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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1573/85

876

BETWEEN JAMES GILMOUR & CO. LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a grocery and tobacco merchant

Plaintiff

A N D RANEE JEWELL ALLEN of Greenhithe, Farmer

Defendant

Hearing 16th June 1986

Counsel Elizabeth Minogue for plaintiff
R. J. Warburton for defendant

Judgment 2nd July 1986

JUDGMENT OF TOMPKINS J

The defendant has moved for an order that judgment entered against her by default on 13th May 1986 be set aside.

The facts are these. Prior to August 1984 a company called Papakura Bakeries Ltd had carried on business at Takanini. In the course of doing so it had incurred trading debts with the plaintiff. On 9th August 1984 the defendant entered into an agreement with Papakura Bakeries Ltd to purchase its business by purchasing the plant and accepting an assignment of the lease. The price was $314,000. Of that $98,820 was stated in the agreement to be for goodwill. Of the purchase price $40,000 was

to be paid by the defendant executing a debenture in favour of Papakura Bakeries, the balance to be paid in cash. In fact a debenture was not completed - instead the defendant executed an instrument by way of security over chattels and a mortgage of lease both securing the balance purchase price of $40,000.

On 10th October 1984 Papakura Bakeries Ltd, by deed, assigned to the plaintiff the mortgage of lease. Indeeed it seems probable that the intention was to assign both the mortgage of lease and the instrument by way of security but the deed itself refers only to the mortgage of lease. The assignment was for the purpose of reducing the indebtedness of Papakura Bakeries to the plaintiff. Notice of that assignment was given to the defendant by registered letter dated 23rd October 1984 which was approximately one month after the defendant had settled the purchase on 21st September 1984.

The defendant made two quarterly payments pursuant to her liability under the mortgage of lease to the plaintiff, the first on 10th December 1984 and the second on 10th March 1985. She defaulted on the payment due on 10th June 1985 and on 10th September 1985. However it appears that before that last date she had ceased business because on 27th August 1985 chattels from the business were auctioned realising $8,000. This amount was paid by the defendant to satisfy or reduce an amount due to another creditor. In September 1985 Papakura Bakeries was placed

in receivership. On 30th October 1985 there was made in this Court an order that Papakura Bakeries be wound up.

On 11th December 1985 the plaintiff issued a writ against the defendant seeking $42,800 being the amount then due under the mortgage of lease plus arrears of interest. The claim was based in the alternative on the mortgage of lease and the instrument by way of security. That writ was served on the defendant on 5th February 1986. No statement of defence having been filed judgment by default was entered on 13th March 1986 for the amount claimed plus $795 for costs.

On 26th March 1986 the solicitor for the defendant purported to file in this Court a statement of defence which whilst accepted, could not validly be filed because judgment had been entered. A copy of the statement of defence was served on the plaintiff's solicitors. This document is singularly uninformative, simply consisting of an admission of certain paragraphs in the statement of claim and a denial of others. It does not comply with the High Court Rules in its lack of particularity. Further, it does not plead any affirmative defences. In the light of the issues now sought to be raised it was clearly defective.

Although on 9th April 1986 the defendant's solicitor advised that an application would be made to set aside the default judgment, such a motion was not filed in this Court until 7th May 1986. By that time the plaintiff had issued a bankruptcy notice

served it on the defendant, then issued and served a bankruptcy petition.

The application is based on rule 469.

> "Any judgment obtained by default may be set aside or varied by the Court on such terms as it thinks fit if it appears to the Court that there has been or may have been a miscarriage of justice."

This rule differs from its predecessor, rule 236 of the Code of Civil Procedure by the addition of the words "if it appears to the Court that there has been or may have been a miscarriage of justice". But in doing so it is setting out the test adopted by Wilson J in Watson v Briscoe [1866] NZLR 35 a test that was adopted and approved by MacGregor J in Edwards v Edwards [1966] NZLR 783.

In Paterson v Wellington Free Kindergarten Association Inc [1966] NZLR 975 McCarthy J at 983 pointed out that the Court is not limited in the considerations to which it may have regard but three have long been considered of dominant importance. They are

1. That the defendant has a substantial ground of defence.
2. That the delay is reasonably explained.
3. That the plaintiff will not suffer irreparable injury if the judgment is set aside.

Finally, in Russell v Cox [1983] NZLR 654 McMullin J, delivering the judgment of the Court of Appeal at 659, referred to the

observations of McCarthy J in Paterson but emphasised that that passage should not be regarded as laying down a general rule that an application to set aside a judgment must satisfy these conditions as a necessary prerequisite to the exercise of the discretion. They do no more than highlight factors which may generally be regarded as relevant to an enquiry which will determine where the justice of the case will lie.

The defence upon which the defendant seeks to rely is not disclosed in the statement of defence she sought to file. It is by way of an equitable set off. Mr Warburton put before the Court a pleading which he said the defendant would file if the judgment were set aside. It alleges that by clause 10 of the agreement the company warranted that the turnover of the business had averaged $10,000 per week for the 12 months preceding 9th August 1984, that in breach of that warranty the turnover had averaged less than $10,000 per week for 12 months preceding that date as a result of which the defendant has lost the goodwill she paid for the business, namely, $98,820. Therefore she claims by way of set off, judgment in an amount equal to any judgment obtained by the plaintiff against the defendant but not more than $98,820. In a rather brief elaboration of that she deposes in an affidavit that when she took the business over the turnover was between $3,000 and $4,000 a week, that it was insufficient for the business to operate profitably and consequently it had to cease. The lease has been cancelled by the landlord. She relies on the assignment of the mortgage of lease to the plaintiff in

support of her contention that she is now able to plead that claim against Papakura Bakeries by way of set off against the plaintiff. Mr Warburton referred to s 42 of the Credit Contracts Act 1981

> "...an assignee of a credit contract from a creditor shall take the contract subject to all equities and to all rights and remedies under this Act that the debtor has or would have against the original creditor or any subsequent creditor."

It was his submission that the defendant's claim against Papakura Bakeries based on a breach of the warranty in the agreement for sale and purchase gives rise to a debt which accrued to her before she received the notice of assignment of the debt to the plaintiff. He relied on the passage in the judgment of Templeman J in Business Computers Ltd v Anglo African Leasing Ltd [1977] 2 All ER 741 at 748

> "The result of the relevant authorities is that a debt which accrues due before notice of an assignment is received whether or not it is payable before that date, or a debt which arises out of the same contract as that which gives rise to the assigned debt or is closely connected with that contract, may be set off against the assignee. But a debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment."

This statement of the rule was adopted by Barker J in Popular Homes Ltd v Circuit Developments Ltd [1979] 2 NZLR 642.

Miss Minogue, in submitting that the defendant had failed to establish a substantial ground of defence, pointed with some justification to the paucity of evidence to support the allegation of breach of warranty. No precise turnover figures

were given, no accounts were produced, and no detailed evidence was given to establish that the failure of the business was directly attributable to the turnover of the business, rather than any other aspect of management. But in the end these are all matters that would need to be canvassed at the hearing. At this stage the evidence before the Court, although somewhat lean, is sufficient to establish that the defendant has a substantial ground upon which to defend the plaintiff's claim. By reaching this conclusion I do not of course mean to express any view on whether in the end that ground should succeed.

On the issue of delay there is evidence in an affidavit filed by a staff member of the defendant's solicitor that the file reveals that instructions were received from the defendant in connection with the writ that had been served on her in "early March 1986". The time for filing a statement of defence expired on 5th March 1986, judgment by default being filed on 13th March 1986. As I have indicated, there was a communication by the defendant's solicitor to the plaintiff's solicitor on 9th April 1986 indicating an intention to move to set aside the judgment but this step was not taken until 7th May 1986, some two months after the time for the filing of the statement of defence had expired. The only explanation tendered by the defendant is the default of the defendant's solicitor - and this seems to be consistent with the evidence before the Court.

Apart from the costs that the plaintiff has incurred in obtaining judgment and issuing bankruptcy proceedings, a matter

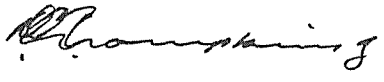
that can be adequately dealt with by terms imposed by the Court, the plaintiff does not seek to set up any irreparable injury if the judgment be set aside.

I return to the central issue, namely, whether there has been or may have been a miscarriage of justice. The defendant would be able to bring an action against Papakura Bakeries for damages for the alleged breach of warranty but on the information before the Court it seems likely that that right is valueless. Even if the present judgment is allowed to stand, the defendant could bring a separate action against the plaintiff on the same grounds set out in the proposed notice of set off, but unless the plaintiff were stayed from executing its judgment then unless the defendant has the resources to meet the judgment - and this appears unlikely - she may well be bankrupt before such a separate claim could be brought to a hearing. So having regard to the nature of the defence by way of set off that the defendant seeks to maintain, the comparatively short period of delay and her explanation for it, in the absence of any serious prejudice to the plaintiff if the cost position is rectified, I have reached the conclusion that there may well be a miscarriage of justice if the default judgment is not set aside.

Accordingly, there will be an order that the judgment obtained by default be set aside on terms. The first is that the plaintiff pay to the defendant $470 being the party and party solicitor's costs incurred on entering judgment and on the

bankruptcy proceedings, $180 being the disbursements incurred on sealing the judgment and on filing and serving the bankruptcy proceedings, and $500 towards the plaintiff's costs on these present proceedings, a total of $1,150. The second is that the statement of defence and set off be filed and served within seven days from the date of this judgment.

The plaintiff is entitled to have its action heard promptly. Rather than in this judgment endeavouring to set out a timetable to achieve this objective, it is preferable that an early judicial conference be held to make any such orders as may be necessary. Either party can apply for such a conference as soon as the statement of defence and set off has been filed and served.



Solicitors

Messrs McElroy Milne, Auckland for plaintiff
R. J. Warburton, Auckland for defendant