

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2020/0063

BETWEEN:

A.S. BRYDEN & SONS (ANTIGUA) LIMITED

Claimant

and

WEST POINT LOUNGE LIMITED

Defendant

APPEARANCES:

Mrs. Stacey-Ann Saunders-Osbourne, Counsel for the Claimant
Ms. Christelle Wilson, Counsel for the Defendant

PRESENT:

Frances-Ann Minors, Representative of the Claimant present
Barry France, Process server
George Edward Kersenhout, Representative of the Defendant present

2021: June 1;
June 7.

RULING

[1] **GARDNER-HIPPOLYTE, M:** This is an application to set aside the judgement in default obtained by the claimant against the defendant on the 25th June 2020.

BACKGROUND

[2] On the 6th of March 2020 the claimant filed a claim form and statement of claim seeking the sum of \$28,624.38 being the balance due for goods supplied to the defendant on credit between the 28th of October 2016 and the

30th of June 2017 at the defendant's request, as well as bank charges for returned cheques.

- [3] The current application before the court seeks to set aside the default judgement under Civil Procedure Rules (CPR) part 13.3; however, the affidavit in support is a mixture of evidence to support part 13.2 and 13.3. Therefore, the court will seek to address both sections to determine whether the defendant's grounds of his application can be met to set aside the default judgement obtained on the 25th of June 2020.

SETTING ASIDE A JUDGMENT IN DEFAULT UNDER 13.2(1)

- [4] The court must set aside a judgment in default if the judgment entered under part 12 - was wrongly entered in the case of - ***a failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied;***
- [5] CPR 12.4 requires a claimant to prove service of the claim form and the statement of claim; the defendant has repeatedly stated that he was not served with the Claim Form and the Statement of Claim therefore the court sought to have the relevant parties attend and give their evidence.
- [6] In summary the defendant in his affidavit in support of the application to set aside the default judgement states that he has never been served personally with a claim form or statement of claim in this action and that on the 26th of March he closed his bar - the West Point Lounge and moved everything out of the bar because of the COVID-19 pandemic. That there was no one there until he reopened on the 4th of June. He also stated until the 26th of March neither him nor anyone at the establishment has been personally served with any documents including a claim form and a statement of claim by Barry France. He says that he is informed by his solicitors that the judgement in default was improperly obtained because no claim form or statement of claim was served personally on him.

- [7] The defendant gave evidence – examination in chief in court on the 1st of June 2021 similar to the evidence of the affidavit in support. When cross examined it was observed by the court that he became confused about the documents, and the court noted when asked questions from counsel for the claimant he often said either I don't know or I don't recall. The court did not prefer his evidence in relation to the service of the claim form and statement of claim.
- [8] However the claimant still has to prove that the documents were served as per CPR 12.4(a). Therefore, we turn to the evidence of the bailiff for the claimant. The bailiff for the claimant, Barry France has been a bailiff for the last 25 years. He filed three affidavits which were all consistent with the evidence that he gave in court on the 1st of June 2021. In particular the last affidavit filed in response to the defendant where in summary he indicated he was given the notice of defendant's code, Claim Form, Statement of Claim and ancillary documents and he was informed by Mrs. Sanders Osborne that there were two directors of the company George Edward Kersenhout and Anna Elizabeth De Jonge and either of them could be served on behalf of the defendant company.
- [9] On the 12th day of March when he went to the business premises - the bar at Jolly Harbour he told a female employee he was looking for the two directors and he gave their names to her and he asked her if she was a female director and she said she was not and she preceded to call the owner of the bar by telephone. Mr. France said he spoke to the owner of Bar who identified himself as George Edward Kersenhout and he gave him directions to his place of residence which is also in Jolly Harbour, St. Mary's. When he got to the residence he blew the horn and when the man came out he asked if he was George Edward Kersenhout and he confirmed yes and he handed the documents to him.
- [10] Additionally, the second time he served him with the default judgement on the 6th day of July 2020 he served him again at his place of residence at Jolly Harbour. The only material place the evidence in his affidavit differs from his evidence in court was the confirmation of the George Edward Kersenhout at

his place of residence. In court the bailiff stated Mr Kersenhout stated “**yes I was expecting these documents**” - instead of using the words of confirming his identity. Whilst the words are different the court considers that the Bailiff having spoken with him earlier considered this to be a confirmation of the identity.

- [11] The court having had a chance to observe the demeanour of the witnesses prefers the evidence of Barry France. His is a bailiff of 25 years and he was consistent in the evidence being presented to the court. On a balance of probabilities, I am persuaded that the service of the claim form and statement of claim was proper service in accordance with the rules. The default judgment was entered properly against the defendant by the court office since the affidavit of service was in compliance with CPR 5.1 and 5.5. Additionally, I am also persuaded that the default Judgment was properly served on the defendant by the bailiff on the 6th of July 2020.

SETTING ASIDE A DEFAULT JUDGMENT UNDER 13.3

- [12] Having found the application to set aside under part 13.2 fails, the court will now turn to consider the application under part 13.3. The application to set aside was filed on the 5th of August 2020, and does not specify CPR 13.3(1) however the grounds pleaded are in accordance with this rule.

- [13] *The grounds of the application are*
- 1. That the application to set aside the judgement in default is being made as soon as reasonably possible after finding that the judgement had been entered;*
 - 2. That the defendant/applicant has a good explanation for the failure to file an acknowledgement of service and a defence;*
 - 3. That the defendant/applicant as a real prospect a successfully defending the claim;*
 - 4. It is in the interests of the administration of justice.*

An affidavit in support filed on the 5th of August 2020 indicates the evidence in support of the grounds laid out before.

[14] CPR 13.3(1) specifies three conditions which a defendant must satisfy before a default judgment can be set aside¹. It is also settled law that the conditions are conjunctive². The court will now turn to consider the three conditions and if any are not met then the court is not in a position to set aside the default judgment.

APPLIES TO THE COURT AS SOON AS REASONABLY PRACTICABLE

[15] The claimant applied for and obtained default judgment on the 25th of June 2020. It was entered on the 1st of July 2020; and was served on the defendant on the 6th day of July 2020. The defendant in his affidavit in support at paragraph 5 refers to the default judgment being improperly obtained due to no service of the claim form, but no specific comment is made about actual service of the document. In court, the defendant under cross examination does not recall being served but after being pressed he recalls “*the paper said I to have to pay the money yes that paper was handed to me.*” This document he said he received at the Bar. Additionally, at paragraph 6 of his affidavit in support he indicates that he was unable to meet with his attorney and provide full instructions due to the COVID-19 pandemic.

[16] The court having read and heard the evidence of the bailiff and having stated above that I am satisfied that the defendant was properly served with the Default Judgment on the 6th of July 2021, will now turn to consider the length of time of 28 days (excluding the date of service and the date of filing the application - 7th of July to the 4th of August 2020) as reasonable in the circumstances because of the COVID 19 pandemic. **Glen Guiste v New India Assurance Co. (T&T) Ltd**³ refers to a lapse of 20 days as not being

¹ 13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under part 12 only if the defendant –

- (a) Applies to the court as soon as reasonably practicable after finding out that the judgement has been entered;
- (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
- (c) Has a real prospect of successfully defending the claim.

² As per Barrow JA at paragraph 7 of **Kenrick Thomas v RBTT Bank Caribbean Limited**, Saint Vincent and the Grenadines Civil Appeal No 3 of 2005 (delivered 13th October 2005, unreported)

³ SLUHCV 2016/0171 (delivered 1st March 2017, unreported) at paragraph 13.

considered unreasonable to set aside default judgment. Therefore, the delay of 28 days was not inordinate and the court can move on to consider the next condition.

GOOD EXPLANATION FOR THE FAILURE TO FILE AN ACKNOWLEDGEMENT OF SERVICE

[17] The affidavit in support of the application filed by the defendant sets out in very brief terms in paragraph 4 “***Up until the 26th of March 2020, neither I nor anyone at my establishment was never served personally with any documents, including a Claim Form and Statement of claim by one Barry France.***” The defendant offers nothing further in his affidavit for the court to consider as an explanation. The court heard the evidence in chief of the defendant where he stated that he found the copies of the claim form and statement of claim at the Bar, it was left there in an envelope. Further he stated he cannot remember what day he got them. He also said he did not know Barry France at all and did not see him at all; he never enquired how the documents got there he just contact Hill and Hill office immediately.

[18] Under cross examination he agreed his bar was open until the 26th of March, that he did not recall how he got the judgment in default. But then he subsequently stated under cross exam that he received it but it was at the Bar.

[19] Having regard to my earlier finding that the defendant was personally served by Barry France on the 12th March 2020, the court is not satisfied that a good explanation has been provided for failure to file an acknowledgement of service. The application therefore does not succeed on this condition. Since the ruling requires a conjunctive test, the court cannot consider anything further on the third condition/limb.

CONCLUSION

[20] For the abovementioned reasons the order of the Court is as follows:

1. The defendant’s application to set aside the judgment in default of acknowledgement of service is refused; and

2. The defendant having been unsuccessful in the application to set aside shall pay costs to the claimant in the sum of \$750.00 to be paid within 30 days of the date of this order;
3. The claimant to draw file and serve this order.

**CHARON GARDNER-HIPPOLYTE
HIGH COURT MASTER**

BY THE COURT

REGISTRAR