

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim No: SLUHCv2019/0114

BETWEEN:

ROYAL BANK OF CANADA

Claimant

-and-

[1] TYRONE DALPHINIS

[2] CURLYN DELIGNY – DALPHINIS

Defendants

Before Master Alvin Pariagsingh

Appearances: Mrs. Shervon Pierre for the Claimants; and
Ms. Mertle John for the Second Defendant.

2023: April 20
October 11

JUDGMENT

Second Defendant's application to set aside default judgment

[1] **PARIAGSINGH, M:** - Before the Court is the Second Defendant's application to set aside judgment in default of an acknowledgment of service entered against her on December 09, 2019.

THE APPLICATION:

[2] The application is made under CPR 13.2 and CPR. 13.3. The main contention of the Second Defendant is that she was not served with a properly filed and sealed claim. As such she contends, the documents served not being a valid claim, the need to file an acknowledgment of service did not arise.

[3] The Second Defendant contends that she was served with unfiled and unsealed copies of the claim issued in these proceedings. The Second Defendant does not dispute being served. The factual dispute is what she was served with.

[4] Alternatively, the Second Defendant contends that she applied to set aside the default judgment as soon as reasonably practicable after finding out that judgment had been entered against her and she has a good explanation for not filing an acknowledgment of service.

THE EVIDENCE:

[5] In support of the application are two affidavits of the Second Defendant. In opposition is the affidavit of PC Albert, Ms. St. Ville and the two affidavits of service of PCAlbert.

DISPUTED FACT:

[6] From the evidence there is one factual dispute, that is, whether the Second Defendant was served with a filed and sealed copy of the claim.

HISTORY OF PROCEEDINGS:

[7] To properly understand the decision of the Court it is necessary to provide a history of these proceedings as it relates to the Second Defendant:

Date:	Event:
March 15, 2019	Claim form and statement of claim filed commencing proceedings against the Defendants seeking payment of certain sums pursuant to a hypothecary obligation dated April 01, 2010.
March 29, 2019	Second Defendant served with the claim (disputed whether the documents were valid) by PC 651 Alfred ¹ .
June 03, 2019	Claimant applies for judgment in default of acknowledgment of service against both Defendants.

¹ Affidavit of PC Alfred does not give the date of the document served or indicate that the documents served were stamped or sealed with the seal of the High Court.

August 08, 2019	Defence filed by the Second Defendant.
August 19, 2019	Court issues notice that the matter is listed for a CMC on December 09, 2019 before a Master.
October 11, 2019	Supplemental affidavit of service of PC Alfred filed to indicate the exact manner of service. ²
December 09, 2019	CMC before Gill, M. Second Defendant appeared personally and represented by Counsel. Judgment entered by the Master in default of acknowledgment of service against the Defendants jointly.
December 10, 2019	Consent order filed by the Defendants indicating that between them they have agreed the First Defendant will be wholly liable for the debt.
March 03, 2020	Claimant's Counsel writes a letter to the Registrar asking that the matter be relisted before the Court as the purported consent order is challenged as invalid.
July 02, 2020	Matter came before Sandcroft M (Ag.)(as he then was). The Second Defendant is absent with excuse but represented by Counsel. Consent order between the Defendants filed on December 10, 2019 is set aside.
July 10, 2020	The Second Defendant filed an application to set aside the default judgment against her. The ground of the application was that the Second Defendant was served with an unfiled claim.
October 08, 2020	Affidavits of PC Alfred and Brenda St Ville, in response to affidavit of the Second Defendant indicating that the documents served had the court stamp and seal.
October 21, 2020	Matter came before Sandcroft M (Ag.)(as he then was) for hearing of the Second Defendant's application to set aside default judgment. The Second Defendant did not appear. Matter adjourned to November 13, 2020 for hearing of the application.

² Supplemental affidavit of PC Alfred still does not indicate that the documents served on the Second Defendant had the stamp or seal of the High Court.

November 09, 2020	Second application of the Second Defendant to set aside the default judgment.
November 13, 2023	Matter came before Sandcroft M (Ag.) (as he then was). The Second Defendant's second application was disallowed. The first application to set aside was set down for hearing.
November 24, 2020	Matter came before Sandcroft M (Ag.) (as he then was) for hearing of the First Defendant's application to pay by installments. The Second Defendant appeared at this hearing represented by Counsel. The First Defendant's application was dismissed.
April 13, 2021	Matter came before Burnette, M (Ag.) (as she then was). The Second Defendant was present and represented by Counsel. Matter adjourned during Covid 19 Pandemic.

ANALYSIS:

[8] I will first deal with the resolution of the disputed fact. I will then deal with the Part 13.2 CPR ground then the Rule 13.3 CPR ground.

Resolution of the factual issue:

[9] The factual issue to be resolved in this application is whether the Second Defendant was served with a filed and sealed copy of the claim filed on March 15, 2019.

[10] There are two competing versions of what was served. On the one hand there is the evidence of PC Albert indicating that the documents served were filed and sealed. I weigh his evidence against the fact that nowhere in his affidavit of service or his supplemental affidavit of service did he say this. This assertion only came in his affidavit in response to the application in excess of a year from service by his own admission.

[11] On the other hand, the evidence of the Second Defendant is that she was served with a photocopy of the claim form and statement of claim. This photocopy does not on the face of it contain the stamp or seal of the High Court. In support of the application the

Second Defendant exhibits a copy of the document she alleges she was served with as 'C.D.1'.

[12] On a balance of probabilities, I find that the Second Defendant was served with a photocopy of the unfiled claim form and statement of claim filed in this matter. This in my view is the only logical explanation for her being able to exhibit it.

Rule 13.2 CPR ground:

[13] Under Rule 13.2CPR the Court does not have a discretion to exercise if a judgment is wrongly entered. A judgment is wrongly entered, in the case of failure to file an acknowledgment of service, if one of the conditions in Rule 12.4 CPR is not satisfied.

[14] The relevant condition for the purpose of this application relied on by the Second Defendant is Rule 12.4(a)CPR which states:

“.....the claimant proves service of the claim form and statement of claim....”

[15] A claim form must be filed for it to be valid. This is not a claim commenced under the e-litigation portal regime. It was commenced at the time of manual filing, at a time when a claim had to be physically stamped with the stamp of the High Court out of which it was filed and sealed.

[16] There is no doubt that the claim form was filed. The original, which form part of the record, contains the stamp and seal of the High Court. The Court file shows that the claim form was filed by the High Court Office on March 15, 2019 at 2:42 pm and assigned the claim number SLUHCV2019/0114.

[17] **Rule 3.9CPR** imposes a mandatory duty on the Court to seal certain documents including a claim form. Actie M (as she then was) in **Francis v Hunte & Anor**³ at paragraph 12 took the view that:

“CPR 3.9 requires sealing of all court documents and specifically the claim form (Rule 3.9 (1)(a)). A claim form which does not bear the court’s stamp is not a valid claim. The claim form to be served on a party must bear the seal of the Court to be a valid claim. It stands to reason that the unsealed claim form with statement of claim served on Christopher Hunte (the Defendant) is of no effect’.

[18] I share a different view with the view expressed in **Francis**. The Second Defendant also relies on the English High Court decision in **Hill Contractors and Construction Ltd v Struth**⁴. In this case the High Court considered the effect of r.2.6 (1) (which requires the court to seal the claim form) and r.7.2 (1) (which provides that proceedings are commenced when the court issues a claim form) and held that the claim form is the document issued and sealed by the court, and is the document referred to in rule 6.3CPR. The Court held that service of a photocopy of the claim form was therefore not sufficient.

[19] Having carefully considered this authority I find that the context in which the statement made in the headnote used is very different to the facts of the case at bar. The facts of that case was that a claim was properly issued owing to limitation but the Claimant had not complied with its pre-action obligations. The Claimant wrote to the Defendants informing them of the issuance of the claim form and attaching a courtesy copy of same. The Claimant’s Solicitor then engaged the Defendant’s Solicitor on agreeing to a stay of the claim to comply with the pre-action protocols. In response, the Defendant’s Solicitor wrote to the Claimant’s Solicitor and indicated that “.....we accept this as service of the said Claim Form”.

[20] The dispute arose whether the claim was struck out as the Claimant had 14 days from service to file his particulars of claim. The dispute was not whether the claim form was

³SLUHCv2018/0613

⁴[2013] EWHC 1693.

properly served per se it was whether the Defendant could accept service of a photocopy of the claim form which made time begin to run. It was in this context that the Court held that what was required for the purpose of time running was service of the original sealed claim form and not a photocopy. These facts are far removed from the case at bar and I find this case to be distinguishable.

[21] The service of a sealed claim under the CPR has been construed as a matter of substance over form. **Blackstone's Civil Practice 2021 The Commentary**⁵ states:

‘In **Weston v Bates** [2012] EWHC 590 QB, [2013] 1 WLR 189, the Court considered whether service out of the jurisdiction of a printout of a scan of a photocopy of a claim form was valid, or whether the original, sealed copy of the claim form was required for service. It was held that under the CPR what constituted a claim form was a matter of substance and that the words ‘claim form’ were not a reference to a particular hard copy of the document.’

[22] In **Weston**, the Court upheld service of a print out of a photocopy of the claim form on the basis that the object of service was satisfied by receipt of the document served.

[23] Price- Findlay JA in **Estephane v Mc Dowell Broadcasting Corporation (MBC) Ltd**⁶ adopted a similar posture to the English High Court in **Weston**. The learned Judge in treating with service not strictly effected in accordance with Rule 5 CPR held that ‘the Court will not allow style to triumph over substance in circumstances where no prejudice is visited on the other party.’

[24] The learned judge at paragraph 41 of her decision referenced paragraph 55 of the decision of Mc Donald – Bishop JA in **Bupa Insurance Limited (trading as Bupa Global) v Hunter**⁷ which states:

‘...the framers of the CPR did not intend for every breach of the rules to be taken as invalidating the proceedings and that would be so whether or not the particular rule that is engaged is stated in mandatory term. Once the consequence for the breach

⁵Page 339 under the Rubric – Definition of ‘claim form’

⁶SLUHCVP2022/0002

⁷[2017] JMCA Civ 3

of the rule is not provided for by the CPR or otherwise, then consideration must be given to the provisions of rule 26.9 in determining the way forward in the proceedings.”

[25] In my view the error of serving the Second Defendant with an unfiled copy of the claim did not visit her with any prejudice or invalidate the proceedings against her in any way for the following reasons:

1. Firstly she accepted the documents and acted on them. She filed a defence on August 08, 2019 albeit after a request for judgment had already been made.
2. Secondly, the Second Defendant attended Court and participated in the proceedings in person and through Counsel a total of three (3) times before applying to set aside the default judgment.
3. Thirdly, the Second Defendant accepted the jurisdiction of the Court by participating in its process in a meaningful way. In **Astro exito Navegacion Sa v HSU**⁸ it was stated that:

‘a person voluntarily submits to the jurisdiction of the court if he voluntarily recognizes, or has voluntarily recognised, that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings.’

From the history of the proceedings set out above, it is clear that the Second Defendant recognised and accepted that this Court has jurisdiction to hear and determine the claim. As such, the Second Defendant cannot now in my view contend that no valid claim was served on her given her acceptance and participation in the Court process.

⁸[1984] 1 Lloyd's Rep 266 at page 270

4. Fourthly, the document served on the Second Defendant is identical to the Court's copy except for the missing court stamp.

[26] At its highest, the failure to serve a filed copy of the claim on the Second Defendant was a procedural irregularity. It does not go to the validity of the claim. Thom J (as she then was) in **Miller v Miller at al**⁹ adopted the modern approach to procedural breaches. At paragraph 35 the learned judge stated:

[35] The traditional approach of dealing with non-compliance of a procedural requirement is for the Court to consider whether the provision is mandatory or discretionary. However, the modern approach is for the Court to not simply consider whether the provision is mandatory or discretionary. The modern approach is outlined in the speech of Lord Wolf MR in **ex parte Jeyanthan and Ravichandran** as follows:

'I suggest that the right approach is to regard the question of whether a requirement is discretionary or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/ discretionary test. The questions which are likely to rise are as follows: is the statutory requirement fulfilled if there has been substantial compliance with the requirement and if so, has there been substantial compliance in the case in issue though there has not been strict compliance? (the substantial compliance question). If the non-compliance capable of being waived and if so, has it, or can it, and should it be waived in this particular case? (the discretionary question). I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the con-compliance? (the consequences question).

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on those questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory one which oust jurisdiction, or discretionary which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

⁹SVGHPT2012/0041

[27] In my view there was substantial compliance with the requirement of service of claim by the Claimant. There was waiver of the non-compliance with the rule requiring filed documents to be served when the Second Defendant filed a defence to this claim, appeared in Court, filed a consent order as between herself and the First Defendant and filed the application now before the Court. The consequence of the non-compliance is that the Claimant now has a default judgment against the Second Defendant.

[28] Given the Second Defendant's conduct as aforesaid, I treat the service of an unfiled copy of the claim as a procedural irregularity which was waived by the Second Defendant.

[29] For these reasons, I find that the Second Defendant's application fails on this ground.

Rule 13.3 (1) CPR ground:

[30] The Court may set aside a judgment in default if the Defendant:

1. Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
2. Gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
3. Has a real prospect of successfully defending the claim.

Promptitude:

[31] The application was filed on July 10, 2020. This approximately seven (7) months after default judgment was obtained against the Second Defendant.

[32] Of note is that judgment in default was not entered by the Registrar in this claim. It was entered by the Master on the day fixed for the first case management conference triggered by the filing of a defence by the Second Defendant.

[33] It is a matter of record that the Second Defendant and her Counsel were both present when default judgment was entered on December 09, 2019. This is the day I consider the Second Defendant to have found out that judgment was entered against her.

[34] The evidential burden is on the Second Defendant to explain the delay in making her application to set aside. There is one paragraph in her affidavit which gives any evidence of delay. That is paragraph 7 which states:

[35] 'I could not afford to make the application or any other application because I am separate from my abusive husband and I am the sole carer for our children'

[36] This bald statement in my view does not assist the Second Defendant in explaining the time lapse of seven (7) months without more.

[37] In her affidavit in response filed on November 09, 2020, the Second Defendant explains in point form what she did from the time she got the documents from the Claimant to the time of the application. From the chronology set out in the affidavit during the period between December 2019 and July 2020 the Second Defendant contends that she was awaiting the filing of a consent order and she had to use her money to take care of her family as that period also marked the onset of Covid -19.

[38] Taken at its highest, even if the delay was not inordinate it is not adequately explained in the evidence. Only a summary of reasons are given without any evidence to support the reasons advanced.

[39] Accordingly, I am not satisfied that the Second Defendant made the application promptly.

Good explanation:

[40] The Second Defendant's explanation is that she operated under the notion that the document she was served with was not a valid claim.

[41] I do not accept this as a good reason as the Second Defendant's own evidence is to the contrary. Whilst the Second Defendant contends she labored under the impression that the documents served on her were not valid she nonetheless filed a defence to the claim. Not only did she file a defence but she appeared in Court on the day fixed for the first case management conference. Even further, when the Claimant's Attorney wrote to the Registrar to have the matter relisted to set aside a consent order the Second Defendant entered into with the First Defendant, the Second Defendant participated in the hearing through Counsel.

[42] Accordingly, I find no good reason for not complying with the requirement to file an acknowledgment of service. The reason advanced is not a bona-fides reason in my view having regard to the Second Defendant's conduct.

Real prospect of success:

[43] No draft defence is attached to the application. I have nonetheless considered the defence filed on behalf of the Second Defendant in this claim.

[44] The defence filed admits the loan but avers that the Second Defendant has no knowledge of the status of the loan as she was separated from the First Defendant due to domestic violence. The Second Defendant also contends that she no longer lives in the property built with the money from the loan and she relinquishes her claim to Block and Parcel 1626B 213.

[45] In my view the defence filed on behalf of the Second Defendant is far from having a prospect of success far less a good prospect of success.

[46] Accordingly, the application fails on this ground.

Rule 13.3 (2) grounds:

[47] This ground was not specifically relied on in the Second Defendant's application. It was however raised in the affidavit in support and traversed in submissions. For completeness I will deal with it.

[48] Exceptional circumstances has been described as a 'knock out point'¹⁰. A point so convincing that the entire substratum of the claim can be defeated by it.

[49] The Second Defendant gives six (6) facts in support of her claim of the existence of exceptional circumstances. These are in summary that she separated from her husband due to an abusive relationship, she does not live at the property in question, she has no knowledge of any information concerning the loan, she was told by the First Defendant not to interfere in his business and she is afraid of the First Defendant and does not wish to 'cross his path'.

[50] I find none of these facts to disclose any exceptional circumstances.

[51] Accordingly, the application fails on this ground.

COSTS:

[52] Costs follow the event. The Second Defendant has lost on every ground advanced. There is no good reason to depart from the general rule.

[53] The Second Defendant shall therefore pay the Claimant's costs of the application filed on July 10, 2020 to be summarily assessed by this Court in default of agreement within 14 days from today on the application of either party.

¹⁰ Per Pereira CJ in Baynes v Meyer – ANUHCVP2015/0026

ORDER:

[54] It is hereby ordered that:

1. The Second Defendant's application filed on July 10, 2020 is dismissed.
2. The Second Defendant shall pay the Claimant's costs of the application filed on July 10, 2020 to be summarily assessed by this Court in default of agreement within 14 days from today on the application of either party.

**Alvin Pariagsingh
Master**

By the Court,

Registrar