

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim No: SLUHCV2010/1050

BETWEEN:

ASCENDANCY CARIBBEAN I LIMITED
Formerly **THE BANK OF NOVA SCOTIA**

Claimant

-and-

WILLIAM J. CHARLES

Defendant

Before Master Alvin Pariagsingh

Appearances: Cleopatra Mc Donald for the Claimant; and
V. Dexter Theodore KC for the Defendant.

2023: April 04;
May 11.

JUDGMENT

Defendant's application to set aside default judgment

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application filed on October 12, 2022 seeking an order setting aside judgment in default dated August 21, 2014.

[2] The application is made pursuant to **Rule 13. 2 of the Civil Procedure Rules 2000 (as amended)**.¹ The Defendant contends that the judgment was irregular, wrongly entered and must be set aside *ex debito justitiae*.²

¹ After referred to as 'CPR'.

² by reason of an obligation of justice : as a matter of right

- [3] The Defendant contends that the claim form having been filed in 2010, expired six (6) months from its date of issue. He contends that no order having been made extending its validity, at the time the request for default judgment was made, there existed no valid process before the Court on which a default judgment could have been granted.
- [4] On February 08, 2011 the Claimant filed an affidavit of service of Adjoiva Best. In this affidavit, the deponent contends that the Defendant was personally served with the claim on January 31, 2011 at 12:14 pm.
- [5] The personal service referred to on the Defendant is not personal service in the traditional sense. The Claimant contends that the Defendant was personally served via Fax. It is contended that the 'Claim Form and Supporting Documents' were faxed to the number 453-1575.
- [6] The deponent contends that it is likely that the Defendant would have had been able to ascertain the contents of the documents by Fax to 'his known place of business'.
- [7] The deponent goes on to say that the Fax number used is listed in the Saint Lucia 2010/2011 Services Directory registered to the Defendant's known place of business. Attached to this affidavit is a 'Message Confirmation' which shows that on January 31, 2011 at 12:20 pm a fax was sent from phone number 4520472 to phone number 4531575 comprising 15 pages. The receipt also shows that the results as 'ok'. This receipt shows the sender as 'G.P. Chambers'.³
- [8] At the time of the filing of the claim, the Legal Practitioner on record for the Claimant was not G.P. It was the law Offices of G.W. The affidavit of service also does not explain this the link between the Claimant's Legal Practitioner's chambers, which the deponent says faxed the documents and the name showed on the fax receipt as sender.

³ Names of previous Counsel redacted as they are no longer in the matter.

[9] The Court notes that from its file that the claim form, statement of claim, appearance form, application to pay by installments and the defence form comprise exactly 15 pages. This means that, on the Claimant's own evidence, if accepted, the Notes to the Defendant's Form was not served on the Defendant, else the bundle faxed would be necessity be more than 15 pages. This was not a point taken by the Defendant.

[10] On July 14, 2011, the Claimant requested judgment in default of an acknowledgment of service against the Defendant.

[11] On August 15, 2011, the Claimant's caused an 'Amended Affidavit of Service' to be filed. This affidavit was sworn on August 11, 2011. The short but important point to be made is that there is nothing known to law as an 'amended affidavit'. An affidavit is evidence. It cannot be amended. Authority for this proposition is found both in the Court of Appeal decision in **Attorney General & Anor v Issac**⁴ and the decision of Moise J in **Prest v Magistrate of District "C"**.⁵

[12] Any changes has to be made by a supplemental affidavit. To the extent that this document contains material information, the deponent contends that:

- i) when the claim form was served, the statement of claim was also served with it;
- ii) on more than one occasion attempts were made by a process server to serve the claim on the Defendant's known place of residence and at his place of business. No details of these attempts are given;
- iii) the Defendant was avoiding service. As such, the deponent says, an alternative method of service was sought; and

⁴ [2017] 2 LRC 1

⁵ [2022] ECSCJ 96

- iv) promptly after sending the documents, she contacted the Defendant's place of business and spoke to the Defendant's Secretary Glenda James Eugene who confirmed and acknowledged receipt.

[13] Having perused the Court's file I am able to confirm that a query was issued by the Registrar on July 26, 2011. The Request for default judgment was not granted as the Claimant has not indicated why Fax was chosen rather than personal service. There is an endorsement on the query sheet that reads 'amended accordingly' and the date August 11, 2011 is written. That is, the same day of the swearing of the amended affidavit of service.

[14] On August 14, 2014 judgment in default of an acknowledgment of service was granted by the then Deputy Registrar for the sum of \$1,171,057.56 together with interest at the rate of 8% per annum from the 12th January 2010 to the date of payment and fixed costs in the sum of \$3,010.50.

[15] The statement of claim neither identifies nor annexes any documents to the claim on which the Claimant wished to rely on in support of the claim in accordance with **Rule 8.7 (3) CPR**. More importantly, no particulars of the basis of the contractual interest sought is given. Specifically it is not stated:

- i) whether the parties agreed that the contractual interest will apply post judgment and
- ii) whether the sum claimed on the claim form already comprised any interest or was the principal balance of a debt only

[16] Whilst in granting a default judgment the Court is not enjoined to make any findings of fact and the pleaded facts are deemed admitted, where contractual interest is being sought, the basis, rate and period of such interest must be pleaded. This is a mandatory requirement by **Part 8.6 (4) CPR**.

[17] On February 13, 2023 the Claimant filed an affidavit in answer to this application. The deponent states most of the facts set out above. The Claimant relies on the service as set out above, as good service of the claim on the Defendant and opposes the application.

ANALYSIS:

[18] The application is made pursuant to **Rule 13.(2)CPR** which states:

- ‘13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
- (a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or
 - (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.
- (2) The court may set aside judgment under this rule on or without an application.’

[19] **Part 12.4 CPR** prescribes the following conditions to be satisfied for judgment in default of an acknowledgment of service:

- ‘12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –
- (a) the claimant proves service of the claim form and statement of claim;
 - (b) the defendant has not filed –
 - (i) an acknowledgment of service; or
 - (ii) a defence to the claim or any part of it;
 - (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;
 - (d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of

- liability to pay all of the money claimed together with a request for time to pay it;
- (e) the period for filing an acknowledgment of service under rule 9.3 has expired; and
- (f) (if necessary) the claimant has the permission of the court to enter judgment'

[20] **Rule 12.4 (b) to (e) CPR** are not in dispute. **Rule 12.4 (f) CPR** is not applicable in this claim. The crux of the Defendant's argument is that he was not served with the claim, that is **Rule 12.4 (a)CPR** was not complied with.

[21] **Rule 5 CPR** deals with service of a claim. The applicable Rules in this application are **5.5, 5.12 and 5.13 CPR**. That is service by electronic means and service by an alternative method.

[22] The general rule is that all claim forms must be served personally. This is set out in **Rule 5.5 CPR**. **Rule 5.13 CPR** gives the Claimant the option to use an alternative method of service. This rule however sets up a procedural scheme to ensure that service is deemed proper before any further steps are taken when personal service is not effected.

[23] **Rule 5.13 (2), 5.13 (4) and (5) CPR** states that:

'(2)Where a party –

- (a) chooses an alternative method of service; and
- (b) the court is asked to take any step on the basis that the claim form has been served;

the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3)

(4) The court office must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must –

- (a) consider the evidence; and
- (b) **endorse on the affidavit** whether it satisfactorily proves service.

- (5) If the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the court office must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days notice to the claimant'

[24] In my view, where as in this case, the Claimant used an alternative method of service, before any further steps could be taken, in this case the grant of a default judgment, there must have been a determination that Court was satisfied that the method of service was sufficient to enable the Defendant to ascertain the contents of the claim form. When the Court is so satisfied, the rules provide for an endorsement to be made on the affidavit. There is no evidence of any affidavit filed in this matter being endorsed by any Registrar, Master or Judge.

[25] I find support for my view in sub rule (5) which provides that if the Court is not satisfied that the method of service was sufficient, the Court must fix a hearing to consider making an order for service by a specific method under **Rule 5.14CPR**.

[26] In my view it is neither proper nor permissible to file an affidavit for endorsement by the Court as good service at the same time a Request for Judgment, the next step, is taken. The service must be deemed proper before the next step is taken. To interpret the rules otherwise will mean that after a request for default judgment is made, the Court may now order service of a claim by a specified method. That is not practical.

[27] In this claim, there is no evidence in the form of an endorsed affidavit or order deeming the service by alternative method good service on the Defendant. The fact that such a decision has to be inferred from the fact that a default judgment was issued in my mind is not proper as it is contrary to the rules.

[28] Having considered the affidavit of service and the amended affidavit of service (which I treat as a supplemental affidavit) neither in my view either individually or collectively proves proper service on the Defendant for the following reasons:

- i) Firstly, the Defendant is not a business with a registered address. Service on his business Fax line, without consent, is improper. It is not the business that is to be served, it is the Defendant.
- ii) Secondly, there is no good reason set out in the affidavits to justify departing from the general rule that the claim ought to have been served personally.
- iii) Thirdly, the evidence does not disclose any basis to support that the alternative method used was sufficient to bring the contents of the claim form to the attention for the Defendant.
- iv) Fourthly, the affidavit does make any connection between the person who allegedly received the fax and her being under any obligation to bring it to the attention of the Defendant. The evidence does not state whether the business to which the claim was faxed was owned or operated by the Defendant or how or why the general rule that a corporate entity is its own legal person does not apply in this case.

[29] The Claimant makes the point in its written submission that the Defendant did not plead any grounds regarding service in his application except that the service issue was raised in his affidavit in support. I disagree. I believe that submission to be an overly simplistic reading of the Defendant's application.

[30] The Defendant's application is made on the ground that at the time the request was made there was no valid claim form. This is tied back to the six (6) month validity period. This period is only interrupted if there was service within the period, an order is made extending the period or an order is made staying the claim. In the absence of proper service within the six (6) months period, at the time of the request, there was no proper process before the Court as there was no proper service within the validity of the claim form. I agree with the Defendant on this ground.

[31] The Claimant has also placed reliance on the decision of Henry J in **Barefoot Yacht Charters (Caribbean) Limited v Kenneth Houston**.⁶ I do not believe this case assists the Claimant to any significant extent. In **Barefoot**, service was done pursuant to a court order. That in my view is a major distinguishing fact from this case. Further, as was done in **Barefoot**, the Claimant in this case has not asked for personal service to be dispensed with.

[32] In my view the proper procedure contemplated in **Rule 5.13 CPR** is to have service deemed proper before a request for default judgment is made. The procedure not being followed combined with the improper service as aforesaid, leads to the conclusion that one of the conditions namely **Rule 12.4(a) CPR** not being satisfied when the judgment was granted.

[33] Accordingly, the default judgment must be set aside. There being no valid service during the life of the claim form, the claim falls by the wayside.

COSTS:

[34] On the issue of costs, there is no reason to depart from the general rule that costs follow the event. The Defendant has been successful in this application is entitled to his costs. The applicable costs regime for interlocutory applications are assessed costs. Those costs are to be summarily assessed by me in default of agreement within 21 days from today on the application of either party.

ORDER:

[35] It is hereby ordered that:

- i) The judgment in default of an acknowledgment of service dated August 21, 2014 is set aside;

⁶ SVGHCV2013/0002

- ii) A copy of this order shall be forwarded by the Registrar or his designate to the Office of Deeds and Mortgages who is directed to forthwith cancel and expunge from its records the judgment registered against the Defendant on October 22, 2014 in Volume 167A No. 211320, at the Claimant's expense, if any; and
- iii) The Claimant shall pay the Defendant's costs of this application to be summarily assessed by this Court in default of agreement within 21 days from today on the application of either party.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court

Dp. Registrar