CITATION:	*PRD Realty Darwin Pty Ltd v Greg Murdock* [2003] NTMC 006
PARTIES:	PRD Realty Darwin Pty Ltd
	v
	GREG MURDOCK
TITLE OF COURT:	Local Court
JURISDICTION:	Small Claims
FILE NO(s):	20203561
DELIVERED ON:	13 February 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	5th February 2003
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Setting aside judgment – irregularity – satisfaction of judgment under Warrant of Execution

REPRESENTATION:

Counsel:

Plaintiff:	Michael Davis
Defendant:	Vin Close

Solicitors:

Plaintiff:	De Silva Hebron
1st Defendant:	Jones King

Judgment category classification:	C
Judgment ID number:	[2003] NTMC 006
Number of paragraphs:	30

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20203561

[2003] NTMC 006

BETWEEN:

PRD Realty Darwin Pty Ltd
Plaintiff

AND:

Greg Murdock
Defendant

REASONS FOR DECISION

(Delivered 13th February 2003)

JUDICIAL REGISTRAR FONG LIM:

1. The Plaintiff has applied to have the default judgement against itself in the Defendant's counterclaim set aside. The history of the matter is as follows:

1.1 The statement of claim is issued 4.3.2002

1.2 Defence and Counterclaim is filed 11.4.2002

1.3 Prehearing conference attended by the Defendant's solicitor and a representative of the landlord (not the Plaintiff)
adjourned to have Defendant himself appear(as is required by the rules)
and the landlord to speak to the Plaintiff about amending the Statement of Claim 13.5.2002

1.4 Prehearing conference Defendant attended but again representative of the landlord and not the Plaintiff. No application to amend the Statement of Claim. Order made

striking out Claim and giving the Defendant leave to proceed on the Counterclaim 27.5.2002

1.5 Application for default judgement on counterclaim 12.6.2002

1.6 Default judgment entered 19.6.2002

1.7 Application for rehearing filed 26.6.2002

1.8 Application for rehearing struck out no appearance by either party 10.7.2002

1.9 Second Application for rehearing filed 15.7.2002

1.10 Application struck out – no appearance by either party 31.7.2002

1.11 Third Application for rehearing 1.8.2002

1.12 Application for substituted service on Defendant 1.8.2002

1.13 Order for substituted service 2.8.2002

1.14 Application for warrant 1.8.2002

1.15 Application for rehearing struck out because of failure to apply for leave 21.8.2002

1.16 Warrant of Seizure and Sale issued 8.10.2002

1.17 Warrant executed debt paid in full 10.10.2002

1.18 Application for leave to apply for rehearing 16.12.2002

1.19 Fourth Application for rehearing 16.12.2002

2. Interestingly the Plaintiff has not applied to reinstate its own claim but only to set aside the judgment in the Counterclaim. It is of further interest that

the Plaintiff had previously issued proceedings in this court for exactly the same action and had discontinued that action.

3. The Plaintiff relies on the affidavits of Mary Hamilton of the 4th December 2002 and Michael Davis of the 15th December 2003.

4. **Leave application**

It was argued by the Plaintiff that even though they had been made to apply for leave there was no requirement on them to do so. Section 20(4) of the Small Claims Act provides:

> "(4) If an application made under this section is heard and determined, the party who made the application must not file in respect of the proceedings to which the determined application relates another application under this section without the leave of the Court or the consent of the other party."

5. It is argued that in this matter the application for rehearing has never in fact been "heard and determined." The first two applications were struck out because the Plaintiff failed to appear and the third because the Magistrate decided he had no jurisdiction to hear it because no leave had been applied for or granted.

6. The Plaintiff argued that the words "heard and determined" should be interpreted to mean heard and determined on the merits. When compared with the provisions of the *Local Court Act* this argument gains strength. The section 20 (5) of the *Local Court Act* provides:

> (5) If an applicant under this section fails to appear at the time fixed for the hearing of the application and the application is struck out, the applicant may re-apply only if the applicant first obtains the leave of the Court

7. There is no equivalent of section 20(4)of the *Small Claims Act* in the *Local Court Act*. The inconsistency between the provisions would indicate that the legislature intended the sections to have different effect. Considering the difference in the meaning of the words of both sections I agree with the

Plaintiff that in this case the previous applications were not heard and determined on the merits therefore leave is not required.

8. **Application for rehearing**

I must now consider the merits of the Plaintiff's application for rehearing. The Plaintiff claims that the judgement on the counterclaim was irregularly entered and therefore should be set aside. It is trite to say that an irregularly entered judgement should not stay on the records of the court.

9. Irregular judgment -The Plaintiff claims that the irregularity lies in the amount for which the judgement was entered. The judgment was entered for a sum of $3032.70. The Plaintiff says the Defendant's counterclaim was in fact only $1774.34 the net amount calculated in the counterclaim.

10. The Defendant's defence and counterclaim was drafted in confusing manner. It sets out the costs the Defendant claims he was put to because of the Plaintiff's failure to heed his requests to rectify some water damage in the unit which they were managing for the landlord. The Defendant then deducts the amount of rent he says was outstanding to the landlord and claims the balance. Unfortunately the Defendant's addition is in error as his arithmetic did not include part of his claim being for $3000 for cleaning costs. Nevertheless the application for default judgement did not include the amount for the cleaning costs. More importantly the default judgement did not set off the outstanding rent in claimed by the Plaintiff as his calculations in the counterclaim had shown.

11. It is my view that even though the Defendant's counterclaim calculated a net loss to himself technically his counterclaim was for the full amount of the expenses he was put to and therefore he was entitled to claim default judgement for the whole amount. Further the Plaintiff is not pursuing its claim for unpaid rent and therefore need not be taking into account in the Defendant's counterclaim. It then follows the judgment was not entered irregularly on the basis claimed by the Plaintiff.

12. Power to set aside judgment which has been satisfied? - The next question must be whether the payment on judgment sum makes the court functus officio to deal with this application. Has the Plaintiff in paying upon the judgement sum accepted that judgement? If the Plaintiff has accepted the judgment then should the court entertain a later application to set it aside.

13. Pursuant to rule 12.01 &12.02(2)(a)&(b) the Defendant applied for judgment and produced an affidavit annexing receipts confirming that those amounts had yet to be paid by the Plaintiff. The Registrar then exercised her discretion pursuant to rule 12.03(1) in favour of the Defendant to enter judgment.

14. It is clear from the chronology set out above that the Defendant then waited until the Plaintiff's first three applications for a rehearing were dealt with before actually filing a Warrant of Seizure and Sale to enforce the judgement.

15. Mr Davis solicitor for the Plaintiff complains that Mr Close solicitor for the Defendant acted unfairly by sending the bailiff around with the Warrant while negotiations were still on foot regarding the further application to set aside the judgement. Mr Close's recollection as set out in his affidavit is different to that of Mr Davis.In any event the Defendant was entitled to enforce the judgement in his favour, there was no stay in place on the enforcement of the judgment not had the Plaintiff applied for a stay.

16. The Plaintiff then pays the judgment sum when the Plaintiff's place of business is attended by a bailiff and the police armed with the Warrant of Seizure and Sale. The judgment sum was paid to satisfy the Warrant.

17. The Plaintiff now claims that the payment was made by mistake because the person who knew about the matter was not in the office at the time. The Plaintiff claims that they would not have paid if the relevant person was there.

18. It is my view that without a stay of execution of the judgment the Defendant was entitled to enforce the judgement. The staff at the business acted in good faith by obeying the court ordered Warrant by paying the judgment sum. There was no mistake about what they were paying as they were provided with a Warrant which shows the details of the parties to the action and when the judgment was entered. The only "mistake" is between different members of the Plaintiff's firm there is no mistake between the parties.

19. Both parties were asked to provide me with written submissions on the court's power to set aside a judgment which had already been satisfied. The Plaintiff referred me to the old English authority of Whistler v Hancock (1878) 3 QB Division 83 however I cannot see how the principle set out in that case, ie if an or else order is not complied with no further steps need be taken to obtain judgement, applies here and in any event the case was overruled by the House of Lords in Samuels v Linzi Dresses [1981] QB 115. The Defendant referred me to a case decided by the Queensland Court of Appeal of Conners v Acherton Pty Ltd (No.2) (1996) 2 QD.R 243 in which one of the parties had executed and recovered part of a judgment which judgement was later set aside.

20. It is my view that as the Small Claims Act section 20 gives the court the power to set aside a judgment and that power is exercised at the discretion of the court. The Queensland Court of Appeal in Conners v Acherton Pty Ltd had no doubt that it had the power to set aside the judgment which had already been executed. Their Honours in fact set aside only part of the judgement because there was no arguable defence to part of the judgment. Their honours did not address the question of the repayment of monies obtained on the execution.

21. I am not of the view that the court is functus officio in this matter just because the judgment has been satisfied. If the judgment had been obtained regularly and executed upon and then later (without an unexplainable delay)

it was shown that the judgment was obtained in bad faith or by an abuse of process then I would have no hesitation in accepting the court's power to set aside that judgement (see Deputy Commissioner of Taxation v Thai (1993) 26 ATR 108).

22. The fact that the judgment was paid and the circumstances of that payment are factors I should take into account when deciding whether the judgment ought to be set aside.

23. Should the judgment be set aside? It is accepted that the applicant must show in affidavit evidence that they have an arguable defence to the action and also explain any delay between the entering of the judgment and the making of the application. It is my view that the Court can also take into account other factors such as actions taken by the parties in relation to the judgment.

24. This is the fourth attempt of the Plaintiff to have the judgment set aside. The Plaintiff has failed to attend on two occasions and was struck out on the last occasion for failing to obtain leave (a matter I have dealt with earlier in my decision). The Plaintiff has shown little respect for court procedure and has wasted much of the court's time.

25. The Plaintiff has chosen not to pursue its claim in this matter (it has not applied to reinstate its action). There has been no explanation as to why the Plaintiff has chosen not pursue its claim.

26. The Plaintiff has also paid the judgment sum. The sum was not paid on the basis that an application to set aside the judgment would be made, nor was it paid by mistake, the person who paid the sum on behalf of the Plaintiff obviously had the authority to sign as cheque to make that payment and knew that they were paying a cheque to satisfy a judgment.

27. The Defendant has taken steps available to him under the rules, he has complied with the rules and even held off on pursuing the issue of the

Warrant of Seizure and Sale to give the Plaintiff the opportunity to pursue its previous applications for rehearing. The Defendant only pressed for the Warrant after the application was dismissed for the third time.

28. The Plaintiff claims that it has an arguable defence in that it was not the managing agent at the time of the damage incurred by the Defendant. The Defendant accepts that while the Plaintiff was not the managing agent at the time of the damage, the Plaintiff took on the responsibility for the property and did not fulfill its duties as the managing agent to ensure the Defendant was reimbursed for his losses (either from the insurance company or the landlord). It is my view that the Plaintiff's defence as claimed is unlikely to be successful.

29. Taking into account the Plaintiff's action throughout this matter and the fact that the defence put forward in unlikely to succeed and that the Plaintiff by paying the judgment sum without any conditions attached it is my view that my discretion should not be exercised in favour of the Plaintiff.

30. My orders are

    30.1 The application to set aside the order of the 27th of May 2003 is dismissed.

Dated this 13th day of February 2003

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Tanya Fong Lim
JUDICIAL REGISTRAR