did not fully adhere to the 7 November 2016 directions. This was said with a view to demonstrate that the other side was also delinquent. The delinquency was the claimant's failure to serve the list of documents and the agreed bundle of documents on the defendant's attorney, although they had been filed on time. I do not mark this omission on the part of the claimant's attorney as exculpatory of the omission on the part of the defendant's attorney.

[9] It should be noted that according to the testimony of the claimant's attorney, it was she who enquired from the defendant's attorney in court on 13 March 2017 why witness statements had not been filed. According to the claimant's attorney, the defendant's instructing attorney informed her that there was no direction for the filing of witness statements and it was only after she checked her computer that she saw the directions. It is not necessary for me to resolve this dispute of fact.

[10] The law in relation to applications for relief from sanction is not controversial. The leading authorities governing the courts' exercise of its discretionary power highlight the three important thresholds that a defaulting party must meet: promptitude in making the application, intentionality, and a good explanation for the breach.

[11] I dismissed the defendant's application for relief from sanctions for the following reasons:-

(1) The application was made 19 days after the deadline for filing witness statements and seems only to have been discovered on the morning of the CMC that was set aside for the giving of final directions and a trial date. In my court, available trial windows are usually six to eight months away. It is therefore of concern to litigants if the fixing of a trial date has to be postponed for a period of four to eight weeks to fix another trial date. The available trial dates will be lost and there is no telling whether the potential trial dates will be lost due to the quantum of cases being fixed for trial. In

other words, the trial may be pushed off two months beyond the first available date and sometimes even longer. While 19 days may not be inordinately long, delay was not a factor that was considered on its own and I took into account the other matters set out below.

(2) With respect to intentionality, I formed the opinion that the real cause was not a deliberate intention to avoid compliance but a failure on the part of the instructing attorney to devise a proper office management system in the creation of her personal diary. It does not seem to me that this failing can be used to create an inference of intentionality, although the system devised for the office—which is highly risky to say the least—was intentionally created.

(3) The area in my view most noteworthy is whether or not a good explanation for the breach has been provided. In my view, a good reason was not provided. It would have been easy for the defendant's instructing attorney to have provided a copy of the email that she said she sent to her secretary. It would prove the date that the email was sent and the specific instructions given to her secretary. A copy of the office diary or the attorney's personal diary for the month of January and February would also have been useful to demonstrate whether the only omitted direction was the witness statement direction. In fact, the defendant also failed to file a list of documents. The fact that there are no documents to disclose does not mean that a party can ignore a discovery direction. I was urged to so find but I do not agree. Discovery should still be made and it should clearly be stated that there are no documents to disclose. In this sense the defendant's instructing attorney also failed to comply with the discovery direction, a matter that I also took into account.

(4) Additionally, I was not satisfied with the reason given by the attorney because, in my respectful view, the control of a diary for something as crucial as trial directions ought not to be left to the vagaries of email

> communication. It seems to me that the attorney should keep a physical record while she is in court, but, if she instead wishes to email the directions to her secretary, she should copy the email to herself so that she can follow-up to ensure that her secretary has made the relevant and appropriate entries in the office diary. The defendant's attorney also had the option of entering the events on the calendar application on her laptop computer, instead of, or, in addition to sending an email to her secretary. The calendar on her laptop could also easily have been synced with her secretary's computer.

[12] In my view, the real reason for the breach is the poor system devised by the defendant's attorney to diarize court orders. She describes it as a standard practice. The dangers inherent in this practice ought to have been easily recognizable.

[13] As a matter of law and on the facts, I exercised my discretion and dismissed the defendant's relief from sanctions application.

James C Aboud
Judge