

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCv2011/1154

BETWEEN:

FANNICIA GILBERT
Administratrix of the Estate of Alex Nicky Gilbert

Claimant

And

- 1. JOHNNY FREDERICK**
- 2. JOSEPH WILLIAM**
- 3. PHILOMENE EDWARD**

Defendants

BEFORE: **His Lordship, the Honourable Justice Rohan A Phillip**
(Judge in Chambers via Zoom)

APPEARANCES: Ms Florita Nicholas of Counsel for the Claimant
Mrs Petra Nelson of Counsel for the 3rd Defendant

PRESENT: Claimant and 3rd Defendant

2021: November 11;
2024: September 06

DECISION

[1] **PHILLIP, J:** This is an application by the claimant, filed on 3rd May 2021, for the court to grant the pending request filed on 8th December 2011 for default judgment against the 3rd defendant, Philomene Edwards (“Ms Edwards”). On 21st October 2021, Ms Edwards filed a notice of objection to the application.

[2] On 11th November 2021, the court gave directions for filing submissions and determining the matter after that on paper without a hearing by consent of the parties. The claimant filed their submissions with authorities on 22nd November 2021, and Ms Edwards filed her submissions with authorities on 6th December 2021.

Background

[3] The brief background¹ to the application so far as relevant is as follows:

1. The claim is an action against the defendants for negligence arising out of a fatal motor vehicular accident on 10th January 2009. The 1st defendant, Johnny Frederick (“Mr Frederick”), was the driver. The 2nd defendant, Joseph Williams (“Mr Williams, deceased”) and Ms Edwards were the vehicle owners, which was the subject matter of the accident.
2. Mr Frederick filed a defence within the prescribed time. However, Ms Edwards failed to do so, and on 8th December 2011, the claimant filed a request for judgment in default of defence against her. On 13th February 2012, Ms Edwards applied for an extension of time to file a defence.
3. At the case management conference on 11th June 2012, the learned Master ordered, among other things, that the proceedings commenced against Mr Williams, deceased, be dismissed as violating Article 609 (3) of the Civil Code of Saint Lucia², and refused Ms Edwards’ application for extension of time to file the defence.
4. On 28th November 2012, when the matter again came on for a case management conference, apart from giving the usual case management directions, the learned Master ordered (para 2) that: *“The request for judgment in default as against the third named defendant [Ms Edwards] pursuant to 12.9 of the CPR will be dealt with during the trial proceedings.”*
5. Upon coming on for trial on 13th May 2015, the learned Judge struck out the case with costs to Mr Frederick. The request for judgment in default against Ms Edwards was not addressed nor mentioned in the order by the learned Judge. The claimant appealed the learned Judge’s order of 13th May 2015, which was allowed on 16th January 2017, with no objection from the respondent [presumably Mr Frederick].
6. Consequent to the appeal being allowed, the matter again came up before a judge for an application for committal on 9th May 2019, and leave was granted to the claimant to withdraw the matter against Mr Frederick and no order as to costs. The claimant filed the notice of withdrawal on 9th June 2021. Still, the claimant seeks to enter judgment in default against Ms Edwards by the instant application.

¹ From the affidavit of Fannicia Gilbert in support of the application and exhibits, which were not challenged.

² Cap 4.01 of the Revised Laws of Saint Lucia

The Claimant's Case

- [4] The grounds of the claimant's application largely chronicle the facts stated in the background above. The claimant submitted that the court did not hear the substantive case, so it was never heard on its merits. The lack of a decision as to the liability of Mr Frederick and Mr Williams, deceased, did not and could not negate any liability on the part of Ms Edwards. She did not appeal the decision of the learned Master of 11th June 2012 to disallow her an extension of time to file her defence. Therefore, the decision stands.
- [5] The claimant referred to the chapeau of the Civil Procedure Rules 2000 (as amended) ("CPR") 12.4, which deals with the conditions to be satisfied for judgment for failure to file an acknowledgement of service,³ and argued that according to the literal rule of interpretation, the literal meaning of the word 'must' is that it is imperative. Thus, if there is no acknowledgement of service, the court must enter judgment upon the claimant's request pursuant to said CPR 12.4. It is not a discretionary rule.
- [6] The notice of application chronicles the timelines of the claimant's case, which began on 4th November 2011 when the claim was filed, and the last court order was given on 9th May 2019. The claimant is not in any way statute barred from making this application to obtain a judgment in default.
- [7] Further, the claimant referred to the case of *Launchbury and others v Morgans and others*⁴ for its jurisprudence on the law of vicarious liability and submitted in that case, three surviving passengers in a fatal road accident sued the representatives of the deceased driver and passenger. They added the wife (the owner of the vehicle) herself personally as a defendant. The judge found in favour of the plaintiffs against all the defendants, i.e. the representatives and the wife personally. She appealed the judgment against her personally. The judgement of Lord Denning, MR stated, among other things:

³ There appears to be some mix-up as to whether the request for the judgment in default was regarding acknowledgement of service (CPR 12.4) or defence (CPR 12.5). However, it may be immaterial concerning the argument, as the chapeau for both rules are identical and the argument would apply equally.

⁴ [1971] 1 All ER 642. A copy of the case was not provided to the court.

‘The owner of a car was responsible at common law for all injury or damage done as a result of negligent driving of the car by a driver whom he had permitted to use it; he could only excuse himself if the car was being driven by the driver on an occasion in which the owner had no interest and for which he had not given permission ...

It does not matter whether the servant or agent is acting for the benefit of his master or principal, or not. Suffice it that the master or principal has put him in a position where he may do injury to another; and should be liable for the way in which he conducts himself therein ...

A motor vehicle is a powerful engine of death and destruction. It is capable of doing much damage to persons and to property unless it is driven with due care and attention ... as I stated it in *Ormrod v Crosville Motor Services Ltd* ([1953] 2 All ER at 755, [1953] 1 WLR at 1123):

‘The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner’s business or for the owner’s purposes, the owner is liable for any negligence on the part of the driver ...

The reason behind this principle is, at bottom, the principle which lies behind all vicarious liability. It is to put the responsibility on to the person who ought in justice to bear it. Now the owner or hirer of the vehicle is in most cases the person who ought to bear the responsibility. He is the one who puts it on the road where it is capable of doing damage. He is the one who causes or permits it to be used ...’

- [8] The claimant concluded by asserting her right under CPR 12.4 to apply for and obtain, against Ms Edwards, a judgment in default of acknowledgement of service.

Ms Edwards’ Case

- [9] The ground of Ms Edwards’ objection to the application was that the court had no jurisdiction to enter the judgment against her because of the withdrawal of the case against Mr Frederick, the only tortfeasor. There is no sustainable case against her, as the claimant made her a party to the claim for vicarious liability.

- [10] Relying on CPR 12.9 (2), which provides for a default judgment against one of two or more defendants, and the cases of *Kenlyn Pamela Clouden v Phil Culzac & Anor*,⁵ *Isula Shearman v Devon Glasgow & Anor*,⁶ *Thompson et al. v Jones et al.*,⁷ and *Pablo Stapleton v Sherlon Pierre et al.*,⁸ which considered this rule, Ms Edwards submitted that allowing the entry of a default judgment at this stage in the proceedings would be erroneous. Had the matter been crystallized in

⁵ SVGHCV 2011/0466

⁶ SVGHCV2011/0259

⁷ SVGHCV2012/0138 & 0139

⁸ NEVHCV2020/0060

a judgment, she would have been bound by the judgment. However, in the absence of such, she can now challenge the entering of a judgment and a basis for striking out the matter.

- [11] Ms Edwards contended the claimant's withdrawal of the claim against Mr Frederick, the tortfeasor, represents a significant change in the circumstances which prohibits the claim from being further maintained against her. Considering the claim made against her is one for vicarious liability, the liability hinges on the liability of Mr Frederick. Notwithstanding that the claimant properly filed the request for the default judgment, it can no longer stand because the claimant withdrew the case against the main tortfeasor. Only on a finding against the driver can the claim against the owner for vicarious liability be maintained in accordance with the rule in *Thompson*.
- [12] For the reasons mentioned above, Ms Edwards submits that the withdrawal of the claim against the primary tortfeasor creates a significant change in the circumstances of the case, one which is fatal to the claimant's application to enter judgment in default. This substantial change in circumstance creates an anomaly; therefore, it is contended that the claim cannot subsist against her, and the result is that judgment cannot be entered.
- [13] CPR 12.4 specifies that the court office must enter judgment if there is default; however, the learned Master, in her order of 28th November 2012, removed the procedure from the ambit of the court office. Therefore, the trial Judge had to consider all the circumstances of the case as provided for. In this case, it is trite law that a claim cannot proceed or be sustained against an owner of a vehicle if there is no claim against a primary tortfeasor.
- [14] Ms Edwards further contends that following the withdrawal, if the court entered judgment at this stage in the proceedings, there would be a real likelihood that it would be set aside under CPR 13.3(2). The anomaly created from the withdrawal of the claim against Mr Frederick is likely to fall within the ambit of an exceptional circumstance as the withdrawal creates a circumstance that is sufficiently unusual and derogates from the normal procedure under which a default judgment would be entered.
- [15] It would be in the interest of time and the furtherance of the overriding objective that the court opts to deny the application of the claimant to enter judgment in default. Ms Edwards contends that the claim cannot be dealt with separately. On the grounds stated in CPR 12.9, the application made by

the claimant ought to be dismissed, and the case against her solely as an owner of a vehicle be struck out with costs.

Discussion

[16] The court notes that the issue of the application being statute barred did not arise and, as such, is not an extant issue for consideration. Also, Ms Edwards mentioned in her submissions to setting aside a judgment under CPR 26.6 and CPR 13.3; however, the issue of setting aside a judgment has not arisen as no judgment in default or otherwise was entered against Ms Edwards.

[17] It is common ground between the parties that the claim against Ms Edwards was based on vicarious liability as an owner of the vehicle driven by Mr Fererick. However, as recognized by the claimant (para [7] above), vicarious liability is not automatically established merely by the vehicle ownership. There must first be proof of liability of the driver for the incident. Secondly, the claimant must prove that the driver was driving the vehicle wholly or partly on the owner's business or for the owner's purposes. I, therefore, agree with the learned Master's order of 28th November 2012 that the request for judgment in default against Ms Edwards should have been dealt with at the trial of Mr Frederick under CPR 12.9, as the claims against them were intertwined and cannot be separated.

[18] CPR 12.9 (2) deals with a default judgment against one of two or more defendants and states that:

- “(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –
 - (a) can be dealt with separately from the claim against the other defendants –
 - (i) the court may enter judgment against that defendant; and
 - (ii) the claimant may continue the proceedings against the other defendants;
 - (b) cannot be dealt with separately from the claim against the other defendants, the court –
 - (i) may not enter judgment against that defendant; and
 - (ii) must deal with the application at the same time as it disposes of the claim against the other defendants.”

[19] In **Thompson**, a case of an eerily similar procedural history as the instant case, save in that case, the default judgment was entered, and the application was to have it set aside. The learned Master Glasgow (as he then was) stated (para [20]):

“ ... CPR 12.9 must be considered when a request is made to enter a default judgment in cases of this nature. The mere fact that the applicant was the owner of the vehicle would not be sufficient in law to find against him in negligence²⁷. His liability was contingent on finding that the second defendant was driving as his servant or agent or for his purposes. As Master

Actie correctly stated in **Kenlyn Pamela Clouden (Administratrix of the estate of Gary Clouden) v Phil Culzac and Phillip James²⁸**,) it would be nigh impossible to separate claims of this nature against two or more defendants) The claim against the owner would of necessity have to await the outcome of the claim against the driver. As such the default judgment may have been erroneously entered.” [Footnotes omitted]

[20] Accordingly, I believe that a judgment in default of either acknowledgement of service or defence could not be entered since the claim against Ms Edwards could not be separated from the claim against Mr Frederick, the primary tortfeasor. I accept Ms Edwards’ submissions that the withdrawal of the claim against Mr Frederick creates a significant change in the circumstances of the case, one which is fatal to maintaining the claimant’s application to enter judgment in default, as the claim cannot subsist against her and the judgment cannot be entered.

Conclusion

[21] The court notes that Ms Edwards successfully resisted the entry of the judgment in default. Still, I believe this matter should have been addressed at the trial or at least when the court gave leave to withdraw the claim against Mr Frederick. Regrettably, this was not done, leaving the properly filed request for default judgment as a live issue for determination, necessitating this application. In the circumstances, it is appropriate that there shall be no order as to costs.

[22] Accordingly, IT IS ORDERED THAT:

1. The application dated 3rd May 2021 to enter judgment in default against Ms Edwards is refused and dismissed.
2. There is no order as to costs.

**Justice Rohan A Phillip
High Court Judge**

By the Court



Registrar