Neutral Citation No. [2010] NIQB 31 | *Ref:* **GIL7766**

Judgment: approved by the Court for handing down | *Delivered:* **03/03/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MICEAL WILLIAM QUINN
And
WILLLIAM KEVIN QUINN

Plaintiffs/Respondents;

-and-

KEVIN McALEENAN
And
MICHAEL McCONVILLE

Defendants/Appellants.

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GILLEN J

Application

[1] The defendants/appellants ("appellants") in this matter have appealed from a decree made by the County Court Judge in the County Court for the Division of Armagh and South Down on 18 September 2009 whereby it was decreed that an application on the part of the defendants to set aside judgments in default of the defence entered on 26 June 2009 pursuant to Order 12 Rule 12 of the County Court Rules (Northern Ireland) 1981 be dismissed and that a decree be entered for each of the plaintiffs in the sum of £10,000 plus half costs against the defendants.

The conduct of this appeal

[2] In this appeal I have followed the same course adopted by McCloskey J in an unreported decision Kerr v Ulsterbus Limited [2010] NIQB 2 delivered 6 January 2010 when, bearing in mind the overriding objective enshrined in

Order 1, Rule 1A of the Rules of the Court of Judicature of Northern Ireland, the mode of hearing agreed by the parties was that the appeal would be decided exclusively on the basis of written submissions. In the instant case both counsel agreed to my suggestion that this should be the mode of hearing at a review in December 2009. I am certain that this has led to a saving in costs and time without sacrificing any protection afforded to either party by a full oral hearing. I commend both parties for their willingness to cooperate in the determination of this appeal through the medium of the paper exercise and I acknowledge the informed and concise written submissions by counsel which have formed the basis of my consideration.

Background to the application

[2] The defendants are the proprietors of a nightclub in Warrenpoint known as "Ocean Nightclub". On 26 December 2006 the plaintiffs alleged that they were evicted from the premises by servants or agents employed by the defendants and that those servants or agents perpetrated an assault upon them.

[3] Civil bills were issued by the plaintiffs on 16 September 2008 seeking £15,000 damages for personal injuries, loss and damage sustained by them by reason of the assault, battery and trespass to the person of the plaintiffs by the servants or agents of the defendants.

[4] No Notice of Intention to defend these cases was lodged.

[5] A default decree was entered on 26 June 2009 in these terms:

> "No Notice of Intention to defend having been served by the defendant herein, it is this day ordered and decreed that the defendant do pay the plaintiff damages to be assessed by the District Judge."

[6] By way of a summons dated 12 August 2009 the defendants were notified of the application to attend before the judge on 18 September 2009 for the purpose of assessing damages. On 15 September 2009 the defendants made an application to the County Court Judge for an order setting aside judgment pursuant to Order 12 Rule 12 of the County Court Rules (Northern Ireland) 1981 on the grounds that the defendants had a defence on the merits to the claims in the action. This application was supported by an affidavit sworn by Mr Michael McConville. Inter alia at paragraph 6 the affidavit of Mr McConville recorded:

> "On 26 June 2009 a default decree was awarded in favour of the plaintiff and a summons for assessment

> of damages was issued on 12 August 2009. When Kevin McAleenan received a copy of the summons he instructed our solicitors to respond to it. This was on 7 September 2009.
>
> As stated above Kevin McAleenan deals with all the legal matters in the business. At the time that the civil bill was issued and served Kevin McAleenan was preoccupied with nursing his very ill mother. Had he been more actively involved in the business at the time this matter would not have been overlooked. It is a very serious matter and we wish to have the opportunity to defend ourselves."

[7] At paragraph 4 of that affidavit Mr McConville averred:

> "The defendants deny that they are in any way responsible for the injuries, if any, sustained by the plaintiff in the manner as alleged and furthermore the defendants dispute that the injuries, if any, were occasioned to the plaintiff by any person who was in their employment at the time of the alleged assault."

[8] The District Judge refused the application to set aside the judgment, heard oral evidence from William Quinn and awarded damages of £10,000 with half costs to each plaintiff. The current appeal is dated 1 October 2009.

The appellants' case

[9] The defendants have filed a further affidavit for the purposes of this hearing namely that of Kevin McAleenan dated 5 January 2010 which serves to set out the case now made by the defendants in the following terms:

- The defendants had instructed S.C. Connolly and Company, solicitors upon receipt of the civil bills and had been advised by the solicitor in that firm, Sinead Toal, that a Notice of Intention to Defend would be lodged. The defendants alleged they heard nothing further until they received the default decree. I pause to observe that this seems to conflict with the case made by Mr McConville that the failure to act had been occasioned by oversight on the part of Mr McAleenan due to a family illness

- Upon receipt of the notice of assessment of damages issued on 12 August 2009 -- which Mr McAleenan claims he did not receive until the end of August 2009-- the defendants instructed their current

solicitor Siobhan Armstrong to respond and on 15 September 2009 the application to set aside the judgments was served.

- In relation to the incident in question Mr McAleenan avers:

> "We would say our defence is that members of staff did not advise us of any alleged incident. No police or ambulance was called to the premises. There was no mention of any alleged incident in the log book. A and E notes and records do not state that the alleged assault occurred on our premises. Security work was contracted out to a third party who in turn managed the security staff. Both defendant's (sic) statements of complaint to police are not consistent."

It is the defendants' case that they have a good excuse for failing to serve a Notice to defend and that there is an arguable defence on the merits of the claim.

Legal principles governing this application.

Delay

[10] As I indicated in Bank of Ireland v Coulson [2009] NIQB 96, there is no rigid rule that an applicant wishing to set aside a judgment must satisfy the court that there is a reasonable explanation why the judgment was allowed go by default, although obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion (see Evans v Bartlam (1937) AC 473 at 480). The application should be made promptly and within a reasonable time. Delay coupled with prejudice to the plaintiff or a bona fide the judgment debt will also be factors.

[11] It is at least questionable as to whether the defendants are being frank with the court on this issue of delay. The initial affidavit from Mr McConville of 15 September 2009 makes no reference to any failure on the part of the S.C. Connolly and Company to perform its professional duty as a solicitor on behalf of these defendants. The excuse proffered was that Mr McConville's partner, Kevin McAleenan had overlooked these cases as he was pre-occupied with nursing his ill mother.

[12] It is in the affidavit of Mr McAleenan of 5 January 2010 that blame is placed on S.C. Connolly and Company.

[13] Subsequent to this affidavit, the Elliott-Trainor Partnership, who act on behalf of the plaintiffs furnished correspondence received from S.C. Connolly and Company, solicitors in the form of a letter of 12 January 2010 from Ms Toal and Ms McCourt of that firm .In that letter they strongly refute any lack of professional care on their part when acting for the defendants proffering the case that after the civil bills had been left into their office on 18 December 2008 without any verbal or written instructions they sought ,by way of letter ,funds in respect of part payment of the fee for the firm of solicitors and counsel but received no response. A letter allegedly was written on 9 March 2009 to the appellants by SC Connolly seeking instructions by close of business on Friday 13 March 2009 if the defendants wished to enter a Notice of Intention to Defend. Despite a telephone call from Kevin McAleenan allegedly on 13 March 2009 promising funds, no payment was received. This state of affairs was communicated to the solicitors acting on behalf of the plaintiffs.

[14] The correspondence from S.C. Connolly and Company further alleges that the default decrees were received by that firm on 1 July 2009 and sent to the defendants on 3 July 2009. Notwithstanding this, no application was made to set aside the judgments until 15 September 2009.

[15] Without attempting to unravel this issue definitively between the appellants and their former solicitor S.C. Connolly and Company, I find no good explanation emerging from the appellants as to why the allegations now raised against S.C. Connolly and Company were not contained in the earlier affidavit of Mr McConville and why no explanation is given of the background to the alleged breakdown of relationship with S.C. Connolly and Company. I note that no attempt has been made to challenge the contents of the letter of S.C. Connolly and Company of 12 January 2010.

[16] Whilst therefore there is no rigid rule then the applicant must satisfy the court that there is reasonable explanation why judgment was allowed to go by default and the primary consideration should be the merits of any proposed defence, nonetheless I have taken into account in exercising my discretion in this matter the highly unsatisfactory background to the failure to serve a Notice of Intention to Defend and the subsequent delay in attempting to set these decree aside.

The merits

[17] If a judgment is regular, then there is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter (1889) 23 QBD 124 and Evans v Bartlam (1937) AC 473.

[18] Thus for the purpose of setting aside a default judgment, the defendant must show that he has an arguable case which carries some degree of conviction (see Day v RAC Motoring Services Limited (1999) 1 AER 1007. At page 1013H Ward LJ said:

> "… The arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it."

[19] The procedure for marking judgment in default is not designed to punish the defendant by destroying his right to a fair and full hearing in relation to the plaintiff's claim but rather the procedure is part of the disciplinary framework established by the rules of court which are designed to ensure proper and timeous conduct of litigation (see Ann McCullough v British Broadcasting Corporation (1996) NI 580. ("McCullough's case").

[20] In this context I should also bear in mind Article 6 of the European Convention on Human Rights and Fundamental Freedoms as enacted by the Human Rights Act 1998 which evinces the right of an individual to have a fair trial and to call witnesses and evidence at such a hearing.

[21] Having considered all these matters however, I find no basis for finding a merits defence in this instance. Mr McConville's defence was simply to baldly assert that they were not responsible for the injuries or, as an alternative, to merely deny that the injuries were occasioned by any person in their employment. Mr McAleenan's belated affidavit does not take the matter materially any further save to assert an ipse dixit that no one reported an incident or inserted it into the log book coupled with a suggestion that a third party, unnamed and unidentified, was responsible for management of the security staff. No serious attempt has been made to put any flesh on any of these allegations. The appellants of course still have the opportunity to contemplate third party proceedings if they so wish. Finally it is alleged that the "defendants" (sic) statements of complaint to police are not consistent. I assume that this is meant to refer to the respondents statements of complaint. Once again no attempt has been made to illustrate this bald assertion.

[22] In all the circumstances I find no basis for upsetting the discretion exercised by the District Judge in these cases. I have come to precisely the

same conclusion having reviewed the material before me. I therefore dismiss these appeals and award costs against the appellants.