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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 83 of 1994

BETWEEN:

STEPHEN RODNEY BEE
Plaintiff

AND:

GREG BUSH
First Defendant

and

DARWIN CITY COUNCIL
Second Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 14 September 1994)

The application

On 7 July 1994 I ordered that the relief sought at items 1 and 2 of the defendants' summons of 1 July 1994 be granted, viz:-

(1) that the default judgment in favour of the plaintiff entered on 9 June 1994 be set aside;

(2) that the first and second defendants be given leave to file their Appearances; and

(3) consequentially, that the plaintiff's summons of 23 June 1994 for the assessment of damages be dismissed.

Mr Stewart of counsel for the defendants then submitted that there should be no order as to costs. Mr Ludher of counsel for the plaintiff opposed that application, submitting that the plaintiff was entitled to the costs of the defendants' summons of 1 July and to costs he had thrown away as a result of the grant of that application. I reserved on the question and rule on it today.

(a) The defendants' submissions

Mr Stewart submitted that the plaintiff's solicitor had failed to notify the defendants that he proposed to enter default judgment; and in those circumstances, there should be no order as to costs.

He conceded that the plaintiff was not required as a matter of law to notify the defendants before entering default judgment. However, he submitted that the plaintiff's solicitor had an ethical obligation to give reasonable notice of that intention to the defendants or to the defendants' solicitors in the circumstances of this case, where there had been prior lengthy correspondence between the parties in which the defendants consistently had denied liability. He submitted that the evidence established that no such notice had been given by the plaintiff's solicitors; that is correct. In support, Mr Stewart relied on pars3-6 (inclusive) of the affidavit of Neil Gwyn Jones of 30 June 1992, and *Pope v Aberdeen Transport Co Pty Ltd* [1965] N.S.W.R. 1550.

(b) The plaintiff's submissions

Mr Ludher submitted that the plaintiff was entitled to the costs of the defendants' summons of 1 July 1994 and of the plaintiff's summons of 23 June 1994, and any other costs he had thrown away.

He submitted that there was no requirement for a plaintiff to notify a defendant of his intention to enter default judgment, particularly a judgment in default of appearance. Further, he said, neither he nor the plaintiff knew that Ward Keller had instructions to act for the defendants in the action; that was not controverted, and I accept it as a fact.

Mr Ludher noted that the default judgment had not been "snapped on" by the plaintiff. The writ was filed on 17 May 1994 and served on the defendants on 25 May 1994. The time within which to file an Appearance expired 7 days after service of the writ, under r8.04(a)(i); that is, on 1 June 1994. The default judgment was entered on 9 June 1994; that is, 8 days after the time for appearance had expired.

Mr Ludher also noted that notice was given to the defendants on 27 June 1994 that damages were to be assessed on 30 June pursuant to the default judgment of 9 June 1994: notice was given by the plaintiff's summons of 23 June 1994. I observe that when the plaintiff's summons of 23 June came on for hearing on 30 June it was adjourned to 7 July, the question of costs being reserved.

(c) The defendants' submissions, in reply

Mr Stewart submitted that the costs of the plaintiff's summons of 23 June 1944 should not form part of any costs order now made. He submitted that r51.02(2) did not require the plaintiff to take out and serve on the defendants a summons that damages would be assessed. Accordingly, it was not appropriate in any event to allow the costs of that summons.

(d) Conclusions

No notice was given to the defendants by the plaintiff, prior to entering default judgment on 9 June 1994.

In my opinion, that fact does not assist the defendants as there is no legal or ethical duty upon a plaintiff to notify a defendant that he proposes to enter default judgment. It is true that if the solicitor for the plaintiff knows that the defendant is represented by a solicitor, it may not be appropriate for him to enter judgment in default of appearance without first warning that solicitor. However, there is no suggestion that that was the case here; to the contrary, Mr Ludher was not aware that Ward Keller had been instructed to act for the defendants in this action. I note that the Professional Conduct Rules approved by the Council of the Law Society of the Northern Territory do not deal specifically with this matter of a prior warning.

In that factual situation, I do not consider that *Pope* (supra) supports the proposition advanced by Mr Stewart. There the plaintiff had signed interlocutory judgment against the defendant who had filed no appearance or pleas. Wallace J held that the defendant had disclosed a defence on the merits and,

"with some hesitation", considered that "justice requires that the interlocutory judgment be set aside." His Honour said at p1551:-

> "- - - the plaintiff signed interlocutory judgment without sending a warning letter to the defendant. I think that where the party signing judgment does so without giving warning of its intention to do so, such party will generally, though perhaps not invariably, be in difficulties on a summons to set aside the judgment where a defence on the merits is disclosed." (emphasis mine)

He then made no order as to costs. I respectfully agree with those observations; however, in that case the parties had lawyers acting for them and his Honour's observations must be understood in that light.

The defendants in their application of 1 July seek the exercise of discretionary power in their favour. One of the factors relevant to the exercise of that discretionary power is whether, if the default judgment were set aside, the prejudice thereby sustained by the plaintiff could not be adequately compensated by a suitable award of costs; see *Kostokanellis v Allen* [1974] VR 596 at 605 and *Hill v Parke Davis & Co Pty Ltd* [1986] 41 8 ASR 349 at 353-5, per Bollen J.

As a rule, a default judgment will not be set aside except on terms that the defendant pay the costs of the entry of that judgment by the plaintiff and the costs of his own application to set that judgment aside; in brief, the usual rule is that the defendant pay the costs which the plaintiff is then seen to have thrown away. See *Re Zagoridis; ex p Q'plas Group Pty Ltd* (1990) 98 ALR 718 at 723. I consider that that is the costs order which should be made here; I so order.

I turn to the question whether the costs which the plaintiff is now seen to have thrown away extend to the costs of his summons of 23 June 1994. Rule 51.02 of the Supreme Court Rules provides as follows:-

> "(1) The party against whom the damages are to be assessed may take part in the assessment.
>
> (2) The party for whom the damages are to be assessed shall, not later than 14 days before the assessment is due, serve notice of the day, time and place of the assessment on the other party to the assessment.
>
> (3) Notice under subrule (2) may be served at the address for service but, if there is no address for service, it shall be served personally, unless the Court otherwise orders."

It can be seen that the plaintiff did not have to give notice by taking out a summons, but was nevertheless required under r51.02(2) to give notice of the time and place of assessment to the defendants. The appropriate allowance for costs in that respect may be made on taxation; it does not extend to the costs of a summons.

Orders accordingly.
