CITATION: *Beaty v Pilton* [2003] NTMC 069

PARTIES:	ORIOLE PATRICIA BEATY
	v
	LESLIE JOHN PILTON
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20213228
DELIVERED ON:	31 December 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	17 November 2003
DECISION OF:	Ms Blokland

CATCHWORDS:

Application to set aside default judgment – delay – disclosure of defence - prejudice

REPRESENTATION:

Counsel:

Plaintiff:	Ms Lennie
Defendant:	Mr Preston

Solicitors:

Plaintiff:	Morgan Buckley
Defendant:	Murray Preston

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 069
Number of paragraphs:	22

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

No. 20213228

[2003] NTMC 069

BETWEEN:

ORIOLE PATRICIA BEATY
Plaintiff / Respondent

AND:

LESLIE JOHN PILTON
Defendant / Applicant

REASONS FOR DECISION

(Delivered 31 December 2003)

Ms JENNY BLOKLAND SM:

Introduction

This is an application brought by the defendant to set aside judgment.

1. On 1st December 2002 the Court made an order for judgment in default of defence in favour of the plaintiff against the defendant. The judgment relates to events alleged to have occurred on 1 August 2001 at the office of the service station owned by the defendant. The statement of claim was filed on 2 September 2002 and alleges negligence on the part of the Defendant that caused the plaintiff to trip and fall over a step and sustain injuries.

The Court Records

2. The assessment of damages was first set down for 11 December 2002 and rescheduled for 5 February 2002. The assessment of damages was again adjourned to 6 March 2003 to allow the plaintiff further time to file further affidavit material. Assessment was further adjourned to 16 April 2003 and

an order was made allowing the plaintiff to serve the defendant by posting her final affidavit material to address. Assessment was further adjourned to 25 June 2003.

3. On 12 June a comprehensive affidavit with detailed annexures was filed. On 25 June 2003 the assessment was adjourned by the Judicial Registrar to 14 July 2003, as it appears from the court file that the Judicial Registrar was not satisfied that 14 days had elapsed from service of the affidavit to the date of the hearing. On 14 July 2003 Judicial Registrar Fong-Lim heard the assessment and requested further information which appears on the court file. On 11 September 2003 Judicial Registrar Fong-Lim assessed damages at $ 17,987.97.

4. On 16 September 2003 the solicitor for the defendant filed a Notice of Acting on behalf of the Defendant and gave notice that the defendant would be seeking to have the judgment set aside. There was also an application and supporting material for costs filed by the plaintiff that has now been disposed of and is not material to the current application.

Principles to be Applied

5. There is no allegation the judgment was entered irregularly. The court still has an unfetted discretion to set aside a regularly entered default judgment.

6. Both parties have emphasised the relevant principles and I take them to be as follows:

- It is usual for the defendant who is applying to explain the delay and for the court to have regard to the length of and reason for the delay.

- The defendant should show a prima facie defence and should disclose the facts they would prove at trial to constitute a defence

- Of most significance is the assessment of whether there is a real likelihood that it would be unjust to the defendant to allow the judgment to stand.

- Whether the plaintiff would be prejudiced in such a way that could not be compensated in costs.

Material Relied Upon By the Defendant to Set - Aside Judgment.

7. In the defendant's own affidavit sworn 10 November 2003 he states he recollects being given a Statement of Claim by police in late 2002. He believes he lost it. He states he does recall the incident of the plaintiff falling down some steps. He says the steps were visible and frequently used by patrons. He says "the plaintiff explained at the time that she was looking away at the time of the accident and did not notice the step". He does not say who the plaintiff said this to. It is unclear whether this is unsourced hearsay or direct evidence.

8. He recalls being contacted by solicitors from Broome seeking details of his insurance. He recalls making checks and finding that his insurance did not cover this situation and only covered worker's compensation. He says he notified the solicitors and heard nothing until the Statement of Claim was served.

9. He sets out in his affidavit the fact that he was injured in a car accident on 15 August 2002. This accident caused serious injuries set out at paragraph five of his affidavit. I accept all that is said there, including the fact of impaired memory and after five days hospitalisation, several months recuperating. He reports the residual injuries are severe headaches, impaired memory and difficulties with concentration.

10. He attests to contacting the Court on a number of occasions and says he made it clear he wanted to defend the case. He doesn't know when he rang the court or received paperwork about assessing damages. He claims he was

told he couldn't defend the assessment proceedings. He states he was told he *couldn't appeal*. He advises also that he has had a separation from his wife and he now runs the hotel himself and has struggled on a number of fronts both personally and financially. He tells the court he has been working some 80 hours per week with little assistance, has poor records and difficulties coping with business and other records.

11. He states he felt he could not talk to his lawyer because he owes him money. He states the Court contacted him on 5 or 6 occasions stating that the hearing was being adjourned. He received legal advice in September of this year and his solicitor notified the court and the plaintiff's solicitors.

12. He states he wishes to defend the proceedings and has a good defence in that it was the Plaintiff's own negligence that cause her injuries; that the steps are clearly visible to patrons, dozens of people use the steps, they have not been drawn to his attention as being a danger and they were safe on the day of the incident.

13. The defendant's solicitor, Mr Preston, who also appeared for the defendant at the hearing of the application, confirms much of the material submitted by the defendant. Mr Preston states the defendant made an appointment to see him on the 3rd or 4th of September 2003 for the 5th of September 2003. Mr Preston was unable to see him at that time. Mr Preston received paperwork from the Defendant on 12 September 2003 and the defendant instructed him to set aside the default judgement. On 16 September 2003 (the day Mr Preston went into hospital for a procedure), he filed a Notice of Acting and advised the Court of his intention to set aside the judgement. He states that in his view the Defendant was under a misapprehension that he could not set aside the judgement until after the assessment of damages.

14. Mr Preston puts forward that the Defendant has a defence particularly on the question of contributory negligence.

Arguments Advanced on Behalf of the Plaintiff/ Respondent.

15. Ms Lennie who appeared for the plaintiff to defend the application reminded the court that the defendant, Mr Pilton was aware of the incident in August 2001. He was aware solicitors contacted him very early in the chronology of events – he checked out his insurance and found the incident would not be covered.

16. Ms Lennie advised the court that the defendant had been served with a minimum of ten notices from the court throughout the process and may have received up to 13 notices. Ms Lennie pointed out the apparent inconsistency of the defendant stating he could not cope due to his injuries and yet stating he worked 80 hours per week at the relevant time. She pointed out that Mr Preston states he had seen the defendant after Christmas 2002 and on some three occasions, apparently the first two occasions without receiving instructions about this matter. She notes also, and from the record appears to be correct that Mr Preston did not write to the Court until after the assessment of damages was complete.

17. Importantly, Ms Lennie argues there has been no credible defence suggested in terms of there being any real prospect of a defence. She points to the prejudice that would flow from being unable to locate relevant witnesses and records after such a lengthy period. She points out that the Defendant has stated he is not good at record keeping. He was not present at the incident. She suggests the plaintiff would see prejudiced by having to go through the process again bearing in mind the pain and expense.

Application of the Principles

18. In my view the delay has not been adequately explained. This is no ordinary delay. The defendant has been aware of the incident, the pending proceedings and then the proceedings themselves when he was served. He was constantly notified by way of service of many documents related to the

action. Although unfortunate, the car accident and consequent injuries can only amount for a few months delay, not nine months. Mr Preston acted as soon as he could with instructions, but he does not appear to have been instructed until September 2003. This is not a case of solicitor's delay and if it is, it only accounts for a few days.

19. I find the explanation that the defendant was confused and thought he could not appeal to lack credibility. He was still working 80 hours per week and running a business. This does not explain why he took no step whatsoever before judgement was entered. Although his injury accounts for some delay, it must be remembered he was hospitalised for five days only. He then took no steps until 9 months or so after judgement was entered.

20. I would not however refuse to set aside the judgement on that ground alone. The defendant needs to show a prima facie defence and should disclose the facts he would rely on. I note Mr Preston does not advance the matter in any real way beyond an allegation of contributory negligence. Williams, *Civil Procedure in Victoria*, explains the matter as follows:

> "It is not sufficient that the defendant swears as to his belief in the existence of a defence: Saunders v Hammond (1965) QWN 39: The affidavit must set out all the defences on which the defendant intends to rely and the facts by which he seeks to establish them. Barnard v Kellett (1891) 7 WN (NSW) 100."

21. I note that a prima facie defence is all that is required. I am not to attempt to discover the merits. The defence material says nothing on how it hopes to prove the plaintiff either caused or contributed to her injury. The only facts that emerge on the defence material is essentially that no one has ever slipped on the relevant step before and the step appears safe to the defendant and his representative. I do not think this is sufficient. In my view it would not be unjust to the defendant to allow the judgement to stand. Credible material out lining the incident and damages has been filed. On the other hand there is a real danger that if this judgement were overturned, important

evidence would be diminished. It is over two years since the incident and a year since judgement was entered.

22. The passing of time will have the inevitable affect of diminishing memory and finding relevant witnesses and in this case finding relevant documentation given the defendant's stated problems with record keeping. There is a real risk that the plaintiff will be prejudiced in the evidence gathering process, particularly as in the two years since the incident giving rise to the action there has been no apparent reason to think that any of the facts asserted would be challenged.

Orders

1. The application to set-aside the judgement of 1st December 2002 is dismissed.

2. I direct a copy of this judgement be delivered by post to the solicitors for each party given one is in Alice Springs (Mr Preston) and one is in Darwin (Ms Lennie).

3. I direct the parties to confer in relation to costs and file minutes of consent orders if agreement can be reached.

4. If agreement cannot be reached either party has liberty to apply to list the matter before me for argument.

Dated this 31st day of December 2003.

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE