DCPI 568/2020

[2023] HKDC 569

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 568 OF 2020

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BETWEEN

KHAN SHAFIQ Plaintiff

and

SATS HK LIMITED Defendant

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Before: Her Honour Judge Levy in Chambers (Open to Public)

Date of Hearing: 18 April 2023

Date of Decision: 18 April 2023

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DECISION

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*A. Background and Facts*

1. In these proceedings, the plaintiff allegedly suffered personal injuries in an accident at work on 23 May 2019. On 17 March 2020, through his legally-assigned solicitors, Messrs John M Pickavant & Co, the writ of these proceedings was filed.
2. On 20 August 2020, by an order made by consent, the court imposed a deadline date of 8 December 2020 for the parties to file and exchange witness statements. This deadline was not complied with by neither of the parties.
3. Before the next order of time extension granted on 10 May 2021 by the court (“**the May 2021 Order**”), various events took place in relation to the plaintiff’s representations. On 23 December 2020, the plaintiff’s Legal Aid Certificate was discharged. Then very briefly he was represented privately by a firm of solicitors, Messrs Chan & Young. Shortly after that, on 27 April 2021, the plaintiff was privately represented by Messrs WT Law Offices. Thereafter, I will refer to this firm as “**the Former Solicitors**”.
4. By the May 2021 Order, the court imposed another deadline date of 1 June 2021. However, shortly afterwards, the plaintiff left Hong Kong in September 2021, hence no witness statement was prepared.
5. Therefore, one day before the next Checklist Review Hearing on 16 February 2022, the defendant filed a joint letter to the court stating that the plaintiff was unable to exchange witness statements with the defendant, allegedly for the reason that the plaintiff was not in Hong Kong. That subsequently prompted an order by the court dated 2 March 2022 (“**the March 2022 Order**”) granting the parties extension of time to file and exchange witness statements, and imposing a new deadline date of 30 March 2022.
6. However, on the strength of the information provided by the defendant, the court granted an unless order against the plaintiff as follows (hearing bundle page 76, paragraph 1): -

“1. Notwithstanding paragraph 3 of the Order made on 20 August 2020 (“the 2020 Order”) and paragraph 1 of the Order made on 10 May 2021 (“the 2021 Order”), there be an extension of time until 30 March 2022 for the parties to file and exchange witness statements. The Plaintiff is to file and exchange his draft copy witness statement, failing which he will be debarred from adducing any witness statement at trial in this action;”

1. By 30 March 2022, no witness statement or draft had ever been filed or served on the defendant. Hence, from that day onwards, the debarring order in relation to the plaintiff’s witness statement took effect.
2. The defendant served its two witness statements on the plaintiff by the deadline day of 30 March 2022 and subsequently filed the same with the court on 4 April 2022. Notwithstanding a slight delay in relation to the filing, the defendant substantially complied with the March 2022 Order.
3. To my puzzlement, at that time when the plaintiff was still represented by the Former Solicitors, the plaintiff’s solicitors did not see fit to deal with the very grave debarring order. Yet, neither did the defendant take any steps to ask for proper directions from the court in relation to the debarring order.
4. In my view, as from that day onwards when the debarring order took effect, no further costs should have been incurred in relation to any procedural steps. This is because without the plaintiff’s witness statement, the entire case should fall. Hence, the subsequent filing of the Revised Statement of Damages on 10 August 2022 by the plaintiff or the defendant’s Answer thereto on 7 September 2022, in my view, is wholly superfluous and the costs that have been spent on them are totally unnecessary. It is my view that no such costs should be allowed in relation thereto.
5. Shortly after the filing of the Revised Statement of Damages, the plaintiff returned. He had left for Pakistan on 13 September 2021 and then returned on 19 August 2022. It is only after the defendant had filed its Answer to the Revised Statement of Damages that the defendant started to deal with the effect of the debarring order by issuing a summons on 22 September 2022 to strike out the action. The ground for striking-out is wholly on the basis of the plaintiff’s non-compliance with the March 2022 unless order and the consequence of default.
6. At that time when the plaintiff was still represented by the Former Solicitors, he had filed an affirmation in opposition to the striking-out application on 31 October 2022, giving an explanation for his default for the non-compliance with the March 2022 Order. I would from now on refer that affirmation as “**the Plaintiff’s First Affirmation**”.
7. However, before the substantive hearing of the striking-out summons on 9 January 2023, the plaintiff became legally-unrepresented by a Notice of Intention to Act in Person filed with the court on 29 December 2022.
8. As a result, at the substantive hearing of the defendant’s striking-out summons, when the plaintiff appeared before me in person, I explained to the plaintiff that it is essential for the plaintiff to make an application for relief from sanction, otherwise, the matter would stand struck out. Hence, I gave an unless order on that day directing the plaintiff to issue an application for relief from sanction with supporting affirmation by 20 February 2023, failing which the plaintiff’s claim be struck out with costs to be paid by the plaintiff to the defendant.
9. After my order in January 2023, the plaintiff engaged the present firm of solicitors on 26 January 2023 by a Notice to Act for the plaintiff. Subsequently, the plaintiff, through his present solicitors, filed a summons pursuant to Order 2, rule 5 of the Rules of the District Court, dated 20 February 2023, to ask for relief from sanction from the March 2022 unless order. As required by Order 2, rule 5(2), the plaintiff also filed an affirmation in support of his application for relief from sanction. I would thereafter refer this supporting affirmation as “**the Plaintiff’s Second Affirmation**”.

*B. Legal Principles*

1. At the hearing today, both the plaintiff and the defendant were represented by counsel and I am indebted to both counsel for their written submissions. Insofar as the legal submissions are concerned, Mr Law, counsel for the plaintiff, had annexed a copy of Order 2, rule 5 and the relevant explanatory notes from the White Book, pages 66 to 67. I would refer to and rely on them. Briefly, Order 2, rule 5 sets out a number of factors the court needs to take into account when considering an application for relief from sanction, which are factors (a) to (j).
2. Mr Ho, counsel for the defendant, in his skeleton submissions, referred to the case of *Top One International (China) Property Group Co Ltd v Top One Property Group Ltd* [2011] 1 HKLRD 606, the judgment of Fok J, as he then was. Mr Ho particularly relied on paragraph 41 of that judgment, in which his Lordship set out the approach the court should take in relation to the consideration of the various circumstances set out in Order 2, rule 5, factors (a) to (j). For the sake of brevity, I will not repeat these legal principles and I believe both parties are in agreement that these principles should apply. I would refer to them in my deliberation of this application.
3. In this application, I am prepared to consider factors (a) to (j) backwards. I will start from factor (j): “the effect which the granting of relief would have on each party”. As I have stated previously, the plaintiff bears the burden of proof, so his witness statement is wholly essential for his continuation with these proceedings. Hence, I would take into account the effect of refusal of relief it would have on the plaintiff, which means that the whole case would fall.
4. Conversely, I would also bear in mind the effect it would have on the defendant, i.e. the prejudice the defendant would suffer should the court grant the relief. The defendant would have to continue to be vexed, as Mr Ho has submitted, given the fact that this matter has been dragged on for some time.
5. Having regard to the grave consequence of this matter would have on the plaintiff should the court refuse the granting of relief from sanction, I am prepared to consider the various factors and the evidence the plaintiff has put forward in his most favourable light.
6. I would consider, in this case, whether the plaintiff is able to provide a good explanation for his failure to comply with the March 2022 unless order and the circumstances leading to the default. I would need to also consider whether that failure is intentional or whether it was the default of the Former Solicitors as the plaintiff now alleges in support of his application.
7. After having carefully considered all the evidence and the submissions of both counsel, I am not satisfied that the plaintiff is able to provide with this court any good explanation for his failure. I am not satisfied that the default was purely that of the Former Solicitors. For brevity, it suffices for me to only highlight two matters that have, in my view, clearly undermined the plaintiff’s present application to enable this court to grant relief.
8. First, there is clearly no explanation given by the plaintiff for the 11-month delay since the March 2022 Order up to the time when he issued the summons in February 2023 for the granting of relief. In the Plaintiff’s Second Affirmation, he had confirmed affirmatively that his draft witness statement would be ready within 14 days and would be in a position to exchange with the defendant by 13 March 2023. However, surprisingly and without any good explanation, up to this morning at the time of the hearing, there was no sight anywhere of either a complete witness statement or even a draft.
9. I find the second matter even more troubling. The plaintiff, with a view to attribute fault on the part of the Former Solicitors, has alleged that a number of documents that were filed to the court were not endorsed by him. He had no knowledge of those documents: (i) the Statement of Truth purportedly signed by him with his signature dated 3 August 2022; and (ii) the Notice of Intention to Act in Person with his signature filed on 29 December 2022.
10. I believe in order to put all the blame in attributing fault on the part of the Former Solicitors, the plaintiff, through his counsel, disavowed his assertions that had been previously made in the Plaintiff’s First Affirmation. Through his counsel, the plaintiff disavowed his conversations and his interactions with the Former Solicitors. The content in the Plaintiff’s First Affirmation was detailed in Mr Ho’s written submissions (paragraph 5). Mr Ho has quoted paragraphs 4 and 5 of the Plaintiff’s First Affirmation.
11. Matters such as the calls and WhatsApp messages made to the plaintiff by the Former Solicitors while he was in Pakistan and the Former Solicitors’ explanation to him about the importance of complying with the March 2022 unless order are now all disavowed by the plaintiff through counsel.
12. According to the documents that are placed before me, in the Statement of Truth dated 3 August 2022 and the Plaintiff’s First Affirmation, apart from the plaintiff’s signature, both contained an interpretation clause. I find it far-fetched for the plaintiff to deny any knowledge of or consent to the filing of these documents. This just simply cannot be accepted and I do not find such evidence credible.
13. In the circumstances, I find that the plaintiff’s conduct does not warrant any ground for relief from sanction for his non-compliance with the March 2022 unless order. Hence, the plaintiff’s summons is dismissed. The plaintiff do pay the defendant’s costs of the summons, with Certificate for Counsel, to be taxed if not agreed.
14. I grant an order in terms of the defendant’s striking-out summons as amended: -

(1) The plaintiff’s claim against the defendant herein be struck out and dismissed on the ground that it is frivolous and/or vexatious and/or it may prejudice, embarrass or delay the fair trial of the action and/or it is otherwise an abuse of the process of the Court; and

(2) The costs of this action (except that the defendant’s costs in relation to the considering of the Revised Statement of Damages and the drafting and filing of the Answer thereto shall be disallowed), including costs of and occasioned by this application, with Certificate for Counsel, be paid by the plaintiff to the defendant, to be taxed if not agreed.

( Katina Levy )

District Judge

Mr Calvin Law, instructed by C M Chow & Company, for the plaintiff

Mr Leon Ho, instructed by Tsang, Chan & Wong, for the defendant