

IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 283 of 2017

(MAUREEN HORTENCE MCKENZIE CLAIMANTS

(JAMES NATHANIEL MCKENZIE

(

BETWEEN (AND

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(DENNIS MCKENZIE

DEFENDANT

BEFORE THE HONOURABLE MADAM MICHELLE ARANA JUSTICE

Mrs. Peta Gaye Bradley of Belize Legal Aid for the Applicant/Defendant

Mrs. Audrey Matura for the Respondents/Claimants

[1] This is an Application by Dennis McKenzie, the Applicant/Defendant, for relief from sanctions pursuant to Civil Procedure Rules 26.8 and for an Extension of Time to file a Defence, Witness Statements and Disclosure pursuant to Civil Procedure Rules 26.9 (3). Maureen McKenzie and James Mckenzie, the Respondents/Claimants, resist this application. All the parties to this claim are brothers and sisters. The substantive claim is a fixed date claim which seeks *inter alia*, an order setting aside a Grant of Probate in the estate of Herbert Edmond Llewellyn McKenzie, Testator and father of the

Claimants and the Defendant, which was granted to the Applicant. This Grant of Probate declared a previous Will to be true and valid.

Legal Submissions on behalf of the Applicant/ Defendant

[2] Mrs. Peta Gaye Bradley on behalf of the Applicant/ Defendant contends that the court should grant Dennis McKenzie relief from sanctions. She argues that the Applicant/ Defendant applied for relief the week after he retained an attorney. Learned Counsel submits that this means that he fulfilled the criteria under the CPR that the application must be made promptly. Mrs. Bradley argues that the failure to comply with previous case management orders made by the court was not intentional. She further contends that there was a good explanation for his failure to comply, and that the Defendant just became aware of the seriousness of the matter, having been duly served with the Fixed Date Claim. Learned Counsel for the Defendant concedes that ignorance of the law is no excuse; however, she points out that the Defendant did file an Acknowledgment of Service without the assistance of an attorney. Mrs. Bradley contends that the Applicant was of the impression that the matter would not proceed because 15 years have already elapsed since he obtained a Grant of Probate in the estate of his late father. The court must have regard to the administration of justice. The delay on the part of the Applicant in not filing documents needs to be balanced with the need to ensure fairness

between the parties in keeping with the overriding objective of the Civil Procedure Rules. The Court must consider whether the failure to comply was due to him or his legal practitioner. The Court should also consider that failure to comply can be remedied, as the documents can be filed within a reasonable time if the extension of time is granted. As no trial date has been set as yet, the trial date can still be met if the relief sought is granted. The effect of the refusal of this relief would seriously prejudice the Applicant, as he has to answer serious allegations of fraud. On the contrary, if the relief is granted there would be no effect on the Respondent who still has to prove allegations made on the balance of probabilities. Mrs. Bradley therefore urges the court to grant the relief sought.

Legal Submissions On Behalf of the Respondent/Claimant

[3] Mrs. Matura Shepherd on behalf of the Respondent submits that the relief should not be granted because the Applicant did not act promptly. Learned Counsel cites CPR 26.8(1) which requires that the request for relief from sanctions must be prompt and must be supported by evidence. The claim against the Defendant was filed on May 15th, 2017 and the Defendant filed an Acknowledgement of Service on June 22, 2017. It is argued that the Defendant clearly knew that a claim was filed against him, yet chose not to do anything

about it. Between May 15, 2017 and February 1, 2018 when the Defendant finally appeared before the Court, two case management hearings had already been held. The Defendant had notice of these hearings as he had been duly served, yet he chose not to do anything. It was not until nine months later after the original claim had been filed and after witness statements were filed and served on the Defendant that he finally decided to appear in court. It is the Claimant's position that the Defendant's request for relief from sanctions and for an extension of time were definitely not prompt. Mrs. Matura-Shepherd also submits that the evidence presented by the Defendant does not support anything other than his own willful intention not to defend the claim. His failure to file a draft defence which would give the court an opportunity to consider whether he has an arguable case further shows his further delay in this matter. In addition, there is no good explanation for his failure to defend the claim. The Defendant is claiming that he was unaware of the seriousness of the matter, and that he was under the impression that the matter would not proceed because the grant of probate was almost 15 years old. He was served with the documents several times and had several opportunities to approach the court in his defense, yet simply chose not to do so. The fact that he is both executor and beneficiary of the estate was indicative of how serious he must have known any issue challenging that is, and the length of time of a grant

cannot be the basis of a good explanation. It is further submitted that the Defendant is in complete violation of this section as he has failed to comply with any rule, direction or order, even though he was served on each and every occasion, yet chose not to do so. Mrs. Matura Shepherd says that the Defendant was especially served by police officers to ensure that he would appreciate that it was a serious enough matter, yet he failed to do anything more other than file an Acknowledgment of Service. She also submits that the failure to comply was solely due to the acts of the Defendant, and not of his legal practitioner. In conclusion, Mrs. Matura Shepherd submits that the span of time between the time when the Defendant was first served with the claim, and the time when he chose to make an appearance in court is so vast as to be beyond unreasonable. Considering that the case management is over, pre-trial is concluded and the court is now setting a hearing date, the matter is now well under way. It is argued that this proceedings would be disproportionately disrupted by an order allowing the Defendant extra time to file a Defense and witness statements, or to be relieved from sanctions. He failed to comply with all rules and orders of the Court made to date, his application for Relief from Sanctions and for Extension of Time should be refused.

Chronology

- [4] May 15, 2017 Fixed Date Claim Form filed
- June 22, 2017 Acknowledgment of Service filed by Defendant
- July 27, 2017 Case Management Hearing 1
No appearance by Defendant
Case Management Order issued re:
(1) Disclosure
(2) Witness Statements
- Aug 17, 2017 Case Management Order dated 7/27/2017 served on Defendant
- Dec 15, 2017 Case Management Hearing 2
No appearance by Defendant
- Dec 18, 2017 Order for Standard Disclosure served on defendant
- Jan 9, 2018 Claimant's Witness Statements served on Defendant
- Feb 1, 2018 Case Management Hearing 3
Defendant makes appear
Hearing adjourned to Feb 8, 2018
- Feb 2, 2018 Claimant's Statement of Facts & Issues filed
- Feb 6, 2018 Application for relief of sanctions and extension of time filed
- Feb 8, 2018 Defendant retains Legal Aid Lawyers
- Feb 15, 2018 Application for relief of sanctions and extension of time served on Claimant

Ruling

[5] I thank both counsel for their submissions on this Application for Relief from Sanctions. At this point in my ruling, I wish to refer to the Chronology of Events so helpfully provided by Mrs. Matura Shepherd in her submissions. Having considered the submissions of both counsels, I find that the arguments of Mrs. Matura Shepherd must prevail. The timeline above illustrates that the Defendant was given every opportunity to comply with orders of the Court and he failed to do so. While this court has considered Mrs. Bradley's submission that the Defendant did not appreciate the gravity of the proceedings, I find that is not an acceptable reason for his non-compliance. In addition, I find that it is too late in these proceedings for him to be allowed to remedy this default, when no valid reason has been put forward for his failure to comply. On the contrary, the Claimants have complied with every order of the court made to date. The failure to file a draft Defence further exacerbates the Defendant's non-compliance, as the court is not in a position to assess even at this stage, whether his Defence has any prospect of success. In preserving the overriding objective of the Civil Procedure Rules, the court must deal with cases justly. Fairness does not apply only to one party, it applies to both the Claimant and the Defendant. The court in this case finds

