

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-01753

NATGEN PROJECT LIMITED

Claimant

AND

SAFEEYA MANZANO

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery January 08, 2021

APPEARANCES

Mr. Colvin Blaize instructed by Ms. Marvelyn Henry Attorneys at law for the Claimant.

Mr. Joseph Toney instructed by Ms. Adanna Toney Attorneys at law for the Defendant.

RULING

1. On 8 July 2020 (“the Application to set aside”) the Claimant applied pursuant to Rule 11.17 CPR to set aside an order of the Court made on 9 March 2020 (“the Final Order”). The terms of the Final Order were as follows:
 - (i) The Notice of Application filed on 19 December 2019 is dismissed.
 - (ii) The Claimant do pay the Defendant’s costs of the Notice of Application filed on 19 December 2019 assessed in the sum of Five Thousand Dollars (\$5,000.00).
 - (iii) Judgment on Admission to the Defendant on her counterclaim for the sum of Thirty-Nine thousand Dollars (\$39,000.00) which sum represents the amount

retained by the Claimant for the Deposit of One Hundred and Thirty Thousand dollars (\$130,000.00) as commission.

(a) The Claimant do pay to the Defendant interest on the said sum of Thirty-Nine Thousand Dollars (\$39,000.00) pursuant to Section 25(a) of the Supreme Court of Judicature Act at the rate of five percent (5%) per annum from the date of judgment until payment.

(b) The Claimant to pay to the Defendant the costs of the Counterclaim in the prescribed sum of Eleven Thousand Two Hundred and Fifty Dollars (\$11,250.00).

(iv) The Claimant's Claim against the Defendant is struck out with prescribed costs in the sum of Twenty-Eight Thousand, Five Hundred Dollars (\$28,500.00) to be paid by the Claimant to the Defendant.

(v) The Claimant do pay to the Defendant the costs of the Application filed on 27 November 2019 assessed in the sum of Ten Thousand, Two Hundred Dollars (\$10,200.00).

2. The Claimant filed an affidavit by Marvelyn Henry, Instructing Attorney at law on the 19 November 2020 ("the First Henry Affidavit") and another affidavit of Marvelyn Henry on the 25 November 2020 ("the Second Henry Affidavit") in support of the Application to set aside. In opposition, the Defendant relied on an affidavit filed by Ms Adanna Toney, Instructing Attorney at law on the 3 December 2020 ("the Toney Affidavit").

3. Rule 11.17 deals with any application to set aside an order made in the absence of a party. It provides:

(1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made within 7 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence showing—

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made.

4. The first hurdle which the Claimant has to cross is to satisfy the Court that the Application to set aside was made within 7 days after the date on which the order was served on the applicant. Paragraphs 15 to 17 of the First Henry Affidavit attempted to address this where it stated:

"15. The Claimant's Instructing Attorney Keisha J. Cook was then on a four (4) month maternity leave, having given birth in February, 2020 and returning to work in the last week of June 2020. The then Advocate Attorney, St Clair Michael O'Neil, effectively left the firm the 1st day of February 2020, leaving the Head of Firm, Colvin Blaize, to deal with entire workload of the firm during that period and was unaware of the date of the hearing.

16. The firm also closed soon after due to precautions taken for the COVID-19 pandemic.

17. In going through the numerous emails which was sent to Instructing Attorney's Account, on the 3rd day of July 2020, I am advised that the Instructing Attorney, Keisha Cook came across the order dated the 9th day of March, 2020."

5. Notably missing from the First Henry Affidavit was the date of the email from the Court when the Final Order was served on the then Instructing Attorney at law, Ms Keisha Cook.

6. On the other hand paragraph 6 of the Toney Affidavit deposed that:

"6. On May 22, 2020 at 12:37p.m. the Attorneys-at-Law for the Claimant and the Attorney for the Defendant received from the Court via email, the Order which the Claimant is seeking to set aside by this Application. A copy of the email in respect of the Court Order with the date and a copy of the Order are attached hereto in a bundle and marked 'A' ".

7. An examination of exhibit "A" clearly showed that the Final Order was emailed to the then Instructing Attorney at law for the Claimant, Ms Keisha Cook and Ms Toney on 22 May 2020. Neither the First Henry Affidavit nor the Second Henry Affidavit has stated that the Final Order was sent to an incorrect email address of Ms Cook. Therefore, the date of service of the Final Order on the Claimant was 22 May 2020 and not when Ms Cook decided to check her emails, as such, the 7 days for filing any application to set aside the Final Order ended on the 29 May 2020.
8. Even if the firm of the Claimant's Attorneys at law was closed during this period due to precautions arising from the Covid 19 Pandemic, by law, legal business and law firms were deemed essential business by all the Legal Notices issued from March 2020 concerning the Covid 19 Pandemic. Further, in Gazette No 44 of 2020 issued on the 2 April 2020, a Practice Direction was issued by the Honourable Chief Justice to facilitate the filing of documents by electronic means for certain matters which included urgent matters. In my opinion, the very nature of the Application to set aside was urgent. There was also a Practice Direction issued on the 27 March 2020 for the hearing of matters electronically. Therefore, there were adequate electronic means for the Claimant to make the Application to set aside, within the time laid down under Rule 11.17 CPR. There was no need for the Claimant's Attorney at law to be physically present in his office. However, the Claimant's Attorney at law failed to make use of any of the electronic facilities.
9. In my opinion, the Application to set aside which was filed on the 8 July 2020 was filed out of time, as it was filed forty-seven days after receipt of the Final Order and forty days after the deadline for making this application. The Claimant has failed to satisfy Rule 11.17 (2) and for this reason alone I can dismiss the Application to set aside as it is not properly before the Court.
10. There was also no application by the Claimant for an extension of time to file the Application to set aside as it was filed out of time. In the absence of any such application, there is no basis for the Court granting any extension of time to deal with

the Application to set aside, as there is no evidence before the Court to consider the factors as set out in **Roland James v The Attorney General of Trinidad and Tobago**¹.

11. While I am not obliged to examine the factors set out in Rule 11.17 (3) CPR for completeness, I shall. I am of the opinion, that the Claimant has not put forward evidence to satisfy the Court that there was a good reason for failing to attend the hearing and that if the Claimant had attended some other order might have been made.
12. The reason the Claimant did not attend was because Ms Cook, the Instructing Attorney at law did not inform the Claimant of the date of hearing on the 9 March 2020.
13. Paragraph 15 of the First Henry Affidavit stated that the Claimant's then Instructing Attorney at law, Ms Cook did not attend the hearing on the 9 March 2020, as she was on a "four (4) month maternity leave, having given birth in February, 2020 and returning to work in the last week of June 2020". Notably missing from the First Henry Affidavit was any medical evidence to support this assertion. Jamadar JA (as he then was) in the Court of Appeal judgment in **Joan Frederick v Maureen Brooks**,² was of the opinion that where a party makes an assertion of a medical condition without any supporting documentary evidence, the Court cannot attach any probative value or weight to the bare assertion.
14. In my opinion, in the absence of any supporting medical evidence of Ms Cook's maternity leave, the Court cannot attach any weight to this assertion as a good reason for Ms Cook not being present in Court when the Final Order was made on 9 March 2020. In any event, even if Ms Cook was not available to attend Court on 9 March 2020, there was no explanation provided to account for her failure to make adequate arrangements for the Claimant to be represented in Court on the said date.

¹ Civ App No 44 of 2014 paras 22-24

² Civ Appeal No 256 of 2008

15. The First Henry Affidavit also stated at paragraph 15 that the reason no other Attorney at law had attended Court on 9 March 2020, was because "the then Advocate Attorney, St Clair Michael O'Neil, effectively left the firm 1 February 2020, leaving the Head of Firm, Colvin Blaize, to deal with entire workload of the firm during that period and was unaware of the date of the hearing."
16. In my opinion, the reason put forward for no other Attorney at law at the firm being in attendance at the hearing on 9 March 2020, is hollow and not good in all the circumstances. Exhibit "C" of the Toney Affidavit is an endorsed copy of the Defendant's application filed on 27 November 2019. According to the endorsement on Exhibit "C", the said application was received by the Claimant's Attorney at law on 27 November 2019 at 3:44pm by one Alister Donaldson who signed his name, date and time of receipt. Therefore, by 27 November 2019 the Claimant's Attorneys at law were aware of the Defendant's application filed on that date.
17. Exhibit "B" of the Toney Affidavit was an email dated 9 January 2020, which was sent from the Court to the parties, notifying the Attorney at law for both parties of the hearing scheduled on 9 March 2020 for the Defendant's application filed on 27 November 2019. Notably, the said email was sent to the email addresses of both the Instructing Attorney at law and the Counsel for the Claimant namely Ms Cook and Mr O' Neil respectively. The Claimant has not asserted that the said email was not received by her then Instructing Attorney and Counsel in the matter. Therefore, the Claimant's Attorneys at law were notified since 9 January 2020 of the hearing on 9 March 2020.
18. In my opinion, there was no good reason put forward by the Claimant's Attorney at law for not attending on 9 March 2020. Both her Instructing and Advocate Attorneys at law were aware of the Defendant's application filed on 27 November 2019 on the same date and they were aware of the date of hearing on 9 March 2020 since 9 January 2020, which meant that they had 2 months' notice of the hearing. Even if Ms Cook was on maternity leave from February 2020, which I have not accepted in the absence of medical evidence and Mr O'Neil left the firm in February 2020, the

Claimant has failed to account for proper arrangements not being made in January 2020, to ensure that she was represented in Court on 9 March 2020. In my opinion, this is important since the Defendant has complied with the provisions of the CPR with respect to service of the Defendant's application of 27 November 2019 and the direction from the Court with respect to the attendance for the hearing on 9 March 2020.

19. Further, there was no evidence from the First Henry Affidavit and the Second Henry Affidavit which demonstrated to the Court, that if the Claimant's Attorney at law had attended some other order might have been made.

Order

20. The Claimant's Notice of Application filed on the 8 July 2020 is dismissed.
21. The Claimant to be the Defendant's costs of the said application to be assessed by the Registrar in default of agreement.

/S/ Margaret Y. Mohammed
Judge