

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1106/83

No Special
Consideration

1227

BETWEEN T _____ NORTH
Plaintiff

A N D J _____ NORTH
Defendant

Hearing : 1st October 1984

Counsel : D.H. Abbott for Defendant in support
Mr McHardy for Plaintiff to oppose

Judgment : 1st October 1984

(ORAL) JUDGMENT OF BARKER, J.

The plaintiff obtained a default judgment in the District Court at North Shore on 27th October 1983 in the sum of \$4,065. The plaintiff then sought to remove that judgment to this Court under the procedures set out in Section 66 of the District Courts Act 1947. The certificate of judgment issued by the Registrar of the District Court was dated 31st October 1983. The certificate was therefore issued three days after the entry of judgment.

On 15th December 1983, after writ of sale proceedings in this Court had been commenced, the defendant moved to set aside the judgment obtained in the District Court and removed into this Court. She filed an affidavit in support which showed, in essence, that the \$4,000 the subject matter of the proceedings, was paid by the plaintiff (her former husband) to her after they had separated to enable her to buy a house. It is clear that the payment, although made after separation, was regarded by the defendant at any rate as having something to do with matrimonial property. Whatever the situation is, the defendant showed a default summons, issued

in the District Court, to a solicitor who had been a friend of both parties. He apparently did nothing with it; in consequence, judgment by default was obtained.

When the defendant discovered that judgment had been entered, she went to another solicitor who filed an application in the District Court to set aside the judgment; however, he found that the judgment had been removed to this Court and the District Court was not willing to receive the application.

The proposed defence of the defendant is that the payment by the plaintiff to her was in the nature of in part a gift to her and in part a trust fund for the only child of the marriage.

The first point for consideration is whether the judgment was rightly removed to this Court. Mr McHardy properly drew my attention to Section 66(2) of the District Courts Act 1947 which reads:

"No such certificate shall be issued before the expiration of the time allowed for giving notice of appeal or before the time at which execution could be issued out of the District Court, and if any proceedings for enforcement of the judgment or order have been issued out of that Court no such certificate shall be issued until after the withdrawal or completion of those proceedings."

Mr McHardy initially submitted that this section showed that the judgment was not properly removed because it was removed to this Court from the District Court before the time for appeal had expired. However, I think that in the circumstances of a default judgment, the more appropriate alternative is that no certificate shall be issued before the time at which execution can be ordered within the District Court; I refer to Section 79(5) of the District Courts Act 1947. That provides that, except by leave of a District Court Judge, no proceedings for the enforcement of a judgment or order shall be commenced in any Court until after the expiry of 48 hours from the time of the entering of the judgment or the making of the order.

In this case, the removal was made 3 days, not 2 days, after the giving of judgment. It seems to me that the alternative of no certificate being issued before notice of appeal has expired is relevant in respect of defended cases or cases where judgment has been entered otherwise than by default without the participation of the defendant.

I consider that the judgment has been properly removed. I therefore consider that on all the numerous authorities relating to setting aside default judgments, the defendant has satisfied the normal criteria:

- (a) That she has a reasonable excuse for not complying with the summons when it was served on her; and
- (b) That she has an arguable defence.

Therefore, following such authorities as Patterson v. Wellington Free Kindergarten, (1966) N.Z.L.R.⁹⁷⁵, the judgment should be set aside and the defendant given her day in Court.

Counsel are agreed that if I set aside the judgment, I should remove the proceedings back to the District Court. This I do. I therefore remove the proceedings to the District Court at North Shore on the basis that the defendant files a statement of defence within 14 days; and that both parties file affidavits of documents within 28 days; and that both join in an application for a fixture within 28 days. The sooner this longstanding dispute is determined, the better for both parties.

The defendant being legally aided, I make no order as to costs. I direct also that the charging order issued in connection with this judgment over the defendant's bank account be dissolved; that order was made on 17th April 1984.

R. D. Barker, J.

SOLICITORS:

Plaintiff: Wallace, McLean, Bawden & Partners, Auckland.

Defendant: Shieff, Angland, Dew & Co., Auckland.