

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. 2008-02024

BETWEEN

ANTHONY HARRICHARAN

Claimant

And

WILSTON CAMPBELL

Defendant

Appearances:

Mr. Haresh Ramnath for the Claimant

Mr. Garnet Mungalsingh for the Defendant

Date of Delivery of decision: 28th February, 2011

Before the Honourable Mr. Justice Devindra Rampersad

REASONS

1. On 28th February 2011, the defendant's application filed on 2nd November, 2010 to set aside the judgment made in these proceedings on 28th October, 2010 was dismissed. These are the reasons for the dismissal.

2. This action was commenced on 3rd June, 2008 by the claimant for the recovery of the principal sum of Forty Thousand dollars (\$40,000.00) loaned to the defendant by the claimant as set out in an agreement in writing made on 9th June, 2001. A copy of the agreement was annexed to the statement of case. Under that agreement, the defendant agreed to repay the said sum by monthly instalments of Five Thousand dollars (\$5000.00) commencing on 9th July, 2001 together with interest at the rate of one percent per month on the remaining balance. According to the claimant, the only payment made by the defendant was the sum of Four Hundred dollars (\$400.00) on 9th June, 2004. The claimant, therefore, brought this claim to recover the principal sum together with interest thereon amounting to a total of \$79,920.00 up to June, 2008 – the date of filing of these proceedings. No pre-action protocol letter was referred to in the statement of case.

3. In his defence, the defendant, who is an attorney-at-law and who was acting on his own behalf up to the date first fixed for trial, admitted signing an agreement but said that the Forty Thousand dollars (\$40,000.00) was actually comprised of Twenty-five Thousand (\$25,000.00) principal and Fifteen Thousand dollars (\$15,000.00) interest which was added on to the principal and which, as set out by the claimant, was to have been repaid by monthly instalments of Five Thousand dollars (\$5000.00) together with additional interest of one percent per month on the remaining balance. The defendant denied that the agreement annexed to the statement of case was the agreement he signed since the one annexed to the statement of case exhibited a photograph which was not on the original. The essence of the defendant's case, however, was that he never made the alleged payment of Four Hundred dollars (\$400.00) on ninth of June, 2004 and, in those circumstances, the claim was statute barred and unmaintainable.

The defendant gave an explanation that after receiving the loan he never saw or heard from the claimant until 2008 and he, the defendant, was of the impression that the claimant had died.

4. In reply, the claimant maintained that the amount borrowed was Forty Thousand dollars (\$40,000.00) and said that the sum was paid the defendant in the presence of another attorney-at-law. In respect of the agreement annexed to the statement of case, the defendant said that the photograph was one which was given to him by the defendant and which was stapled to the agreement after it was signed. The claimant insisted that the payment of Four Hundred dollars (\$400.00) was made as alleged and gave details as to where and when and in the presence of whom this payment was made.

The procedural hearings

5. The procedural hearings were as follows:
 - 5.1. The matter was first scheduled for 10th November, 2008 for a CMC and was adjourned to 15th December, 2008;
 - 5.2. On 15th December, 2008 the defendant did not appear and leave was granted to the claimant to file and serve a reply on or before 27th February, 2009. The matter was adjourned to 23rd March, 2009 and the claimant undertook to serve notice of the adjourned date on the defendant;
 - 5.3. On 23rd March, 2009, the parties appeared and directions were given for:
 - 5.3.1. Standard disclosure by 30th April, 2009 – the claimant filed his list on 21st May, 2009;
 - 5.3.2. Mutual inspection on or before 14th May, 2009;
 - 5.3.3. The filing and exchange of statements of issues and facts by 29th May, 2009; and
 - 5.3.4. Witness statements to be filed and exchanged by 30th June, 2009.

A PTR was then fixed for 6th July, 2009

- 5.4. On 6th July, 2009, the time for the filing and service of the defendant's witness statements was extended to 2nd July, 2009 and the matter was adjourned to 5th October, 2009 pending settlement.
- 5.5. When the matter came up before this court on 5th October, 2009, it was agreed that the main issue was whether or not the alleged Four Hundred dollars (\$400.00) payment in 2004 was in fact made. If so, then the matter would not be statute barred. Otherwise it would be. Estimated lengths of cross-examination were given to the court and the trial was fixed for 27th July, 2010.
- 5.6. On 27th July, 2010, the defendant did not appear. Instead, Mr. Dipnarine Rampersad attended and indicated to the court that the defendant's brother had died and, as a result, the defendant was unable to attend and was requesting an adjournment. The claimant did not object to this application and the matter was then adjourned to 28th October, 2010 at 9:00 a.m. in SF-16.
- 5.7. On 28th October, 2010, the matter was called at 9:00 a.m. and was stood down to allow the parties to attend. Shortly after, Mr. Dipnarine Rampersad was noticed by the court and he indicated to the court that he had been instructed to request the matter to be stood down a few moments as the defendant's attorney was on his way. The matter was then recalled at approximately 9:28 a.m. and the matter then proceeded in the absence of the defendant or his attorney-at-law who, by that time, had failed to show up. Evidence was taken from the claimant and his wife who both gave witness statements in this matter and, at 9:39 a.m., judgment was given for the claimant against the defendant in the sum of Seventy-nine Thousand, Nine Hundred and Twenty dollars (\$79,920.00) together with interest at the rate of one percent per month from 1st July, 2008 on the principal sum of Forty Thousand dollars (\$40,000.00) to date of judgment. The costs of the claim were then assessed with the consent of the claimant in the sum of Fourteen Thousand dollars (\$14,000.00).
- 5.8. On 2nd November, 2010, the defendant filed an application pursuant to part 40.3 of the CPR to set aside the judgment entered against him on 28th October, 2010 and to fix a new date for the trial on the ground that the defendant and his advocate attorney-at-law were misled by incorrect information fed into the

court's computer as a result of which the matter was not listed on the list posted at the information booth nor on the door of the courtroom. Defendant said that he had a good defense and that had he attended, some other judgment or order might have been given or made.

The application to set aside the judgment

6. The application was made pursuant to part 40.3 of the CPR which requires a party who was not present at the trial and who wishes to apply to set aside that judgment or order to make such an application within 7 days after the date on which the judgment or order was served on the applicant. The application has to be supported by evidence showing:
 - 6.1. A good reason for failing to attend the hearing¹; and
 - 6.2. That it is likely that had the applicant attended some other judgment or order might have been given or made².

The law

7. The defendant has placed the main thrust of his caselaw reliance upon the case of *Shocked v Goldschmidt* [1998] 1 All ER 372 but, it has to be noted, that that particular case has not featured in the English post- CPR landscape at all. The defendant also referred to the case of *Lambeth London Borough Council v Henry* [2000] 1 EGLR 33 – which was a case falling in the pre-CPR arena – and *Riverpath Properties Limited v Brammall* [2000] The Times 16th February - which was a case falling under part 23.11 of the English CPR and which deals with applications heard in the absence of a party and which contains a provision which is a bit different from part 11.16 of our local CPR and which is not applicable to the current application under part 40.3 of our local CPR.

¹ See part 40.3(3)(a)

² See part 40.3(3)(b)

8. In his judgment in *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206 Dyson LJ contrasted in one particular context the "intricate and numerous" authorities' under one of the former Rules of the Supreme Court on the one hand and the 'new procedural code" (which should generally be interpreted without reference to earlier case law) on the other (see [10], [12]).
9. In the case of *Brazil v Brazil* COURT OF APPEAL (CIVIL DIVISION) [2002] EWCA Civ 1135, (Transcript: Smith Bernal), MUMMERY LJ spoke about what was capable of being "a good reason" and said at paragraph 12:

"There has been some debate before us, as there was before the judge, about what is or is not capable of being a "good reason." In my opinion the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. I agree with Hart J that, although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true "reason" for non attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase "good reason" as used in CPR 39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance."

10. In *Hackney London Borough Council v Driscoll* COURT OF APPEAL (CIVIL DIVISION) [2003] EWCA Civ 1037, [2003] 4 All ER 1205, the defendant became aware of the proceedings and attended court for procedural hearings. However, he did not receive notice of the trial date. At trial in November, 1996 an order for immediate possession was made in the defendant's absence. In 1997 the defendant heard that the authority had evicted his tenants and recovered possession but by that time he was suffering from a severe mental illness and remained under hospital care until August, 1999. In January, 2001 he applied for an Order setting aside the Possession Order. Both the district judge and the circuit judge refused his application, finding that he did not satisfy the first and third criteria in CPR 39.3(5) (CPR 39.3, so far as material, is set out at [9], below) which provided that where an application to set aside a judgment was made by a party who had failed to attend the trial, the court could grant the application only if the applicant: (a) had acted promptly when he found out that the court had exercised its power to enter judgment against him; (b) had a good reason for not attending the trial; and (c) had a reasonable prospect of success. It was held -- A distinction was to be made between a case in which a party had no knowledge of the proceedings at all and a case in which he had no knowledge of the date fixed for a hearing. Once a defendant knew about the proceedings and had participated in them, the court had the necessary jurisdiction to make an order affecting him. In the instant case the judge and the district judge had been correct to apply CPR 39.3(5). That rule gave the absent party the opportunity of explaining why he had a reasonable prospect of success. It also gave the party in whose favour the judgment had been given the chance of not having to prove his case all over again, with the expense that that would involve, if a court were satisfied that there was no reasonable prospect that the judgment would be reversed. Accordingly, the appeal was dismissed.

The resolution of the matter

A good reason

11. The Defendant in these proceedings is an attorney-at-law known to this court to be in active practice in the Civil Courts for more than fifteen years. These rules – the CPR – came into operation on the 16th September, 2005 – more than five years ago. There is no doubt that the defendant was aware of the trial which was fixed for 28th October at 9:00 a.m. He deposed to that in paragraph 2 of his affidavit sworn to on 29th October, 2010 and filed in these proceedings on 2nd November, 2010. There is no doubt either that his advocate attorney-at-law was also aware of the trial date and time as referred to at paragraph 18 of the defendant's affidavit. In fact, the defendant says that his advocate attorney-at-law came prepared to do the trial and asked a colleague, Mr. Dipnarine Rampersad, to indicate to the honourable judge that he needed about ten to fifteen minutes before he appeared. Therefore, there is no doubt in the court's mind that both the defendant and his attorney were fully aware of the trial date and time fixed for it.
12. The issue, therefore, is whether the defendant's allegation that the matter was not listed in the computer at the information desk of the court for that date but was listed for the next day amounts to a good reason as prescribed under part 40.3.
13. The defendant alleges that he was present on the morning of 28th October together with his witnesses, none of whom have deposed any affidavit in support of this application. This omission to file affidavits in support, to this court, is a rather important factor for the court's assessment of all of the circumstances surrounding the events of 28th October.
14. It is not at all uncommon, in the experience of this court, for matters to be listed before the court wrongly or sometimes to not be listed at all on the lists provided. These lists are, as far as this court is aware, maintained in the registry as a guide and to be of

assistance to members of the public who wish to be informed about matters connected to their particular proceedings before the court. It is of great importance especially to those who are not aware of the date a particular matter is listed to proceed before the court. However, at the end of the day, it would have to be the court's recording³, notebook and the court's file which guides and verifies notes in relation to the proceedings. To my mind, the list at the information booth at the front is merely a guide and it would be folly, in the circumstances which were prevailing on the date where:

- 14.1.1. All parties were aware of the date of hearing;
- 14.1.2. All parties had representatives before the court, including the Defendant;
- 14.1.3. The court was ready and waiting for the Defendant and his advocate attorney and witnesses;
- 14.1.4. The defendant's representative in court indicated that that the defendant's attorney-at-law was on his way;
- 14.1.5. The claimant and his attorney-at-law were both present in court;
- 14.1.6. The matter was called outside of the court in the corridors on several occasions and no one showed up for the defendant, not even his witnesses;

to rely upon the same rather than do what ought to have been the logical thing and ask the court if there was in fact an error in the date especially where the defendant and his witnesses were all allegedly present.

- 15. Although, as set out in the case of *Brazil* supra, the court is not required to take too analytical an approach, to my mind, it is still necessary for the court to be satisfied, on a balance of probabilities, with the reason given by the applicant. In light of all of the circumstances set out above, this court has serious difficulties with the explanation given by the defendant for his failure to attend. He alleges that all of his witnesses were present yet failed to have them depose to affidavits verifying, at least on paper, their attendance on the date. The crux of the reason given by the defendant is that, notwithstanding the attendance of himself, his attorney and his witnesses, he sought to

³ See the **Recording of Court Proceedings Act** Chapter 4:31 of the laws of Trinidad and Tobago

rely upon a computer listing at the information booth rather than to have come into court to make the very same inquiry. The information booth is situated on the ground floor entrance level of the sub registry in San Fernando. This matter was dealt with in the very same building and it was not unreasonable, to my mind, for the defendant and his witnesses and his attorney-at-law to have attended the courtroom especially since they had gone through all that trouble to attend the court. The failure to attend the courtroom puts serious doubts on the defendant's bona fides which is further aggravated by the lack of independent affidavit support to the allegation.

16. As a result, this court found that the requirement for the provision of a good reason for failing to attend the hearing was not met by the applicant i.e. the defendant in these proceedings.

The likelihood of some other judgment or order

17. This court accepts that there is a likelihood that if the defendant had attended the trial some other judgment or order might have been made. As indicated, the parties and the court identified the issue to be a simple one – whether or not the defendant paid the sum of Four Hundred dollars (\$400.00) in 2004 to the claimant. That was an issue of fact to be dealt with at the trial and to be resolved after cross-examination of the witnesses. Mr. Mungalsingh, for the applicant, sought to raise for the very first time an issue of limitation falling under the Moneylenders Act. Respectfully, that was not and has never been the defendant's case. The defendant's case was simply one relating to the alleged payment in 2004. Consequently, this court did not require submissions in respect of this limb of part 40.3.

The order made

18. The court is of the view that the 2 conditions of part 40.3 (3) quoted above must be met in order for the application to be successful. In the circumstances of this case, the court was further of the view that the requirement of part 40.3 (3)(a) – the good reason – was not met and, as such, the application of 2nd November, 2010 was dismissed.

Devindra Rampersad
Judge