IN THE SUPREME COURT OF BELIZE A.D.2008

SCC 633/2008

BETWEEN: MICHAEL WILLIAMS JR. APPLICANT

AND

ATTORNEY GENERAL FIRST DEFENDANT
FITZROY YEARWOOD SECOND DEFENDANT

Mr. K. Arthurs for the applicant.
Mrs. M. Perdomo, Crown Counsel for the Attorney General, the first defendant.
Mrs. N. Badillo for the second defendant.

27.4.2010 RULING

1. *Notes: Civil case procedure – an application by the claimant for an order to set aside an earlier order made in his absence, striking out his claim; R11.18 of the Supreme Court (Civil Procedure) Rules, 2005; good reason for the applicant failing to attend the hearing. Court will consider the merit of the matter for hearing when the applicant failed to attend, in order to determine whether a different order was likely to have been made had the applicant attended court. Consequence of failure to file witness statements or disclosure.*

2. On 26.1.2009, at a pretrial review, this court made an order striking out the claim of Mr. Michael Williams Jr. The reason was that his

attorney or Mr. Williams Jr. himself did not attend at the pretrial review, and he had not filed witness statements or made disclosure (filed documents he relied on) by 3.12.2008, as ordered at case management conference held on 13.11.2008. Attorneys for Mr. Williams Jr. were served on 9.2.2009, with the order of 26.1.2009, striking out his claim.

3. On 25.2.2009, attorneys for Mr. Williams Jr. filed this application for an order to set aside the order made on 26.1.2009. The application was made under R 11:18 of the Supreme Court (civil Procedure) Rules, 2005. The rule states:

> *"11.18 (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 not more than 14 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 on affidavit 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 application was presented in Court today by learned counsel Mr. Kevin Arthurs for Mr. Williams Jr. The reason for the claimant failing to attend the pretrial review on 26.1.2009, given in the affidavit of Mr. Leo Bradley Jr., the attorney who acted for Mr. Williams Jr., was that, the attorney was ill on 26.1.2009, and could not attend court on that day; he produced a medical note in support. It is good reason that attorney for the claimant-applicant was ill and unable to attend the pretrial review on 26.1.2009. However, in considering the application there are more questions for consideration than good reason for failure to attend court.

5. Under ***R 11.18 (2),*** an application for an order to set aside an order made earlier in the absence of the applicant must be made not more than 14 days after the date on which the order was served on the applicant. This application was made 15 days after attorneys for Mr. Williams Jr. were served with the order made on 26.1.2009. It was late, but I would waive the delay, given that attorney for Mr. Williams Jr. was ill.

6. Further, ***R 11.18 (3) (b)*** requires that, the court satisfy itself that a different order was likely to have been made, had the applicant attended court on the occasion the earlier order was made. That is where the applicant met a hurdle. The business of the court at the pretrial review on 26.1.2009, included requiring the claimant to explain why he had failed to file witness statements and discloseable documents by 3.12.2008, in accordance with case management conference order.

7. In his affidavit supporting this application, Mr. Bradley Jr. said that he did not file disclosure because he was waiting for amended defence to be filed in response to an amended statement of claim that he had filed

pursuant to case management conference order. Regarding witness statements, he said that attorneys for both defendants were aware that the witness statements existed since the statements were, "quoted at case management". Mr. Williams Jr. also swore affidavit in which he said that he was attending college in Dangriga town, Stann Creek District, it was difficult to contact him on week days.

8. In court, Mr. Kevin Arthurs who moved this application on behalf of Mr. Williams Jr, submitted that R 11.18 should be interpreted to exclude consideration of the merit of the business on the occasion that the applicant did not attend court, and an order was made against him. Applied to this application, the submission is that this court should not consider the merit of the business on 26.1.2009, which were explanations about why Mr. Williams Jr. had not filed witness statements and discloseable documents by 3.12.2008.

9. My respectful view is, that cannot be correct. ***R 11.18 (3) (b)*** requires the court to determine: "*that it is likely that had the applicant attended, some other order might have been made"*. That necessarily means that when considering an application to set aside an order made

earlier in the absence of the applicant, the court must consider the merit of the matter in court on the occasion on which the order sought to be set aside was made. In this case, the court must consider the explanations that would have been given by Mr. Williams Jr. for failing to file witness statements and disclosure in time.

10. The reasons given in the affidavit of Mr. Bradley would not be good enough to excuse the failure to file witness statements and disclosure in time. The case management conference order regarding witness statements required that witness statements be filed and be served before 13.12.2008. It is no answer that attorneys for the defendants knew that the statements existed because the statements were quoted from during the case management conference. Filing and service of the witness statements were required by the order.

11. It is also no answer to failure to file disclosure that the claimant was waiting for amended defence to be filed in answer to the amended statement of claim filed by the claimant pursuant to case management order. The principle is that where amended defence has not been filed

in response to an amended statement of claim, the defendant is deemed to have adopted his original defence.

12. Further, it is not a satisfactory answer that Mr. Williams Jr. was not available during the week. He started a court claim, it was his duty to check with his attorneys for any development.

13. The above reasons lead me to conclude that at the pretrial review on 26.1.2009, I would have rejected Mr. William's explanations for failing to file witness statements and disclosure by 3.12.2008. I would have refused to accept them late, and the claim would have been dismissed. Dismissal of the claim has the same effect in this case as the order made striking out the claim. So a different order was not likely to have been made had the claimant-applicant attended the hearing on 26.1.2009.

14. The ruling on the application dated 24.2.2009, filed on 25.2.2009, for an order to set aside the order made by this court on 26.1.2009, is refused. That ends this claim No. 633 of 2008, of Mr. Michael Williams Jr. He will pay $1,000.00 to each defendant as costs of this

application, in addition to the costs of $2,500.00 to each defendant, ordered on 26.1.2009.

15. Delivered this Tuesday 27th day of April 2010
At the Supreme Court
Belize City

Sam L Awich
Judge
Supreme Court