EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

IN THE DISTRICT COURT
AT MANUKAU

CIV-2014-092-003561
[2017] NZDC 12436

ALAN REX WITHERS and
GLENISE MARY WITHERS

as trustees of the AR and GM Withers Family Trust
Plaintiffs

v

MARK CHANDLER
Defendant

Hearing:	7 June 2017
Appearances:	David Rooke for plaintiffs Noel King for defendant
Judgment:	12 June 2017

RESERVED DECISION OF JUDGE McILRAITH ON APPLICATION TO SET ASIDE JUDGMENT

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[1] On 8 September 2015 Judge Blackie conducted a formal proof hearing in this proceeding. After considering the extensive evidence filed by Mr and Mrs Withers in support of their claim, Judge Blackie entered judgment in the sum of $21,411.90 together with interest of $2,120.59 and costs including disbursements of $8,268. The total for which judgment was entered was therefore $21,800.49.

[2] Mr Chandler has applied to set aside the judgment.

Background

[3] In 2013 Mr and Mrs Withers engaged Mr Chandler to undertake building work enclosing an existing carport to constitute a garage at the property owned by the AR and GM Withers Family Trust at[address deleted], Maretai. In his affidavit opposing this application Mr Withers sets out in great detail the work that was then undertaken and the difficulties that he says he encountered.

[4] Mr Chandler has set out in his affidavit in support of his application that he entered into what he calls a fixed price contract "to renovate the garage". He says that he started the job on 19 August 2013 and met all key performance indicators. He says that the job was done on time, on budget and met all quality and building code requirements. He says that Mr Withers broke the contract in a number of ways and that an acrimonious relationship then developed.

[5] Mr Chandler initially made a claim in the Disputes Tribunal and subsequently proceedings were issued by the AR and GM Withers Family Trust. Mr Chandler filed a response to that claim – set out from page 105 in the defendant's bundle of documents in relation to this application. In particular, at pages 117 through 121 he set out his response in some detail. Also attached as appendices were correspondence setting out his perspective.

[6] A decision was made to discontinue those initial proceedings. The Withers Family Trust then commenced the current proceedings and they were served upon Mr Chandler on 16 May 2015. Mr Chandler was self represented. Email correspondence between himself and the solicitor acting for the Withers Family Trust, Mr Rooke, has been provided to me. It is clear from that correspondence that Mr Chandler was served with the proceedings and was advised by Mr Rooke, quite responsibly, that he was unable to assist him and ought to obtain his own legal representation.

[7] No steps were taken by Mr Chandler in relation to these proceedings. No issue was taken with the process of the Court in relation to the proceedings. The simple fact of the matter is that Mr Chandler for reasons set out in his affidavit in support of his application took no steps. In particular, he points to dental work being

undertaken during July and August 2015 and an extensive period of stress and anxiety that he has suffered since 2013. Mr Chandler considers that his naivety in not taking any steps has been ruthlessly taken advantage of by the Withers Family Trust. An important point to note is that Mr Chandler at all times appears to have understood that his response to the initial claim would, somehow, be transferred to the new proceeding.

The issue

[8] The issue in this application is whether the judgment should be set aside. The judgment was regularly obtained. Rule 15.10 of the District Court Rules 2014 is applicable. The rule provides that a judgment obtained by default (as this one was under Rule 15.9) may be set aside or varied on such terms as are just **if it appears to the Court that there has been, or may have been, a miscarriage of justice.** The Court's discretion in such a matter is guided by three well established considerations[1]:

(a) The defendant has a substantial ground of defence;

(b) The delay is reasonably explained; and

(c) The plaintiff will not suffer irreparable injury if the judgment is set aside.

[9] It was common ground before me that Mr Chandler must satisfy me on this application that he has a defence to the claim. There was debate as to whether that must be a credible, arguable or reasonable defence. I agree with the submission of Mr King that the best way to approach this question is to consider whether there is a reasonable defence to the claim.

[10] Mr King submitted that there is a reasonable defence established in the affidavit filed by Mr Chandler and also by reference to the response filed to the original Court claim. He conceded that no draft statement of defence has been filed

[1] Paterson v Wellington Free Kindergarten Association Inc. [1966] NZOR975

in support of this application but nevertheless maintained that a defence could be discerned from these documents. He submitted that the defence is as follows:

(a) Progress payments were made such that the Withers Family Trust must have accepted its obligations to pay;

(b) The Withers Family Trust was satisfied with the work completed but is now coming back after completion to dispute agreed costs;

(c) The dispute is on the amount charged yet it is on the basis of Mr Withers own calculations;

(d) There was in fact a fixed price for the contract for $50,000;

(e) While the Withers Family Trust denies that there was a fixed price contract it nevertheless paid Mr Chandler prior to receipt of his invoice; and

(f) The exact nature of the agreement and whether costs were correctly charged could only be determined at a substantive hearing.

[11] I accept Mr Rooke's submissions on this point. While I have read carefully Mr Chandler's affidavit and his earlier response, I find it difficult to discern a reasonable defence to the claim. This is particularly in the context of a formal proof hearing having taken place before Judge Blackie in which a considerable amount of evidence, including expert evidence, was presented to His Honour. In that process Judge Blackie went through a careful process of assessing what was in fact payable to Mr Chandler. Having done so, he reached the view that the claim of the Withers Family Trust had been established and in the quantum he so ordered. As Mr Rooke submitted, Mr Chandler has, in effect, received payment for the work actually undertaken and having read his response to the correspondence with the Withers Family Trust, I do not consider that a reasonable defence has been established.

[12] In addition, I do not consider that the delay that is present in Mr Chandler's application has been reasonably explained. While I appreciate that Mr Chandler was

self represented, he did receive the notice of discontinuance of the original proceeding and the notice of proceeding for these proceedings and accompanying documentation. He emailed Mr Rooke and the email exchange between them is very revealing. It is clear that despite the dental treatment which I can see was extensive, Mr Chandler was aware of the proceedings and was in a position to enter into this correspondence with Mr Rooke. I can see no reason and no explanation for him not taking the step to either instruct a solicitor or, alternatively if cost was an issue for him, talking to the Court Registry and making clear that he wished to file a defence to the proceeding. He did none of these things. He took no step whatsoever in the proceeding.

[13] Given the view I have reached I do not need to consider whether the Withers Family Trust would suffer irreparable injury if the judgment is set aside. However I do accept the submission made by Mr Rooke that substantial cost has no doubt been incurred by them in seeking to enforce the judgment that they obtained.

[14] For these reasons, I do not consider that there has been, or may have been, a miscarriage of justice in the obtaining of judgment by the Withers Family Trust. As raised with Mr King in submissions, I also consider that there is merit in the submission made by Mr Rooke that there is benefit in recognising the finality and conclusiveness of the present judgment. The matters in issue in this proceeding arise from events four years ago. The amount involved is modest. In the absence of any miscarriage of justice it is important to bring these proceedings to a close.

The application is declined. I have a discretion in relation to costs. While I have declined his application, I do not consider that an award of costs against Mr Chandler is appropriate. He was initially self represented and while I am not satisfied that he has explained satisfactorily his absence of steps, some allowance ought to be made for that fact. Costs on this application are therefore to lie where they fall.

RJ McIlraith
District Court Judge