NZLR 813

IN THE HIGH COURT OF NEW ZEALAND M. 1362/82

AUCKLAND REGISTRY

155

BETWEEN JOHN A. BOOTE (previously trading as International Novelties), C/- Pitts Motorcycle Salvage Company, 20 Bath Street, Christchurch, Manager

APPELLANT

A N D CAC INDUSTRIES LIMITED of Mt. Eden, Manufacturers

RESPONDENT

Judgment: 3 February 1984

Hearing: 3 February 1984

Counsel: J.M. Wells for Appellant
R.J. Warburton for Respondent

ORAL JUDGMENT OF CASEY J.

Mr Boote has appealed against a decision of the District Court at Auckland on 17th September 1982 whereby the learned Judge refused to set aside a judgment obtained by the Respondent against him by default for the sum of $6,318.46 inclusive of costs and disbursements in respect of moulding of hair combs between October and November 1979. The sum of $600 had been paid on account of the original amount of $6,853.46 apparently due for this work. It was commissioned following verbal discussions between the Appellant and his partner and the Respondent Company, and embodied in a short written contract providing for a delivery period of eight weeks from receipt of order and this document was dated 16th August 1979. There were obviously delays and it seems apparent from the Appellant's affidavit filed in support of the application to the District Court, that these combs were originally contemplated as being available for the Christmas trade. Later documents suggest the parties accepted that the processing would not start until some time in the middle of November, and

in fact I understand that delivery was not completed until May of the following year. However, the Appellant did accept delivery and there is no information on the file, nor can Counsel tell me, what has become of the combs. He refused to pay, apparently because of the loss which he claimed to have suffered arising from the delay and eventually a default summons was issued by the Respondent on 29th March 1982, and there is on the record an affidavit of service which was supplemented by one giving further detail from the process server, deposing to the fact that she served the Appellant personally.

In his affidavit in support of the motion in the District Court, he denies that he was ever handed the summons personally and said that on or about 22nd April he found the document on his desk at work and then wrote to the Registrar of the Court enquiring about the hearing date, only to learn in his reply of 5th May that judgment had been entered on that former date and that he would have to make application to set it aside. He made further enquiries about the method of service and then says that he undertook on his own behalf to file an affidavit, which he prepared with the assistance of a friend and forwarded it to the Court on 15th June. This document suggests a somewhat rudimentary appreciation of Court procedure. The Registrar told him the correct method and an application was duly prepared and forwarded and he attributes the delay to his inexperience of Court procedures; subsequently he instructed a solicitor. Having regard to the amount of the claim it is surprising that this step was not taken very much earlier in the piece.

The learned Judge in the Court below was confronted with a situation where on the affidavits there was a conflict of evidence about personal service. He had to consider the provisions of Rule 228 of the District Court Rules 1948, and it provides that where judgment is entered by default in such an action and the defendant satisfactorily explains his default and satisfies the Judge that he has a

defence or counterclaim which ought to be heard, then the latter may set aside the judgment and any execution; or where only a counterclaim remains to be tried, stay execution on the judgment pending the hearing of the counterclaim. It will therefore be apparent that before the discretion can be exercised, the two conditions precedent of satisfactory explanation, and a defence (or counterclaim) which ought to be heard, must be established.

There is no record of the learned Judge's reasons for refusing to set the judgment aside, but Counsel inform me that he expressed himself as being satisfied that personal service had been effected. This, of course, raises a problem in a matter dealt with purely by contradictory affidavits. It may not be doing justice to the parties to determine such a matter without at least giving an opportunity for cross-examination and by oral evidence enabling some impression of the credibility of the witnesses to be gained. But in addition to this difference over personal service, the Appellant also demonstrated an ignorance of Court procedures. It is obvious that he expected a hearing date to be fixed, from his enquiry of the Registrar, which unfortunately arrived after judgment had been entered. There is also a certain lack of appreciation of the need to obtain proper legal advice in a claim as large as this, suggesting that the defendant - to put it politely - suffered from a degree of confusion in the way that he handles his business affairs. For these reasons I think with respect to the learned Judge, that the default has been satisfactorily explained as being due to ignorance and forgetfulness on the part of the Appellant, even accepting that he may have been served personally with the summons.

The next question is whether or not he has a defence or a counterclaim which ought to be argued. He may be hard put to establish that he has an arguable defence in view of the discussions which apparently took place over the contract. The contemplated delivery date before Christmas would obviously have to be extended, and there is also his action in taking delivery of the combs and retaining them.

In these circumstances the Respondent could well expect to be paid for them, notwithstanding the delays which had taken place. I raised with Counsel the alternative matter of the counterclaim. There is material in the affidavit relating to cancelled orders because of delay, and also the discrepancy between the date when the combs might have been expected on the delivery period specified in the original contract, and the date when delivery was completed, some months later. These suggest a good counterclaim for losses the Appellant says that he suffered due to late delivery.

Counsel indicated they are prepared to accept an exercise of discretion which I think is appropriate in this case. Where only a counterclaim remains to be tried the Court may stay execution on the judgment pending the hearing thereof. I think that is the appropriate course to adopt here in the interest of justice which, of course, is the overriding consideration in these procedural rules. I make such an order accordingly but subject to the Appellant paying interest from the date of the default judgment at 11 percent on any outstanding balance that might be found due to the Respondent under this action after the disposal of the counterclaim. In accordance with the usual practice the Respondent will have costs of $100 together with any disbursements on this application. The Respondent may apply on seven days notice for leave to execute the judgment in the event of any undue delay on the Appellant's part in instituting or prosecuting the counterclaim, or for any other sufficient reason.

McCasey J.

Solicitors:

Rudd Watts & Stone, Auckland, for Appellant
Foley & Warburton, Auckland, for Respondent