

THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil Division)

SLUHCV2018/0158

BETWEEN:

BANK OF NOVA SCOTIA

Claimant /Respondent

and

ALBERTA JOSEPH-FELICIEN

Defendant/Applicant

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances:

Mr. Horace Fraser for the Defendant/Applicant
Mr. Leevie Herelle for the Claimant/Respondent

Present:

Mrs. Alberta Joseph-Felicien, the Defendant/Applicant
Ms. Yasmin Joseph representative of the Claimant /Respondent

2019: May 15;

2020: August 3.

RULING

[1] **JOHN-THEOBALDS M [AG.]:** This is an application to set aside the judgment entered against the defendant on 11th May 2018, in default of acknowledgement of service.

Background

- [2] The circumstances giving rise to this application can be shortly stated. On 28th March 2018, the claimant (“the Bank”) instituted proceedings against the defendant to recover the sum of \$51,421.61, together with interest at the rate of 12% from 22nd October 2015. This sum represented a debt owed by the defendant to the Bank in respect of a small business loan granted for the conduct of business for the company Alwin Manufactures Ltd. The Bank maintained that the claim form and the statement of claim were served on the defendant personally on 9th April 2018. The defendant having not filed an acknowledgment of service within 14 days of the date of service of the claim, the Bank made a request for entry of judgment in default which was entered against her on 11th May 2018.
- [3] On 15th June 2018, the defendant was served with a copy of the judgment in default. The defendant alleged that she was unaware that a claim had been filed against her as she was never served personally with the claim. On 4th July 2018, she therefore filed an application seeking to have the default judgment set aside together with an affidavit in support.
- [4] It appears from the heading of the defendant’s application to set aside the default judgment that it is being made pursuant to rules 13.2(1) and 13.3(1) of the **Civil Procedure Rules 2000** (the “CPR”). The grounds of the application, however, have not been clearly set out by the defendant, who has left the court to navigate through the maze of the written submissions. In any event, it seems that the defendant is, in the first instance, seeking to have the default judgment set aside under rule 13.2(1) of the CPR, on the basis of her contention that she was never served with the claim. I will therefore deal with these in turn.

Application to set aside default judgment under rule 13.2(1)

- [5] Under rule 13.2(1) of the CPR, the court must set aside a judgment entered under Part 12 if the judgment was irregularly entered, where there was a failure to file an acknowledgment of service, or where any of the conditions in rule 12.4 of the CPR

was not satisfied. Rule 12.4 (a) outlines the conditions to be satisfied when the court enters judgment for failure to file acknowledgment of service, as follows:

“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;...”

[6] The Bank filed an affidavit of service on 26th June 2018 attesting to service of the claim form and the statement of claim on the respondent. The affiant who is a process server, Police Constable 369 Anthony Worrell John (“Officer John”), deposed that he personally served the defendant on 9th April 2018 at 5:53 pm at the registered business address of Alwin Manufactures Ltd. However, in her affidavit filed in support of her application to set aside the default judgment, the defendant stated that she was never personally served with the claim form and statement of claim in this matter and that she was only aware of a previous suit which had been discontinued against her. Thus, she contended that the default judgment should be set aside.

[7] The application to set aside came up for hearing before another master on a number of occasions, where the matter was case managed. With service on the defendant clearly being in issue, the learned master summoned the process server, Officer John to attend court on 15th May 2019 to be examined on his affidavit of service.

[8] When the application came up for hearing on 15th May 2019, the court heard the evidence of the defendant and Officer John. The defendant testified that she was very familiar with Officer John whom she has known for a long time and that he would have had no difficulty identifying her. When asked whether Officer John had ever served her with any documents, she recalled being served by him only once, which was on 15th June 2018 when she was served with the judgment in default of defence. The defendant testified that on the day in question she was at work at the Bordelais Correctional Facility where she is employed as a correctional officer. She said that her workday ended at 5:00 pm, however on that day she never went to Alwyn Manufactures Ltd. She also stated that Alwyn Manufactures Ltd. is her

husband's company and that she does not perform any functions at the company. In essence, the defendant was adamant that she was not served with any documents by Officer John on 9th April 2018.

[9] In his oral evidence, Officer John confirmed that he has known the defendant for over 15 years as she was a family friend. He testified that he did in fact serve the defendant with the claim form, statement of claim and supporting documents on 9th April 2018 at Alwin Manufactures Ltd. He testified that he was not mistaken that he served the defendant. Learned counsel for the defendant, Mr. Fraser, in his cross examination, suggested to Officer John that he served Mr. Andre Felicien, the defendant's husband with the documents and not the defendant. Officer John denied this, as he was certain that he only served Mr. Felicien documents that were relevant to him and the defendant was whom he served on that day.

[10] It is a fact that there is some measure of familiarity between the defendant and Officer John as they both testified to having known each other for a while. The defendant confirmed that on 15th June 2018, before she was served with the judgment in default, Officer John telephoned her to find out where she was and she informed that she was at Alwin Manufacturers Ltd. He then went to serve her at that location. Officer John testified that he was not mistaken as to who he served, or any of the other details of the service because he took notes and was able to produce an affidavit of service from these notes.

[11] During his oral submissions, Mr. Fraser stated that the length of time it takes to travel from the Bordelais Correctional Facility to Union where Alwin Manufactures Ltd. is located is about one hour. He argued that, if the defendant leaves work at 5:00 p.m., it would be impossible for her to have been at Alwyn Manufactures Ltd. by 5:53 pm for Officer John to have served her there. Mr. Fraser therefore asked this court to find that Officer John was not a credible witness; that he did not effect personal service on the defendant, but instead left the documents at Alwin Manufacturers Ltd. with Mr. Felicien.

[12] In her affidavit in support of her application the defendant deposed that “it seemed” that the process server left the documents at Alwyn Manufacturers Ltd., a place where she did not live or work. It is noteworthy that at no time during the evidence given by the defendant did she intimate that the document was served on her husband and not her. The first time that this version of events was canvassed was briefly in Mr. Fraser’s cross examination of Officer John. Later in his closing arguments, Mr. Fraser sought to persuade the court that Officer John was so familiar with the defendant and her husband, Mr. Andre Felicien, that he in fact left the claim form and statement of claim with Mr. Felicien, as opposed to serving the defendant personally. The court at that time intimated to Mr. Fraser that no such account had not been brought out in the defendant’s evidence.

[13] Having listened intently to the testimonies, and after closely and carefully observing the demeanor of both witnesses, the defendant did not appear to me to be forthright about service of the claim form and statement of claim on her. The defendant also did not appear to be forthcoming in some of her answers. During cross examination, the defendant became very defensive and irritated and at times was aggressive to counsel for the Bank although the line of questioning was not antagonistic or unduly unreasonable. Her demeanor while giving her evidence suggested to me that she is not a credible witness.

[14] Additionally, Mr. Fraser’s submission in relation to why it was not possible for Office John to have served the defendant at the location he deposed to have, is not convincing to me. Therefore, I do not accept that it was impossible for the defendant to have left place of work at 5:00 pm and have arrived at Alwin Manufactures Ltd. to be served at the time that she was.

[15] I prefer the evidence of Officer John as I find it to be more credible. He was very forthcoming with his answers. In addition to being a process server for over 20 years, Officer John testified that works as a process server for a number of attorneys, including counsel for the defendant and that he had no desire to tarnish his reputation or bring his clients into disrepute. Having also carefully considered

the defendant's testimony, I am not persuaded that she was not served with the claim and supporting documents by Officer John.

[16] Taking all of the above into consideration, I therefore find that the claim form and statement of claim were duly served on the defendant. Consequently, the application to set aside the default judgment under CPR 13.2(1) fails as: (i) the Bank has proven service of the claim form and statement of claim; and (ii) the defendant has failed to file an acknowledgment of service within the time stipulated by CPR 9.3(1).

Application to set aside default judgment under CPR 13.3(1)

[17] Having found that the application to set aside under CPR 13.2 fails, I will now consider the application to set aside the default judgment under CPR 13.3(1).

[18] CPR 13.3(1) specifies three conditions which a defendant must satisfy before the court can set aside a default judgment. It provides that:

“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 judgment had 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.”

[19] It is settled law that the conditions for setting aside a default judgment are conjunctive.¹ Therefore, unless all three conditions are satisfied, the court ought not to set aside the judgment. I now turn to consider whether the defendant has satisfied the conditions under CPR 13.3(1).

¹ Kenrick Thomas v RBTT Bank Caribbean Limited, Saint Vincent and the Grenadines Civil Appeal No. 3 of 2005 (delivered 13th October 2005, unreported).

Limb 1 - Applies to the court as soon as reasonably practicable

[20] Judgment in default of acknowledgment of service was entered against the defendant on 15th May 2018 and was served on her on 15th June 2018. The defendant filed an application to set aside on 4th July 2018. This would put the defendant's filing of the application to set aside some 19 days after being served with the default judgment. In **Glen Guiste v New India Assurance Co. (T&T) Ltd.**,² Cenac-Phulgence J did not find a lapse of 20 days to be unreasonable. Although the defendant did not give a reason for filing the application 19 days after being served with the default judgment, I find that the delay was not inordinate. The defendant therefore satisfies this limb.

Limb 2 - Explanation for the failure to file an acknowledgement of service

[21] The affidavit in support of the application filed by the defendant sets out in very general terms, over one brief paragraph, the defendant's explanation for failing to file the acknowledgment of claim. The explanation offered by the defendant was simply that she was not personally served with the claim form and statement of claim. The defendant further deposed in paragraph 7 of her affidavit in support that:

“It seems that the process server left those documents at Alwin Manufactures Ltd, a place where I do not work or live.”

[22] The defendant offers nothing further by way of an explanation. Taking her explanation into consideration, there may not be much more which the defendant could have offered if this was the basis for her failure to file an acknowledgment of service. However, having regard to my earlier finding that the defendant was in fact personally served by Officer John, I am not satisfied that the defendant has provided no good explanation for her failure to file an acknowledgment of service. The application therefore fails on this limb.

² SLUHCv2016/0171 (delivered 1st March 2017, unreported) at para 13.

Limb 3- Real prospect of successfully defending the claim

[23] As stated earlier, all three conditions under CPR 13.3 must be satisfied for the default judgment to be set aside. It therefore follows that the defendant having failed on the second limb will not be successful in her application to set aside the default judgment. However, for the purposes of completeness, I will consider the third condition.

[24] Before addressing the third limb of the test under CPR 13.3(1), I note that CPR 13.4(3) provides that the affidavit in support of an application under CPR 13.3(1) must exhibit a draft of the proposed defence.

[25] The defendant, however, has failed to exhibit a draft defence in accordance with the requirements of CPR 13.4(3). In my opinion, the construction of CPR 13.4(3) was deliberate. It was not intended for the proper consideration of applications under CPR 13.3(1) to be done only on the basis of the affidavit in support of the application. Indeed, CPR 13.4(3) clearly states that the affidavit **must** exhibit a draft of the proposed defence. This is because in order to satisfy the test under CPR 13.3(1), the applicant has to demonstrate a real prospect of successfully defending the claim. It is therefore to the draft defence which the court must look to determine whether the applicant has demonstrated any such prospect of success. It must go hand in hand with the affidavit in support. While an affidavit contains the evidence in support of the application, the draft defence particularises what the applicant's defence will be at trial should the application to set aside the default judgment succeed.

[26] Mr. Fraser's response to this observation was that the affidavit in support of the application to set aside the default judgment, sets out what the defence will be. In my view, such an approach is not contemplated by the CPR. However, I note the position taken by Thom J (as she then was) in **Doreen Leslie v Bradley Davis et al**³ where Her Ladyship acknowledged that the purpose of filing a draft defence is

³ Saint Vincent and The Grenadines High Court Civil Claim No. 47 of 1998 (delivered 21st September 2006, unreported).

to allow the court to determine whether there is a real prospect of success. Notwithstanding counsel's failure to exhibit a draft defence, the court proceeded to consider the affidavits filed in support of the application to determine whether the defendants had a real prospect of successfully defending the claim. I am guided in this regard and will now examine the affidavit in support to determine whether the defendant has a real prospect of success.

Res Judicata

[27] In her affidavit in support, the defendant stated that she was also a defendant in claim no. SLUHCV2015/0847 along with Mr. Felicien and Alwin Manufacturers Ltd. On 23rd February 2018, the claim against the defendant was withdrawn and discontinued by the Bank before any determination by the court and that claim was never served on the defendant. On 13th March 2018, judgment was entered in favour of the Bank against Mr. Felicien and Alwin Manufacturers Ltd. On 28th March 2018, the Bank initiated these proceedings in respect of the same debt, this time against the defendant only. The defendant contended that when the Bank withdrew the claim against her and entered judgment against Mr. Felicien and Alwin Manufactures, the issue of the loan, which was the subject matter of the claim, became a non-issue. She argued that the Bank is estopped from raising the issue as the matter is *res judicata*.

[28] In assessing this issue, a useful starting point is paragraph 975 of **Halsbury's Laws of England**,⁴ which states:

"Essentials of res judicata.

In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties... It is not enough that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

⁴ 4th Edition (Reissue).

[29] Paragraph 1529 of **Halsbury's Laws of England** goes further to indicate that the plea of *res judicata* should only succeed where the cause of action is the same and has already been determined on the merits. It emphatically states that a procedural prohibition will not satisfy *res judicata*. Therefore, the defendant must demonstrate not just that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed, but showing that it actually was so put in issue and that the same point has been actually decided between the same parties.

[30] During his oral submissions, Mr. Fraser contended that if the judgment is set aside, the defendant can avail herself of the plea of *res judicata* at trial. He stated that the fact that judgment was entered in claim no. SLUHCV2015/0847 amounts to the matter being adjudicated and consequently the Bank is estopped from bringing this present claim which is in respect to issues which could have been raised in the previous claim. He further contended that the instant claim is an abuse of process. In support of his contentions, Mr. Fraser relied on **Greenhalgh v Mallard**⁵ and **Barber v Staffordshire County Council**.⁶

[31] I agree with learned counsel for the Bank, Mr. Leevie Herelle, that **Greenhalgh** and **Barber** do not provide much assistance to Mr. Fraser's contentions as both cases involved circumstances very different to those of the case at bar. In support of his submission that *res judicata* does not apply, Mr. Herelle referred to the decision of the Court of Appeal in **Analdo Bailey v St. Kitts and Nevis Cable Communications Limited**.⁷ In that case, the Court of Appeal held that the debt in question, which was owed to the respondent, had in fact not been litigated in the previous proceedings and hence *res judicata* did not apply.

⁵ [1947] 2 All ER 255.

⁶ [1996] 2 All ER 748.

⁷ Saint Christopher and Nevis Magisterial Civil Appeal No. 3 of 2004 (delivered 1st November 2004, unreported).

[32] The case of **Douglas O'Neal Creese v Vibert Creese**⁸ is instructive on this point.

In that case, Thom J (as she then was) opined:

“Where a claim was withdrawn and none of the issues raised in the claim were adjudicated upon, the doctrine of res judicata does not apply to prevent a party from raising the same issues in a subsequent proceeding. This issue was considered in **Land v Land [1949] AER p. 218**. In Land's case a summons by a wife for maintenance on the ground that her husband had deserted her was withdrawn after the wife had given evidence but before the Court made a ruling. The wife subsequently filed a second summons on the ground of the husband's desertion. The evidence given was substantially the same as in the earlier proceedings. It was argued on behalf of the husband that the wife was precluded from bringing a second summons on the same grounds. The Court held that the matter of complaint not having been adjudicated on, the wife was not estopped from proceeding with a second complaint based on the same matter.” (Emphasis added)

[33] Support for the position set out in **Creese v Creese**, is found in the decision of the Court of Appeal in **Marie Madeleine Egger v Herbert Egger**⁹ where Alleyne JA held:

“ [W]here there is a challenge as to the effect of a judgment, the binding authority of the judgment, in the sense of estoppel or res judicata, only arises when the Court has had the benefit of argument by counsel on both sides and has actually adjudicated the question...**a default judgment, is not the result of adjudication by the Judge, but...of failure of the defendant to take a procedural step within a prescribed time or at all.**” (Emphasis added)

[34] A careful examination of the case law in this area reveals that estoppel or res judicata can only properly be pleaded, and by extension relied upon, where the first claim was decided based on its merits, rather than by mere procedural prohibition. It is clear that the defendant's liability in relation to the debt was never put in issue as the claim was withdrawn against her before the matter was adjudicated. Moreover, as the first claim culminated in a default judgment, the issues raised in the claim were not decided on their merits and therefore cannot properly be said to

⁸ Saint Vincent and The Grenadines High Court Civil Claim No. 318 of 2004 (delivered 24th October 2005, unreported) at para. 13.

⁹ Saint Lucia Civil Appeal No.17 of 2002 (delivered 26th April 2004, unreported) at para. 67.

have been adjudicated. Accordingly, I am not of the view that the defendant has any real prospect of defending the claim on the basis of *res judicata*.

Forbearance Agreement

[35] Additionally, the defendant in her application briefly stated that on 17th April 2018, the Bank entered into a forbearance agreement with Mr. Felicien with respect to the said debt. A copy of the agreement was adduced. However, Mr. Fraser did not address the issue of the agreement in his written or oral submissions.

[36] In the written submissions filed on behalf of the Bank, learned counsel Mr. Herelle advanced a number of reasons why the defendant cannot rely on the forbearance agreement to defend the claim. Upon review of the agreement, I agree with Mr. Herelle that there is no mention of the defendant. The agreement speaks to a meeting with Mr. Felicien relative to the debts owed by Alwin Manufacturers Ltd., of which it was in default. The Bank therein agreed to forbear pursuing legal action on the conditions that (i) payments would be maintained at a minimum of \$500.00 per fortnight and would be made no later than the 15th and 30th of each month and (ii) that the bank does not waive the defaults and reserved its rights arising from these defaults, including the right of acceleration. I also note, as pointed out by counsel for the bank, that the agreement was dated after the date that judgment against Mr. Felicien and Alwin Manufacturers Ltd. was entered in suit SLUHCV2015/0847 and that it makes no reference to the claim or the judgment or any other claim for that matter. I am satisfied that the defendant is not a party to the forbearance agreement. Therefore, I do not consider that the defendant has a real prospect of successfully defending the claim on the basis of the agreement.

Conclusion

[37] For the forgoing reasons, I hereby make the following orders:

- (1) The defendant's application to set aside the judgment entered on 11th May 2018 in default of acknowledgment of service is refused; and

(2) The defendant, having been unsuccessful in her application to set aside the default judgment, shall pay costs to the Bank in the sum of \$750.00 to be paid within 21 days of the date of this order.

[38] I am grateful to counsel for their assistance in this matter. I deeply regret the delay in delivering this judgment.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar