

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

Claim No: ANUHCV2020/0470

BETWEEN:

[1] ELIZABETH SMITH
[2] STRAHINJA TEODOSIC

Claimants

and

[1] IVAN FLOYD
[2] LIONEL FRANCIS

Defendants

Appearances:

Leslie-Anne Brissette, Counsel for the Claimants
Kemar Roberts, Counsel for the first Defendant

2022: March 17th
May 4th

DECISION

- [1] **GARDNER HIPPOLYTE, M.:** This is an application by the first Defendant to set aside a default judgment under Civil Procedure Rule (CPR) 13.2, alternatively for the default judgment to be set aside under CPR 13.3.

Background

- [2] The instant claim was filed on the 18th December, 2020 and the first Defendant was served personally on the 22nd January, 2021 with the claim form and the statement of claim.¹ The authorization code was not served on him at that time.
- [3] The affidavit in support of the first Defendant's application to set aside the judgment indicates that the person subsequently served with the authorization code is an attorney for the insurance company and the Attorney for the insurance company filed an acknowledgment of service on the 29th January, 2021.

¹ The affidavit of service of Jerry Francis filed on the 2nd of February 2021 states that he personally served Ivan Floyd with the claim form and statement of claim

- [4] The affiant to the application in support further deposes that the first defendant did not instruct the attorney for the insurance company to accept service on his behalf. Further that the first defendant had no knowledge that the authorization code had been served on the Attorney for the insurance company or that an attorney had been elected to represent him in these proceedings by the insurance company.
- [5] The affiant for the first Defendant indicates that his instructions to the insurance company was only to facilitate settlement and some payments were made to the Claimant. The affiant is adamant that at no time was it communicated to the first Defendant that he was being represented by Counsel.
- [6] An affidavit in support of service of the claim form was filed by the Claimants on the 2nd February, 2021. It deposes personal service on the first defendant on the 22nd January, 2021 of the claim form and the statement of claim. A supplemental affidavit was then filed on the 1st April, 2021 by another deponent. The affidavit states that the first Defendant was served via email on the 29th January, 2021 the exhibit attached refers to an email sent to C. Brown on the 28th January, 2021 with the authorization code and the email is acknowledged by C. Brown on the 29th January, 2021.
- [7] On the 29th January, 2021 an attorney files an acknowledgement of service on behalf of the first Defendant, and subsequently no defence was filed. On the 26th March, 2021 a request for judgment in default of defence was filed and granted.
- [8] On the 23rd June, 2021 the matter came up before the Court and it was noted that the first Defendant had separate counsel than who appeared on the court's E-litigation record. It was agreed that directions for assessment could be issued but the counsel on the E-Litigation record would withdraw to allow the newly instructed counsel to enter an appearance. An appearance was subsequently entered by the newly instructed counsel on the 21st October, 2021. Thereafter an application to set aside the default judgment was filed on the 10th November, 2021. The application is grounded first under CPR 13.2, and in the alternative 13.3 to set aside the default judgment.
- [9] On the 15th December, 2021 the Claimant filed another affidavit deposing that the Form of Judgment for an amount to be decided by the Court, a notice of Hearing and the Authorization Code form was served on the first Defendant on the 30th April, 2021.
- [10] Written and oral submissions were received from both Counsel for the Claimants and for the first Defendant. I find that the application to set aside the default judgment can be granted under CPR 13.2 and the reasons for the same will be highlighted below. Accordingly, an examination of CPR 13.3 will not be necessary in the circumstances.
- [11] I will now go on to the substance of the application as it pertains to the rules of service under CPR 5, Rule 13 under the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019, entering a default judgment under CPR 12.5, and setting aside a default judgment under CPR 13.2.

The Applicable Law

CPR 5

- [12] CPR 5 sets out clearly the rules as it pertains to service on a defendant. The first requirement is that a claim form must be served personally on each defendant.² Proof of personal service is laid out in CPR 5.5 with requirements for the method of service, the place of service, and how a person is to be identified.³
- [13] CPR 5.6 highlights if a legal practitioner is authorised to accept service on behalf of a party and they have notified the Claimant in writing that he or she is so authorised to accept the service, the claim form may be served on the legal practitioner.

Rule 13 - Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019

- [14] With the advent of the Electronic Litigation Filing, rules were implemented to assist users with proper procedure on filing under the E-litigation Portal. The rules include a component of how service is to be effected in relation to documents. The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019 at rule 13 sets out the requirements for service of proceedings that have commenced. Rule 13.(3) has a twofold mandatory requirement by the filing party to firstly ensure that service is effected in accordance with the applicable rules and secondly, the generated authorization code must be served at the same time.
- [15] The rule 13.(3)(b) states **“the filing party must at the same time serve the authorization code generated by the Electronic Litigation Portal in Form 1 in Schedule 2 to these rules.” (My Emphasis)**
- [16] Rule 13 (4) further qualifies this section and emphasises that “where the authorization code generated by the Electronic Litigation Portal is not served on a party in accordance with sub-rule 3, service shall be deemed not to have been effected, except where service is effected in

² Civil Procedure rule 5.1(1)

³ RULE 5.5 states as follows: 1. personal service of the claim form is proved by an affidavit sworn by the server stating – a. the date and time of service; b. the precise place or address at which it was served. c. the precise manner by which the person on whom the claim form was served was identified; and d. precisely how the claim form was served.

2. If the person served was identified by another person, there must also be filed where practicable an affidavit by that person – a. proving the identification of the person served; and b. stating how the maker of the affidavit was able to identify the person served.
3. If the server identified the person to be served by means of a photograph or description there must also be filed an affidavit by a person –
 - a. verifying the description or photograph as being of the person intended to be served; and
 - b. stating how the maker of the affidavit is able to verify the description or photograph as being of the person intended to be served.

accordance with directions given by the court in respect of an order permitting substituted service.”

- [17] Accordingly, if the authorization code is not served on a party the service shall be deemed not to have been effected.⁴

CPR 12.5

- [18] CPR 12.5 requires the Court office at the request of a Claimant to enter judgment for failure to defend if the Claimant proves service or an acknowledgment of service is filed. The request made by the Claimant was for the failure to file a defence since an acknowledgment of service was filed on behalf of the first Defendant on the 29th January, 2021.

- [19] CPR 12.5 states as follows:

12.5 The court office at the request of the claimant must enter judgment for failure to defend if –

- (a) (i) the claimant proves service of the claim form and statement of claim; or
- (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

CPR 13.2

- [20] The first Defendant subsequently applied to the Court to set aside the default judgment. The first ground refers to Civil Procedure Rule 13.2. This rule requires the Court to set a default judgment if it was wrongly entered if any of the conditions in rule 12.5 are not satisfied. The rule is set out as follows:

Cases where court must set aside default judgment

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.

- [21] There are two questions that have to be answered in the context of the law and the facts provided.

⁴ Rule 13.(4) Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019

Firstly was service effected on the 22nd January, 2021; and secondly if not, was the procedural misstep remedied by serving the authorization code on the attorney via email on the 29th January, 2021 and subsequently on the first Defendant on two further occasions;

Was service effected on the 22nd January, 2021?

- [22] The first affidavit filed on the 2nd February, 2021 does not indicate that the Claimant served on the first Defendant on the 22nd January, 2021 with the authorization code along with the claim as required by rule 13.(3).⁵ This is also stated in the affidavit in support of the application to set aside the default judgment where the affiant deposes that the first Defendant was not served with the authorization code until 15th June, 2021.
- [23] Accordingly, I find that the service on the first Defendant on the 22nd January, 2021 is deemed not to be effected in accordance with the rules as no accompanying authorization code was served with the claim.

Was the procedural misstep remedied?

- [24] The affidavit filed on the 1st April, 2021 would appear to correct this defect by emailing the authorization code. The affidavit states that the first Defendant was served via email on the 29th January, 2021 with the authorization code. The code and the email are exhibited to the affidavit and it shows that a C. Brown was served with the authorization code.
- [25] In opposition to this service of the authorization code, the affiant for the first Defendant deposes that the Attorney for his insurance company accepted the authorization code not him. The affidavit states the first Defendant did not issue instructions for them to accept service on his behalf, and instructions were not issued for them to act on his behalf. Counsel for the Claimant highlighted to the Court that if an attorney represents to her Chambers that they are acting for the Defendant it is not for Chambers to go behind this and examine if this is correct.
- [26] Acceptance of service by a legal practitioner is permissible if the legal practitioner has notified the Claimant in writing that he or she is so authorized to accept the service. The affidavit in support of the application clearly states that the first Defendant did not instruct Counsel to accept the authorization code on his behalf. Additionally, in the email and affidavit of 1st April, 2021 there is no reference as to who exactly is and in what capacity C. Brown is accepting service.
- [27] Accordingly, I find that the service on the 29th January, 2021 on C. Brown did not remedy the defective service initially commenced on the 22nd January, 2021 for two reasons. Firstly, there is no documentation provided to the Court in compliance with CPR 5.6 and therefore with the requirement of rule 13.(4)⁶ the service continued to be deemed not effected.⁷

⁵ The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019

⁶ Ibid

⁷ Rule 13.(4) The Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules 2019

- [28] Additionally, the rules require that when the authorization code is to be served it must be served with the claim form and supporting documents. Therefore, the service on the Attorney via email on the 29th January, 2021 of **only the authorization code** does not satisfy the requirements under the rules.
- [29] The Claimant has indicated that the authorization code was subsequently served on the first Defendant on two separate occasions - April and June 2021. However, at both times the service effected on the first Defendant of **only the authorization code** without the claim form, statement of claim and accompanying documents does not accord with the requirements in the rules. The defect can be remedied but the claim form, statement of claim along with the authorization code must be served together.⁸
- [30] Therefore I find service was not remedied, and the conditions as per rule 12.5 were not satisfied. Accordingly, the default judgment is to be set aside under CPR 13.2.

Conclusion

- [31] For the above-mentioned reasons the order of the Court is as follows:
1. The first Defendant's application to set aside the judgment under CPR 13.2 is granted;
 2. The Claimant having been unsuccessful in the application shall pay costs to the Defendant in the sum of \$750.00 within 3 months;
 3. The matter is adjourned to the 18th May, 2022 at 11:30 am for report on the next steps in relation to the claim as it pertains to the first Defendant;
 4. The first Defendant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

BY THE COURT

REGISTRAR

⁸ Flavio Maluf v Durant International Corp BVIHCMAP2021/0025 at paragraph 86.