

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**



Claim Number: **SVGHCV2018/0133**

Between:

**STEVE WALTON PIERRE
AKA STEVEN PIERRE**

Claimant/Respondent

-and-

ELDON SPECKS SAMUEL

Defendant/Applicant

Appearances:

Ms. Patina Knights for the Claimant/Respondent
Mr. Roderick Jones for the Defendant/Applicant

2019: January 16
February 20

JUDGMENT

Burnett, M (Ag):

The Application

- [1] This is an application by the defendant to set aside the Judgment in Default of Acknowledgement of Service (the Default Judgment) obtained by the claimant on the 16th day of November, 2018. The application is made pursuant to part 13.3 of the Civil Procedure Rules 2000, as amended ("CPR").
- [2] The Defendant's application identifies four (4) grounds, namely:
- a) The applicant/defendant applied promptly to have the Judgment set aside.

- b) The Judgment is irregular by virtue of the fact that the claim is for a specified amount and the claimant only provided evidence by way of invoice for part of the amount claimed.
- c) That the failure to file acknowledgement of service on time was due to the inexperience of secretary/legal clerk.
- d) That pursuant to natural justice the Defendant should be allowed the opportunity to defend the matter.
- e) The Defendant has a real prospect of successfully defending the matter.

Background

- [3] On the 14th day of September, 2018, the Claimant commenced proceedings against the defendant claiming the sum of \$39,719.38; damages for misrepresentation, interest, costs and further or other such relief as the court deems fit. The claim form, statement of claim, acknowledgment of service, and defence were personally served on the Defendant on the 2nd day of October, 2018.
- [4] The Defendant failed to file an acknowledgement of service within the time limit for so doing and on the 9th day of November, 2018 the Claimant filed a request for judgment in default of acknowledgement of service. This judgment was granted on the 16th day of November, 2018. According to the Defendant the judgment was served on him on or about the 11th day of December, 2018.
- [5] On the 7th day of December, 2018 and 4th day of January, 2019 the Defendant filed a notice of application and amended notice of application respectively to set aside the default judgment.
- [6] The application is opposed by the Claimant, on the ground that the Defendant failed to meet the criteria set out in Rule 13.3 of CPR.

The Law and its Application

- [7] Setting aside a default judgment is not something which the court will do lightly unless the Defendant has some convincing reason or reasons why a regularly obtained judgment should be set aside.
- [8] C.P.R. 13.3 gives the court the discretion to set aside a default judgment and provides the conditions under which the court may do so and states as follows:
 - 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 judgment has been entered.
 - b. Gives a good explanation for the failure to file an acknowledgement of service or a defence.
 - c. Has a real prospect of successfully defending the claim.
- 2) In any event the court may set aside judgment entered under Part 12 if the Defendant satisfies the court that there are exceptional circumstances.
- 3) Where the Rule gives the court power to set aside a judgment, the Court may instead vary it.

Was the Judgment Irregular?

- [9] Counsel for the Defendant contended that the judgment entered while regular was in fact irregular. He posited that the claim was for a specified amount and that the Claimant only provided evidence by way of invoice for part of the amount claimed.
- [10] Counsel for the Claimant submitted that once Rule 12.4 is satisfied the judgment can be properly entered, Counsel further submitted that the judgment was not given after a trial where the documentary evidence would have been provided.
- [11] From the request for the Entry for Judgment it was observed that the claimant apart from claiming a specified sum also made a claim for damages for misrepresentation to be assessed.
- [12] Rule 12.8 (3) states that if a claim is partly for a specified sum and partly for an unspecified sum the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum.
- [13] It would seem to this court that where this was not done as is the case at bar and is the case where no evidence is provided to prove the amount stated in the claim, the proper order of the court is for default judgment to be granted with damages to be assessed.
- [14] In the case of **Josephat Small v Thomas Ambrose**¹ Master Actie in addressing a similar issue stated:
 "The court in *Matthew Harris v Lindsay Mason (Trading as "Tropical Home Design Construction Services")*² states that there is nothing irregular in entering judgment for a specified sum with damages to be assessed in a mixed claim.
- [15] The scope of CPR 12.8(3) suggests that only claims within 12.8(2) are susceptible to default judgment by request. If an additional remedy is claimed, the Defendant can obtain default judgment if that additional remedy is abandoned in the request for default judgment³."

¹ Claim No. SLUHCV2008/1163

² GDAHCVAP2014/0028

- [16] It is noted in this claim that the Claimant claims for exemplary damages in addition to a specified sums stated in the claim. However, the request for judgment in default was silent on the claim for exemplary damages. It is imperative that the Claimant expressly states whether or not the other relief claimed is abandoned or is still being pursued.
- [17] "There must be finality in the assessment of damages. The court cannot be left to mere conjecture as to whether the other relief is abandoned or is still being pursued and infer an abandonment of the other reliefs. Where there are other reliefs which are not abandoned by the Claimant then judgment in default with an amount to be assessed is to be entered. Where the Claimant in a request for default judgment on a specified sum is silent on the other reliefs claimed in the statement of claim it was advisable to the court office to refer the request to a judge or master."⁴ I do not agree with Counsel for the Defendant that the judgment should be set aside for this reason. I am persuaded by the position taken by Master Actie in the Small v Ambrose case where she held that a failure to prove the specified amount in the claim and a failure to indicate whether or not the claim for exemplary damages or other relief are abandoned can be remedied by a simple amendment. Consequently, it is accepted that the judgment in default should have been entered for an amount to be assessed by the court and not for a specified sum as was granted in this matter. I so order.

Was the Application made within Reasonable Time?

- [18] The Defendant in his supplemental affidavit stated that he was served a copy of the default judgment on the 11th day of December, 2018. However, the notice of application which was filed to set aside the default judgment was filed at the court office on the 7th day of December, 2018.
- [19] The court has noted that the affidavit of the claimant stated that the Defendant was served on the 4th day of December, 2018. The court accepts that the judgment in default was served on the Defendant on the 4th day of December, 2018, and not on the 11th day of December, 2018 as the Defendant alleges. The court accepts that the Defendant has satisfied the requirement in CPR 13.3 that the application must be made within a reasonable time.

Does the Defendant have a Good Reason for the Delay in Filing the Acknowledgment of Service?

- [20] Counsel for the Defendant submitted that the reason for the delay was due to administrative negligence due to a change in staff. This was supported by an affidavit sworn to by Natalia Ollivierre. Counsel for the Claimant submitted that administrative laxity is not a good explanation to satisfy CPR Part 13.3.
- [21] In the case of Michael Laudat the A.G of Dominica and Danny Ambo HCVAP2010/0016, the Court of Appeal states:

"Finally we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order or practice direction where the

³ Civil Procedure White Book 2011 Vol.1

⁴ Claim No. SLUHCV2008/1163

explanation given for the delay is misapprehension of law⁵, mistake of the law by counsel⁶, lack of diligence, volume of work, difficulty in communicating with clients⁷, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence⁸, or inadvertence⁹."

- [22] I accept the legal principle in the Laudat case, I find the reason of administrative negligence to be inadequate for failing to file an acknowledgment of service.

Does the Defendant have a Real Prospect of Success?

- [23] The Defendant filed his notice of application on the 7th day of December, 2018 to set aside the default judgment. No draft defence was submitted. An amended notice of application was filed on the 4th day of January, 2019, neither was any draft defence submitted for the attention of the court.
- [24] The purpose of a draft defence is to enable the court in considering an application to set aside a default judgment to determine whether the Defendant has a real prospect of successfully defending the claim.
- [25] The defendant has failed on two occasions to provide a draft defence to the Court. What is before the Court is to determine whether the defendant has a real prospect of success? Nothing was provided to this Court.

Conclusion

C.P.R. 13.3 gives the court the discretion to set aside a default judgment and provides the conditions under which the court may do so.

It is also settled law that the requirements are conjunctive and must all be satisfied in order for a regularly obtained judgment to be set aside.

The defendant has failed to satisfy the requirement for setting aside the default judgment.

⁵ Richard Frederick and Owen Joseph and others St. Lucia Civil Appeal No. 32 of 2005 (Unreported)

⁶ Donald F. Conway and Queensway – Trustees, St. Christopher Nevis Civil Appeal No, 11 of 1999 (Unreported) 3/4/2000

⁷ John Cecil Rose and Anne Marie Rose St. Lucia Civil Appeal No. 19 of 2003 (Unreported) 22/9/03

⁸ Mills v John, OECS Law report Volume 3 page 597 per Liverpool JA, Vena McDougal and Reno Romain, Commonwealth of Dominica HCVAP 2008/0003 (Unreported) 7/4/08.

⁹ Anthony Clyne v The Guyana and Trinidad Mutual Insurance Co. Ltd., Grenada Civil Appeal v 11 of 2010 (Unreported) 5/5/10

Order

The Default Judgment made on the 16th day of November, 2018 is varied to read:

- 1) Judgment in Default of Acknowledgement of Service is granted to the Claimant for an amount to be assessed by the Court.
- 2) Application to set aside the default judgment is denied.
- 3) The Claimant to file application for assessment of damages.
- 4) Costs to the Claimant/Respondent to be assessed if not agreed.

Rickie Burnett
MASTER (Ag.)

By the Court

REGISTRAR'S OFFICE
[Signature]
ST. VINCENT AND THE GRENADINES
Registrar

