19/9

NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.101/80

1138

IN THE MATTER OF Rule 265 of the Code of Civil Procedure

AND

IN THE MATTER OF An application by RAYMOND ALFRED MARSH for an Order setting aside judgment

BETWEEN DIANE ST. CLAIR KOUTSOS
Plaintiff

A N D RAYMOND ALFRED MARSH
Defendant

Counsel: G.L. Colgan for Defendant in Support
J.P. Doogue for Plaintiff to Oppose

Hearing and Judgment: 7 September 1984

ORAL JUDGMENT OF GALLEN J.

The applicant has moved for an Order setting aside judgment and has also moved for an Order for stay of execution of judgment.

As far as the motion for stay of execution of judgment is concerned, while Mr Doogue for the plaintiff in the earlier proceedings does not consent to that motion, he

does not as I understand it, oppose a temporary stay of execution on the understanding that time can be made available for the substantive application in the week commencing 8 October although he has specifically asked that it be recorded that this is the basis of his lack of opposition.

A temporary stay of execution is therefore granted and I note that Mr Doogue reserves the right on behalf of the original plaintiff to oppose any extension of that temporary order.

Mr Doogue has moved under the provisions of Rule 184 (2) of the Code of Civil Procedure that the applicant should be available at the substantive hearing for cross-examination. In a careful and detailed argument, he has set out a number of reasons why this should be regarded as a situation giving rise to special circumstances as those words are understood where they appear in the Rule. He submits that the material which has been supplied by the applicant in the affidavits is not sufficient without cross-examination and in particular he considers that the Court needs additional information with regard to the reasons why the applicant did not consult a solicitor or make or endeavour to make, special arrangements to be present at the hearing. He points to the allegations which the applicant makes and he draws attention to the fact that if the applicant is unsuccessful in his substantive motion, then a difficult trial relating to matters which occurred a considerable time ago will be avoided. It appears

too that there is a considerable dispute between the legal advisers who were initially instructed by the parties as to what arrangements, if any, were made with regard to what the applicant contends was an agreed adjournment and which the plaintiff in the earlier proceedings says was a request for an adjournment refused and in consequence the plaintiff obtained judgment in the absence of the defendant. Bearing those matters in mind Mr Doogue now asks to extend his application to include Mr Haigh who was the person advising the applicant in a voluntary capacity and who has filed an affidavit giving his understanding of the arrangements which were made. Mr Colgan opposes the applications and did so in some detail, putting forward opposition to each of the points made by Mr Doogue.

I propose to decline the applications and I do so substantially because the reasons which are put forward in support of the applications are all, on analysis, reasons which tend to deal with the substantive application itself and its merits or lack of them. This application is not before me. It will have to be determined in the end by the Judge who hears it on the basis of the information which he has. He will no doubt approach it on those principles which have been established in relation to applications for re-hearing, but I am sure he will not endeavour to resolve the substantive aspects of the claim on the re-hearing application.

It seems to me that the deficiencies in the affidavits to which Mr Doogue points, are matters which could be cured if necessary by additional affidavit evidence - that if the applicant does not choose to make this information available, then it will be a matter for comment on the part of Mr Doogue's client that this has not been done. I cannot think for example, that the cross-examination of legal advisers is likely to lead to more information being before the Court than would be the case if they were to file additional affidavits and I think Mr Colgan's point is valid when he says that it is perhaps premature to apply in respect of Mr Haigh before a subsequent affidavit is filed by Mr Young. Mr Doogue quite properly said that the affidavit is unlikely to make concessions, but I cannot assume what it will contain. I have no doubt that the two legal practitioners concerned will make available material to the best of their recollection and material which as far as possible relates to the comments made by the other.

In the end, I think the most significant factor is that this application will not be the substantive hearing between the parties and should not be so treated. There is of course nothing to stop Mr Doogue's client making a renewed application on the basis of the completed material which will be available for the hearing of the application and it will then be a matter for the Judge dealing with the

particular application to make a decision on the basis of the material before him.

At this stage, I do not consider that the special circumstances contemplated by the Rule have been met and I accordingly decline the applications.

R S Savage J

Solicitors for Defendant in Support:	Messrs Haigh, Lyon and Company, Auckland
Solicitors for Plaintiff to Oppose:	Messrs McCaw, Lewis, Chapman, Hamilton