In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2016: No. 069

B E T W E E N:

DAVID SALTUS

Appellant

-v-

MICHAEL WELLMAN

Respondent

EX TEMPORE JUDGMENT

(in Court)

Default Judgment – jurisdiction of Magistrates' Court to adjudicate a further application to set aside having previously refused the same application-discretion to refuse application on abuse of process grounds-interlocutory decision-need for leave to appeal

Date of hearing: March 30, 2017

The Appellant appeared in person
Mr. Craig Attridge, C. Craig S. Attridge, Barristers & Attorneys, for the Respondent

Introductory

1. By Notice of Appeal dated 27th January 2017, the Appellant appeals against the decision of the Magistrates' Court (the Worshipful Nicole Stoneham) dated the10th December 2015, refusing to set aside a default judgment entered against him. The stated grounds of appeal are as follows:

    (1) the Learned Magistrate erred in her decision by finding that there was an abuse of process by the Defendant where the defendant satisfied the Court that the delays were in fact genuine and not with the intention of delaying the matter;

(2) the Learned Magistrate erred by not setting the matter down for trial to examine the evidence before reaching judgment especially considering there is sufficient evidence for the court's consideration to test liability.

2. The appeal faces insuperable obstacles. The starting point is that the decision which is appealed was an interlocutory decision, which could only be appealed with leave of either the Magistrates Court or the Supreme Court, and no such leave has ever been obtained; and so, having filed a Notice of Intention to Appeal on the 11th January 2016, the Appellant or intending Appellant was required to obtain leave and never did.

3. In addition, and this may be a minor point, the Notice of Intention to appeal, should have been filed by the 24th December, 2015, and was filed late. So even that required an extension of time which was never sought.

Merits of appeal

4. But, to focus on the merits of the appeal, or proposed appeal, the decision of the Learned Magistrate in any event read as follows:

> *"Having considered arguments on the preliminary point of whether the court is functus in light of its previous ruling, I'm no minded to move away from previous ruling. This court has exercised its discretion on three occasions to permit defendant opportunity to set aside. There have been various counsels on record on behalf of defendant Mr. Woolridge, Ms. Clemons, Trott & Duncan and now Mr. Scott. The history of proceedings is torrid. Counsel owes duty to client high standard. No cause has been shown as to why previous order should be rescinded. Therefore my previous Order is confirmed on 19th November, 2014. Costs to the Plaintiff."*

5. The decision seems to have two elements to it. Firstly, the Court seems to be finding that, as Mr. Attridge argued, the Court was *functus*, having already refused an application to set aside a default judgment on 19th November 2014. But secondly, having decided to hear Mr. Michael Scott on behalf of the Appellant, who was apparently not present at the hearing, the Court seems to have in the alternative rejected the application on its merits. This may be why the Notice of Appeal refers to an abuse of process.

6. Mr. Attridge put before the Court a chronology which does support both alternative findings of the Learned Magistrate. It was clearly the case that on 19th November, 2014 an application to set aside the default judgment was made and was refused. And

it seems to me to be quite clear, as a matter of law, that once a court refuses to set aside a default judgment the court has no further jurisdiction to entertain a fresh application, in respect of the same default judgment. And so the Learned Magistrate was clearly right in law to conclude that she had no jurisdiction to entertain another application to set aside.

7. But, even if that were wrong, the history of the proceedings clearly demonstrated that it would have been an abuse of the process of the Magistrates' Court to set side aside the default judgment. Because the history of the matter has the following key elements to it:

- there was, as early as January 2014, an initial hearing of an application to set aside a default judgement entered on the first return date of the Ordinary Summons (that was the 1st November 2013). On that occasion the judgement was confirmed;

- subsequently, on 30th July 2014 (in my view wrongly) the Magistrates' Court effectively granted the second application to set aside and allowed the Appellant an opportunity to file a Defence by giving directions for the filing of a Defence by 8th September 2014. That opportunity was not seized; because on 8th September, 2014 neither the Appellant nor any legal representative appeared, and so, the judgment in default was confirmed a second time;

- it was then, following that history, that on 19th November, 2014 the Appellant appeared with Makaela Clemons, who sought to blame former counsel for a failure to comply with Court orders. And the Worshipful Nicole Stoneham (as she then was), refused to set aside judgment, on the grounds that to do so would be an abuse of process;

- it was consequent upon that application and that decision which should have been appealed, that the application which was heard on 10th December, 2015 came to be made.

Conclusion

8. So in summary, this is a case where there are no arguable grounds for challenging the legal validity of the decision reached by the Learned Magistrate on 10th December 2015 and, in these circumstances:

(1) I refuse to grant the leave to appeal which the appellant actually requires; and

(2) for the avoidance of doubt in any event dismiss the appeal.

[Having heard the parties]

9. The Respondent is awarded the costs of the appeal.

Dated this 30th day of March, 2017 _____
IAN RC KAWALEY CJ