COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

1995/CL/1178 (NASSAU)/2001/CL/FP125

MICHELLE GOMEZ

Plaintiff

AND

SYNTEX PHARMACEUTICALS INTERNATIONAL LIMITED
a.k.a.
SYNTEX CORPORATION
d/b/a
SYNTEX BAHAMAS CHEMICAL DIVISION

Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Stephen Turnquest for the plaintiff

Mr Ferron Bethell and Ms Camille A. Cleare
for the defendant

3 May 2010; 2011: 10 February; 3 March

RULING

Evans, J.

1. In a written ruling delivered by this Court on 10 November 2009, on the application by the defendant to have this action struck out for want of prosecution, I dismissed the defendant's application but made an "unless" order in the following terms:

> a. Unless the plaintiff within fourteen days from the date hereof set this matter down for trial, the action is to stand dismissed with costs to be paid by the plaintiff to the defendant, such costs are to be taxed if not agreed.
>
> b. In any event, the costs of this application are to be paid by the plaintiff to the defendant, such costs are to be taxed if not agreed.

2. In the aforesaid ruling, I indicated, as I had at the hearing of the aforesaid application on 28 July 2009, that the first week of May 2010 was available for the trial of the action and that I was prepared to meet with the parties on Monday, 8 February 2010 at 10:00 a.m. for a pre-trial review conference.

3. A notice of trial in this action was filed on 24 November 2009 and on that date, in a letter addressed to the clerk of this Court ("the clerk"), with the notations "urgent" and "priority" and sent via fax, counsel for the plaintiff wrote to the clerk informing him of some of his firm's internal difficulties and indicated that the "letter herewith forwarded is sent in order to comply with a deadline set by the Court for trial of the matter [to be] set down by today. Regrettably, we have been unable to direct from this end a filing of the notice of trial and the letter is not now accompanied by a filed Notice. Nevertheless, in the circumstances, we should be grateful if you would accept this communication as a setting down of the matter for trial as there seems to be no other way in which to achieve the objective of meeting the Court's deadline."

4. That letter, which was not copied to counsel for the defendant, was accompanied by a copy of another letter also marked "urgent" and "priority" in which counsel for the plaintiff requested a fixture for trial during the month of May 2010. The letter requesting trial dates, although marked "cc: Mr Luther McDonald", was not in fact copied to Mr McDonald. The original of that letter was brought to my attention on 27 November 2009, and I indicated thereon the dates 3-5 May 2010 at 10:00 on each day as trial dates and times.

5. It is unclear what transpired after that.

6. It appears, however, that notwithstanding the dates having been given, the notice of trial was not served on the defendant or its counsel. According to the correspondence exhibited to the affidavit of Adrianna D. Knowles of counsel for the defendant filed on 7 February 2011, it seems that in mid- to late-January, the defendant had engaged new counsel who, while reviewing the Court's file discovered the notice of trial, without dates and times, and the aforesaid letter from counsel for the plaintiff to the Court with the dates 3-5 May 2010 noted thereon.

7. Counsel for the plaintiff has conceded that neither a copy of the aforesaid letter dated 24 November 2009 was sent to, nor the notice of trial served on, the defendant or its counsel, present or former, and it appears that nothing further was done towards setting the matter down.

8. According to an affidavit of service by Miko Pinder filed on 11 February 2010, a notice of change of attorney for the defendant filed on 22 January 2010 was, on the same date, served on the firm of the attorneys for the plaintiff at their chambers in New Providence.

9. By letter dated 25 January 2010 to the clerk, counsel for the defendant forwarded a final judgment with a request that the same be initialed by me prior to being filed. I directed my clerk to inform counsel for the defendant that it was not customary for me to initial judgments entered pursuant to an order therefor. Further, in light of the fact that the notice of trial had been filed and dates given for the trial, I indicated that it should be initialed by counsel for the plaintiff.

10. On 28 January 2010, counsel for the defendant wrote to counsel for the plaintiff forwarding the said final judgment with a request that the same be initialed by him and returned to counsel for the defendant by close of business on Monday, 1 February 2010, failing which he would proceed to have the final judgment filed without it having been initialed by counsel for the plaintiff.

11. Counsel for the plaintiff did not initial and return the judgment. Instead, by letter dated 1 February 2010 to the clerk, he requested a date for the hearing of a summons, filed 1 February 2010, seeking an extension of time within which to comply with the "unless" order.

12. The final judgment was filed on 2 February 2010 and on 4 February 2010, counsel for the plaintiff filed a summons to have that judgment set aside. That summons as well as the one filed on 1 February 2010 also sought directions as to the further conduct of this matter.

13. Counsel for the plaintiff sought to have the aforesaid summonses heard on 8 February 2010, the date which I had indicated in the aforesaid ruling that I was prepared to conduct a pre-trial review. However, as counsel for the defendant did not appear because of a prior fixture before the Court in New Providence, the matter was adjourned to 3 May 2010, the date intended to have been the first day of the trial of the action.

14. On the adjourned date, Mr Bethell for the defendant, raised the issue of the jurisdiction of the Court to hear the applications as, in his submission, this Court, having delivered its decision and the defendant having filed its final judgment pursuant thereto, was *functus officio*.

15. The matter was further adjourned to allow both sides to produce written submissions and authorities for their respective positions on the sole issue of whether or not this Court was, in fact, *functus officio*, which they did by 10 June 2010.

16. Having heard the parties and considered their submissions and the authorities cited, for example Samuel v Linz Dresses Ltd [1980] 1 All ER 803 and International Capital Realty Limited [1989-90] 1 LRB 444, I determined that this Court was not *functus officio* and on 6 July 2010, I so informed counsel and invited them to agree a date for hearing of the plaintiff's aforesaid applications. Pursuant thereto, the parties had, in July 2010, agreed to 17 December 2010. That date was later vacated at the request of counsel for the defendant because it conflicted with a fixture before the Privy Council of which he received notice sometime in October 2010. In fairness to counsel for the defendant, he had alerted the Court at the hearing in May that he was awaiting confirmation of the date before the Privy Council.

17. The plaintiff's application for leave to extend the time for setting the matter down for trial was supported by the affidavit of Sidney Cambridge, a former attorney who had carriage of this matter at the time the aforesaid strike out application was heard in July 2009.

18. In that affidavit filed 8 February 2010 Mr Cambridge deposes, inter alia, as follows:

> a. I am a former partner in the law firm of Callenders & Co., the attorneys of record for the above-named plaintiff.
>
> b. As such I previously had carriage of the action herein on behalf of the plaintiff and in that capacity have been asked by Mr Stephen Turnquest to attest to what I recall transpired at the last hearing of the matter which was held in July, 2009.
>
> c. I depose hereto of my own knowledge and the content hereof is to the best of my knowledge information and belief true and correct.
>
> d. When lately informed by Mr Turnquest that the defendant had filed judgment against the plaintiff on the basis that the matter had not been set down for trial within 14 days from the date of a November 10, 2009 Court Order, I advised Mr Turnquest that according to my recollection, a trial fixture had already been assigned by the Court at the last hearing. I promised, however, to review my notes of the hearing and to verify the position one way or another.
>
> e. I subsequently found my handwritten notes a true copy of which is now produced and shown to me marked "SAC 1". Having consulted them, I was reminded that the last hearing took place on July 28, 2009, and on turning to the bottom of the last page of the exhibit, was fortified in my recollection that on July 28, 2009 the matter had been set down by the Court for trial, namely over 5 days from May 3 – 7, 2010."

19. The procedure for setting down for trial of an action begun by writ is set out in Order 34 of the Rules of the Supreme Court, relevant portions of which are set out hereunder:

> **3.** (1) In order to set down for trial an action which is to be tried before a judge, the party setting it down must deliver to the Registrar, by post or otherwise, a request that the action may be set down for trial at the place specified in the order made on the summons for directions, together with two bundles (one of which shall serve as the record and the other be for the use of the judge) consisting of one copy of each of the following documents, that is to say-
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> (a) the writ;

(b) the pleadings (including any affidavits ordered to stand as pleadings), any request or order for particulars and the particulars given;

(c) all orders made on the summons for directions.

(2) Each of the said bundles must be bound up in the proper chronological order and the bundle which is to serve as the record must be stamped with the stamp denoting payment of the fee payable on setting down the action and have indorsed thereon the names, addresses and telephone numbers of the attorneys for the parties or, in the case of a party who has no attorney, of the party himself.

6. (1) A party to an action who sets it down for trial must, within 24 hours after doing so, notify the other parties to the action that he has done so.

20. The plaintiff does not deny that there has been non-compliance with the "unless order". As her attorney puts it, "if the plaintiff is to be held strictly to Order 34 of the Rules of the Supreme Court, there was obviously not strict compliance with the setting-down rule." Indeed, the application for an extension of the time to comply is, in my view, prima facie evidence of non-compliance.

21. However, counsel for the plaintiff submits that such non-compliance was neither intentional nor contumelious, but, rather, was due to a series of "internal missteps" by his firm which he sets out in a letter to the clerk dated 1 February 2010 and exhibited to the affidavit of Courtney L. Pearce filed herein on 9 February 2011 on behalf of the plaintiff.

22. I note here that although there were several letters passing between the parties and the clerk, there is no affidavit by or on behalf of the plaintiff accounting for the delay in having this action set down for trial in accordance with Order 34.

23. However, counsel for the plaintiff in support of his application for an extension relies on Rule 25 of Order 31A of the Rules of the Supreme Court (Amendment) Rules, 2004, which provides that the Court may, on application for relief from any sanction imposed for a failure to comply with, *inter alia,* an order, only if it is satisfied that the non-compliance was not intentional, that there is a good explanation for the failure, and the party in default has generally complied with all other relevant rules, practice directions, orders and directions. In considering whether to grant relief the Court is mandated to have regard to:

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's counsel and attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

24. In the submission of counsel for the plaintiff, the requirements of Rule 25 above have been "substantially" met by the plaintiff. He submits that as soon as it became clear that the "setting down" had not been communicated to counsel for the defendant, he proceeded with all reasonable haste to try and get the matter remedied and that as soon as he became aware that counsel for the defendant "wanted to file judgment", he immediately applied for an extension of time to comply with the unless order and that once the judgment had been filed, he immediately applied to have it set aside.

25. The defendant opposes the plaintiff's application. In his submission, Rule 25 aforesaid relates to directions or orders made pursuant to the case management rules and, provides no guidelines for, nor governs, whether or not a peremptory order ought to stand. He submits further that the plaintiff's failure to have the matter set down for trial in accordance with Order 34 aforesaid was "*de jure* plainly and unquestionably intentional and contumelious."

26. In support of his position, counsel for the defendant relies on the Bahamas Court of Appeal cases of Absa Bank Ltd v Meridien International Bank Ltd. (In Liquidation) [2002] BHS J. No. 15 ("Absa") and Mega Management Limited v Southward Ventures Depositary Trust and others [2008] 5 BHS J. No. 66 ("Mega Management").

27. In Absa leave was granted to extend the time for compliance with the "unless" order. On appeal, the President of the Court of Appeal concluded at paragraph 60:

> "This is a borderline case: if it were not for the fact that the respondent's counsel sought to contact counsel for the appellant before the time for compliance had expired and also shortly after the time expired, served the requested particulars, and also indicated that the disobedience was not intentional but was due to a medical emergency of a personal female nature, I would have allowed the appeal. In light of those facts however, and in fairness to the respondent who is represented by Mrs Gibson's chambers, I would dismiss the appellant's appeal."

28. In Mega Management, leave to extend the time was refused. The President of the Court of Appeal made the following comments at paragraph 89:

> "I cannot say that the learned judge erred in principle or made any mistake as to material facts in coming to her conclusion that the time should not be extended even though it was only a few days outside the time fixed by the unless order. After all, orders of the court are meant to be observed otherwise the administration of justice is the real sufferer if they are constantly made and observed more in the breach than in the observance."

29. Further, in upholding the judge's decision not to extend the time to comply with the unless order, the President reasoned that the judge had:

> "refused the extension of time because of the history of delays in the prosecution of the appellant's claim and the failure to obey a peremptory order of the Court when on the appellant's own evidence it was in a position to comply since the week of 20 March 2006."

30. Similarly in this case, counsel for the defendant urges this Court not to grant the extension sought because of the history of delays by the plaintiff in prosecuting her claim as well as her failure to obey previous orders of the Court.

31. In that regard, counsel points out that there has been a delay of more than fourteen years in prosecuting this action which, he says, involves a claim that relates to injuries which allegedly occurred since 1989. He points out further that the plaintiff and/or her counsel have disobeyed several orders of this Court commencing with the order for directions back in 1998 in which it was ordered, inter alia, that the trial be set down within 100 days; that in addition to the "unless order", the plaintiff has also ignored the orders for consolidation made by Longley J on 12 May 1999 and Mohammed, J on 22 June 2005 as well as the June 2007 order of Maynard, J (Actg) to have this matter set down for trial within 90 days, in addition to which there have, to date, been several unsuccessful attempts by the defendants to have this action dismissed for want of prosecution.

32. Indeed, Mr Bethell submits, because of the plaintiff's delay in prosecuting her claim, the cause of action for which arose more than twenty-one years ago, it would be unjust to set aside the judgment and extend the time for compliance with the "unless order" and in his submission, to do so would be to encourage the plaintiff in her contumelious behaviour. Mr Bethell points out, as have counsel on behalf of the defendant pointed out on the various strike out applications that it has now become impossible for the defendant to defend this action, primarily because of its inability to locate witnesses.

33. It is clear from the authorities cited that the Court has jurisdiction to entertain an application to extend the time specified in an "unless" order, even after that time has expired, and that it also has power to extend the time notwithstanding judgment had been entered as a result of the failure of the other side to comply with the said "unless" order. See International Capital Realty Ltd et al v Royal Bank of Canada [1989-90] 1 LRB 444.

34. However, as pointed out by the Court of Appeal in the Mega Management case, that is not to say that the Court will automatically extend the time when there has been non-compliance with a peremptory order of the Court as the power to extend the time in such circumstances "should be exercised cautiously and with due regard for maintaining the principle that orders are made to be complied with

and not to be ignored." See also Samuels v Linzi Dresses Ltd [1981] 1 All ER 803.

35. In the aforesaid ruling of this Court delivered on 10 November 2009, with counsel for both sides present, I wrote at the final paragraph thereof:

> As I indicated to counsel on the last appearance before me, the first week of May 2010 is available for the trial of this action and I am prepared to meet with the parties on Monday, 8 February 2010 at 10:00 a.m. for a pre-trial review.

36. I also noted at paragraph 2 thereof that:

> After hearing the parties on 28 July last, I indicated to counsel that I was considering making an "unless order" and giving the parties the first week of May 2010 for the trial. Counsel for the defendant invited me, rather than making an order at that time, to give a written decision. This I now do.

37. So, contrary to Mr Cambridge's averment, the matter was not, on 28 July 2009, "set down" by this Court for trial from 3 to 7 May 2010. What I did indicate to counsel on that date was that if they were serious about the matter, they could have the first week in May as trial dates and that I would "pencil them in" on those dates.

38. However, notwithstanding my comments and what Mr Cambridge perceived to be firm trial dates, and notwithstanding the "unless order" and my comment at paragraph 37 in the aforesaid ruling that it would be unfair to keep the defendant waiting indefinitely for a trial, counsel for the plaintiff apparently did nothing to have the matter set down for trial until the day before the time was set to expire for doing so.

39. As I indicated, no affidavit setting out the reasons for the delay has been filed. However, in the aforesaid letter dated 1 February 2010, counsel for the plaintiff blames "internal missteps" in his office for the plaintiff not having complied with the "unless order" within the time limited therefor. Those "missteps" notwithstanding, counsel for the plaintiff did, in fact, file a notice of trial on 24 November 2009, the date on which the time under the "unless order" was set to expire, and this Court did, in fact, on 27 November 2010, indicate that the dates "3 to 5 May 2010" were available trial dates.

40. However, it seems that no attempts were made with counsel for the other side to agree those or any other dates prior to the request therefor. Further, although the dates were given on or about 27 November 2009, up to 25 January 2010, counsel for the plaintiff had had no communication with counsel for the defendant with respect thereto. The notice of trial had not been served on the defendant or its counsel. Indeed, it appears that nothing further was done towards trial preparation and it was only after counsel for the defendant sought, in his letter dated 25 January 2010, to have the final judgment (for costs) initialed by me and then in his letter of 28 January 2010, sought to have it initialed by counsel for the plaintiff, that the plaintiff filed the aforesaid summons on 1 February 2010 seeking an extension of the time to have the matter set down.

41. Having heard the parties and considered their arguments, submissions and the authorities provided, I have decided against granting the relief sought by the plaintiff.

42. In arriving at my decision not to accede to the plaintiff's application for an extension of time, and consequently to set aside the final judgment herein, I bear in mind

firstly that this is not the case of a first-time strike out application that the plaintiff has had to defend. According to the file, the plaintiff has survived at least eight applications by the defendant to have this action struck out for want of prosecution, but even a cat with nine lives is likely to die at some point.

43. Secondly, this action commenced in 1995 - counsel for the defendant says it was commenced just on the borderline of the limitation period for injuries allegedly suffered in 1989 - and more than fifteen years later, it is not yet ready for trial.

44. Thirdly, as observed by the Court of Appeal in the Mega Management case, an "unless order" is an order of "last resort" which is usually only issued after there has been a history of a party failing to comply with the provisions of the rules of Court or with peremptory orders issued by a Court. In this case, not only has the plaintiff failed to comply with the most recent order to have this matter set down, she, or her attorneys, have also failed to comply with previous Court orders including an order made on 20 June 2007 for the matter to be set down for trial within 90 days and although allowances have been made over the years for failings by the plaintiff's attorneys, I note, like counsel for the defendant, that there is no evidence of the plaintiff doing anything after 10 November 2009 to ensure that the "unless order" was complied with within the time specified.

45. Fourthly, I bear in mind that the plaintiff's failure is not just a procedural failure, but it is a failure to comply with a peremptory order, and that notwithstanding in her affidavit filed 6 February 2009, in opposition to the defendant's 2009 strike out application, the plaintiff averred that she was "ready to go to trial to have this matter resolved as soon as possible" and she was "confident" that her attorneys "will advance" her "case to trial forthwith"; in addition to which her counsel at the time assured the Court that "after 14 years and tenacious pursuit, Mrs Gomez is ready for trial" - in his words: "two to three days, and you give her one week and she will be here..." Well, she was given two weeks and yet, almost two years later, the matter has not yet been set down for trial.

46. Finally, I am mindful of Lord Diplock's comments in the case of Birkett v James [1978] AC 297 at page 321 that:

> "The Court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where, at the trial the case will turn upon the recollection of witnesses to past events. For this purpose the Court may make peremptory orders providing for the dismissal of the action for noncompliance with its order as to the time by which a particular step in the proceedings is to be taken. Disobedience to such an order would qualify as 'intentional and contumelious' within the meaning of the first principle laid down in Allen v. McAlpine"

47. In Absa, the Court of Appeal concluded that were it not for the explanation profferred and the attempts by counsel for the plaintiff to contact counsel for the defendant before the time for compliance had expired, the appellant's appeal against the judge's order to extend the time would have been allowed.

48. On the other hand, in Mega Management, the Court of Appeal upheld the judge's refusal to extend the time because they were of the view that "she refused the extension because of the history of delays in the prosecution of the appellant's claim and the

failure to obey a peremptory order of the Court when on the appellant's own evidence it was in a position to comply" before the time expired.

49. In this case, the plaintiff, nor her counsel contacted counsel for the defendant before the expiration of the time for compliance. In fact, it was only when counsel for the defendant wrote on 28 January 2010 trying to have its final judgment initialed by counsel for the plaintiff before filing, that the plaintiff's summons for an extension was filed and in my view, the "internal missteps" by the plaintiff's counsel is not an acceptable explanation for her failure to comply with a peremptory order, particularly after surviving eight attempts by the defendant to have the action struck out.

50. As for the delay, as indicated, this action commenced in 1995, more than fifteen years ago. In Mega Management, the action had begun in 2004 and three years later, in 2007, Thompson, J. gave an "unless order"; further, in the Mega Management case, by the time the application for the extension was made, the plaintiff had, albeit late, complied with the "unless order", whereas in this case, although at the July 2009 hearing, counsel for the plaintiff and the plaintiff in her aforesaid affidavit were adamant that the plaintiff was ready for trial, yet more than a year later, the plaintiff is still asking for more time.

51. For those reasons and in exercise of my discretion, I refuse to grant the relief sought by the plaintiff in the summonses filed herein on 1 February 2010 and 4 February 2010.

52. Costs of the applications are to be paid by the plaintiff to the defendant, such costs are to be taxed if not agreed.

DATED this 3rd day of March A.D. 2011

Estelle G. Gray Evans

Justice