EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2013-044-001159
[2016] NZDC 11814

BETWEEN	STEVEN JOHN TAPP Plaintiff
AND	JAMES EDWIN TURNER Defendant

Hearing: 21 June 2016

Appearances: Plaintiff appears in Person
B Harris for the Defendant

Judgment: 21 June 2016

DECISION OF JUDGE P A CUNNINGHAM
[Application to set aside judgment]

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[1] This is an application by one of the defendants, James Edwin Turner, to set aside a judgment that was entered against him by default on 16 April 2015.

[2] I turn first to the notice of claim which is dated 1 August 2013. The plaintiff Mr Tapp was, as at a date in 2005 until April 2007, living in a property at 226 Stoney Creek Road Kaukapakapa which he had agreed to buy under a sale and purchase agreement with the then owner, Mr Galway. Mr Tapp was occupying the property as part of an agreement for what was in effect a property swap plus some cash.

[3] In the event, Mr Tapp was unable to settle the sale of one of his properties to Mr Galway and eventually there was litigation between the two of them which resulted in a High Court case in mid-2007. The result of that decision was that Mr Galway was entitled to cancel the agreement whereby Mr Tapp was going to

purchase 226 Stoney Creek Road because Mr Tapp was unable to settle the sale of one of the other two properties.

[4] During the period in which Mr Tapp lived in the property he was doing some work on the house. He also had on the property a number of chattels which were many and varied, all of which were still in the property when he left in April 2007. He was able to retrieve some of these items after the High Court judgment came out in July 2007 but has never retrieved the rest.

[5] In June 2007 Mr Turner agreed to purchase the property from Mr Galway. Mr Turner was already utilising a shed and possibly some other parts of the property for his hay baling business. He settled the purchase with Mr Galway on 13 August 2007.

[6] The statement of claim in this case lists the chattels that Mr Tapp says were still at the property when Mr Turner became the owner in August 2007. The list, which is some two and a half typed pages long, carefully lists all of the items and they range from six children's car rides at $1500 each, car doors and other car items, cabinets, trolley jacks, motorcycle trailers, boat trailers, tools and a lot of trees and plants which Mr Tapp says were all still in pots, therefore able to be mobile without being dug out of the ground, and fish ponds and associated items: pumps, filters and goldfish. He self valued those items at $48,335.

[7] Mr Tapp's claim against Mr Turner is essentially in conversion or theft, because he says that his efforts to retrieve these items from the property since Mr Turner has owned it have been unsuccessful.

[8] Mr Turner rented the property to tenants through a period in 2013 and 2014, which appears to have led to difficulties in terms of Mr Tapp being able to locate him and personally serve him with the proceedings. I can see from the Court file that time was extended in which service was to occur in July 2014.

[9] Mr Tapp's position is that he brought these proceedings to the attention of Mr Turner by leaving a copy of them with the tenants, and he has shown to me a

document which records a visit that Mr Turner paid to the police in January 2015 which includes the following: "The male," referring to Mr Tapp, "Handed over some paperwork for the tenants to hand over to the informant," referring to Mr Turner. "The document was a typed letter addressed to the informant," that is Mr Turner, "Stating that the male," Mr Tapp, "Was taking the informant to Court for disposing of his belongings. The informant," referring to Mr Turner, "Kept the letter for some time and later disposed of it when nothing further transpired from it."

[10] Although that is all hearsay because it is a record of a police officer, presumably it is based on what Mr Turner said to the police and it does signify that Mr Turner may have been aware of these Court proceedings whenever the tenants gave him the letter. However, that is all really by the by because that is not personal service in accordance with the rules of Court and there was no substituted service order of the Court.

[11] The next important date is January or February 2015; January according to Mr Tapp, possibly February according to Mr Turner, when Mr Tapp turned up at Mr Turner's property. He was speaking to Mr Turner's wife who is not the person named as a defendant. When Mr Turner arrived, Mr Tapp's version of the events is that he gave the service documents to Mr Turner and spoke words that would have left Mr Turner in no doubt that they were Court papers. Mr Turner denies that he was told that they were Court papers.

[12] There was already a level of mistrust and perhaps even dislike between the two men and what followed was Mr Turner attempting and at times succeeding in returning the papers to Mr Tapp and vice versa. Mr Turner's version of events is that he never actually looked at those papers and was not left with them, that they went in Mr Tapp's car. Mr Tapp's version of events accords with Mr Turner's in the sense that he does not say he saw Mr Turner look at them but he says that, when he left, the papers remained on the Turner property.

[13] Service is important because lack of service can mean a judgment is irregularly obtained. However, it is not the end of the matter in terms of this

application and without there being cross-examination of the two men, I am really not in a position to determine whether there was personal service or not.

[14] Judgment was entered by a registrar for the value of the chattels in the schedule, plus interest, bring to a total the judgment sum of $64,164.25. Mr Turner says that he knew nothing about this until he received a letter from Mr Tapp asking how the judgment amount was going to be paid. That was on or about 12 September 2015. Mr Tapp took enforcement proceedings and Mr Turner was summonsed to Court and eventually an attachment order was made in late November 2015 in the sum of $120 a month. Mr Tapp shortly afterwards instructed lawyers and filed this application to set aside the judgment in December 2015.

[15] Mr Tapp is acting for himself. Mr Turner is represented by counsel.

[16] At the beginning of this hearing I identified the issues as far as I saw them which are the issues around service, which I have already dealt with and secondly whether this was a liquidated amount for which judgment by default should be entered.

[17] I have already said that the schedule of chattels was self-valued by Mr Tapp. That is the first difficulty I see in terms of this being a suitable case for the entry of judgment by default. If this file had been directed to a Judge I am in no doubt that a Judge would have required a plaintiff to prove the damages of the missing chattels by way of formal proof; that self-valuing those items would not get past a Judge on a formal proof basis. One would require something more independent. That would not necessarily be a valuation; it might be something along the lines of an estimate by a second hand dealer or photographs. What is very commonly used now is prices from sales of similar items on Trade Me but self-valuation is just that, a subjective assessment, although I hear what Mr Tapp says when he says that in his view those were conservative estimates.

[18] The next issue is that interest has been granted and forms about one third of the judgment amount. There is no dispute that this claim has been filed by Mr Tapp very close to the six-year deadline for claims of this sort. That being the case, it is

not necessarily automatic that the plaintiff would be entitled to interest for the full six years because, to an extent or to quite a large extent, the plaintiff has sat on his hands before issuing proceedings.

[19] There is one thing I should say about that and it is this. That initially Mr Tapp sued Mr Galway, the prior owner, for recovery of his chattels and/or damages in lieu and after some discussions between the parties, Mr Tapp accepted that it was not Mr Galway that he should be pursuing but Mr Turner and so those proceedings came to an end somewhere around the end of 2008. However, 2009, 2010, 2011 and 2012 all passed before proceedings were finally issued in 2013. Therefore, in my mind there is a real issue about whether or not it was appropriate to award interest for that whole, almost six-year, period.

[20] The 2009 rules which were in force at the time that this proceeding was issued did not contain a definition of what a liquidated sum was. However, Mr Harris has brought to my attention that rule 12.26 of the District Court Rules refers to what is required when a plaintiff seeks recovery of chattels. That includes that, "The plaintiff may either recover the chattels, or any of them, or the value of the chattels." It then goes on to say at 12.26.3 that, "The plaintiff may have the proceeding tried for the purpose of assessing the value of the chattels." That would indicate that there needs to be some independent assessment of the value of the chattels rather than the self-assessment of value that has happened here.

[21] Although it is later in time, it is interesting to observe that the District Court Rules 2014 actually do define what liquidated demand means and rule 15.75 includes the following and the definition of liquidated demand:

> A sum that has been quantified in a contract, that is, quantified by reference to an enactment relied on by the plaintiff has been determined by agreement, mediation, arbitration or previous litigation,

And then, "Is a reasonable price for goods supplied or services rendered where no contract quantifies the price." That definition really makes it perfectly clear that this kind of claim would not fall within the definition of a liquidated claim under the 2014 rules.

[22] I am more than satisfied that this was never a case that was suitable for judgment by default because:

(a) It was not a liquidated amount.

(b) There is a real question about whether interest should have been awarded for the full, almost six-year period.

[23] The next ground is whether or not there is an arguable defence. Whether or not there is an arguable defence is one of the bases on which the Court of Appeal has said that a judgment has been settled, set aside. Going back to the old case of *Russell v Cox* [1983] NZLR 654, the other side of the equation is whether or not there is going to be irreparable harm to the plaintiff if the judgment is set aside.

[24] Dealing with that first, there is no dispute that the chattels that Mr Tapp is seeking appear to have gone. Mr Turner has frankly admitted that some of the rubbish, as he calls it, that was left behind by Mr Tapp has been disposed of in a bin. Mr Tapp was eventually given access to the property via Court order in terms of his proceeding against Mr Galway in 2008 and he confirms that the items have gone. So his claim now is for money to compensate him for the items that have disappeared. That being the case, there cannot be any irreparable damage to Mr Tapp including because the only detriment to him now, if he does have a provable claim, is that he is going to have to wait longer for his money and that in some way can be compensated for by granting him interest.

[25] I now come back to the issue of whether or not there is an arguable defence and I am easily able to find that there is, and the reasons I say that are as follows:

(a) Firstly, Mr Turner disputes whether all of the items were on the property when he and his former partner took ownership on 13 August 2007.

(b) Secondly, Mr Tapp left the property around April 2007. That comes from the High Court decision of Associate Judge Venning, as he was then, dated 17 July 2007, *Tapp v Galway* High Court Auckland CIV-2006-404-002347, 17 July 2007 at paragraph 45 of the judgment.

Between the release of that judgment and the time that Mr Turner and his then partner took ownership of the property, about a month elapsed. Mr Tapp has told me that there were two occasions during which Mr Galway allowed him access to the property, when he removed some of the items that he had had there, he estimates approximately 50 percent. In my view Mr Turner inherited the problem of Mr Tapp's chattels. That does not go so far as to say he does not have some legal responsibility towards the items. He would have been a bailee of those items by virtue of circumstance. But what does arise is Mr Galway's part in all of this, namely not ensuring that those items were off the property before Mr Turner ever took ownership of it and/or possibly not taking sufficient steps to give Mr Tapp adequate opportunity to get his items out of that property before he settled his sale to Mr Turner and his then partner. What all of that means is that one or both parties might be entitled to explore whether or not they should join Mr Galway as a party to the proceedings. There does seem to me to be scope to explore what legal liability Mr Galway may or may not have in all of this. I know that Mr Tapp does not accord with that view. His view is that delivering the chattels to him fell into the lap of, in terms of responsibility, of Mr Turner, once he took ownership of the property and his view is that Mr Turner has been uncooperative in terms of allowing him access to the property since he became the owner, to allow Mr Tapp to retrieve his items.

(c) Thirdly, there is the value of the items, as I have already said. Mr Turner did not see value in any of the items that were left behind; Mr Tapp clearly does. That is another area of dispute.

All of these areas of dispute, as I have described, do in my view amount to an arguable defence.

[26] The test for whether or not a judgment should be set aside is whether or not there has been a miscarriage of justice. I am firmly of the view that there is, or may

have been, a miscarriage of justice in terms of Mr Turner's right and ability to defend this claim.

[27] There is one final thing that I will mention, which is that Joanne Peters was Mr Turner's partner until 2009 and they have now gone their separate ways and she has returned to live in England. She has not been served and indeed Mr Tapp probably wants to consider whether or not he wants to proceed against her. All of this is going on without her probably knowing anything about it and that really needs to be tidied up. There either needs to be a discontinuance against Joanne Peters or arrange to serve her overseas, although I note that the judgment that has been entered is against Mr Turner only. So the judgment will be set aside.

[28] Mr Harris argued that I should ask Mr Tapp to serve a statement of claim, which the 2014 Rules now require, as opposed to the notice of claim procedure under the 2009 Rules. I do not require that at this stage and that is because, in my view, the notice of claim that has been filed by Mr Tapp makes it very clear what is being sought, with the typed list of chattels fairly clearly laying out what they are and it forms part of the notice of claim. There may come a time when a statement of claim needs to be done but I am not satisfied that it needs to be done at this stage and in particular because a strike-out application has been filed by Mr Turner. Mr Harris does not ask me to set that application down for a hearing as yet. What he suggests and I agree with it, is the defendant Mr James Turner should now file a statement of defence within 28 days and serve a copy of that on Mr Tapp.

[29] Thereafter, the Court should allocate a conference in Court on the first available date after 28 days so that both parties can consider what they view are the next step. That will give Mr Turner time to decide whether or not he wants to proceed with his strike-out application and it will give Mr Tapp time to think about the next step or steps that he wishes to take.

[30] Three clear days prior to the conference each party is to file a memorandum setting out the step or steps that they consider to be appropriate and, although the 2014 Rules do not apply, I suggest the parties might find guidance by looking at the sorts of issues that need to be canvassed at a case management conference.

[31] Mr Harris' instructing solicitors seek costs. Particularly in view of the fact that I have not resolved the issue of service or not, I do not consider it is appropriate to award costs for or against any party at this stage. If it is found in the end that service has been properly effected, then Mr Turner's application for costs is unlikely to find favour. Even if it was not properly served, I think Mr Tapp should have the opportunity to make submissions on costs because the unusual features, including that there is some evidence that the proceeding was brought to Mr Turner's attention in 2013 by the tenants, are the sorts of matters the Court must consider before making an award of costs.

P A Cunningham
District Court Judge