

THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

Claim No. SKBHCV2015/0283

Between:

MOHAMMAD SADIK ATASSI
CHIRIN ATASI

Claimant

And

RAGHED MURTADA
LIVENEVIS DEVELOPMENTS LIMITED

Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Mrs. Angela Cozier for the Claimant

Mr. O'Grenville Brown for the Defendants

2016: May, 10

Setting Aside Judgment in Default - Claim Against More Than One Defendant – Whether Court Office Can Enter Judgment in Default Against One of Several Defendants – Whether Application Must Be made to the Court

JUDGMENT

[1] **CORBIN LINCOLN M:** Live Nevis Development Limited (**LIVE**) has applied to set aside the judgment in default of defence entered against it on 10th February 2016.

- [2] Having considered the application I am satisfied that there are exceptional circumstances for setting aside the judgment in default under Part 13.3 (2) of **Civil Procedure Rules 2000 (“CPR”)** for the reasons set out herein.

Brief Summary

- [3] Mr. Mohammad Atassi and Ms. Chirin Atasi commenced a claim against Mr. Raghed Murtada and LIVE for various reliefs including rescission of various contracts and damages for fraudulent misrepresentation.
- [4] On 10th February 2016 Mr. Atassi and Ms. Atasi filed a request for judgment in default of defence against LIVE. The request asked the court office to enter judgment for , among other things, rescission of the various agreements and aggravated damages for fraudulent misrepresentation. I pause to note that **CPR 12.10 (4) and (5)** require a claimant to make **an application to the court** to determine the terms of the judgment where the claim is for some other remedy. A request for judgment in default cannot be made to the court office where as in this case the claimant was seeking remedies such as rescission.¹ These matters were addressed by Mitchell JA in **Dr. Miranda Fellows v Carino Hamilton Development Company Limited**.²
- [5] In any event, the court office entered judgment against LIVE for an amount to be determined by court.
- [6] LIVE has applied to set aside the judgment in default under **CPR 13.2 (1) and 13.3 (1)**. LIVE asserts that the court office did not properly enter judgment in default against it since the claim is against two defendants and the claim against the defendants cannot be dealt with separately.

¹ Unless of course the claim contains a claim for a specified sum together with other remedies and the claimant opts to abandon the other remedies and request the court office to enter judgment for a specified sum.

² NEVHCVAP2011/006

[7] I do not find that LIVE has satisfied the requirements for setting aside the judgment in default under **CPR** 13.3 (1) because I do not find that there is a good explanation for the failure to file a defence within the time fixed by the **CPR**.

[8] However, the court has a discretion under **CPR** 13.3(2) to set aside a default judgment if the applicant satisfies the court that there are exceptional circumstances to so do. In this case I am satisfied that there are exceptional circumstances for the reasons outlined below.

Analysis

[9] A good starting point is the **CPR** 12 which deals with default judgments.

[10] **CPR** 12.3 sets out the cases where permission is required to enter judgment in default. It states:

Cases in which permission required

12.3 (1) A claimant who wishes to obtain a default judgment on any claim which is a claim against a –

(a) minor or patient as defined in rule 2.4; or

(b) State as defined in any relevant enactment relating to state immunity;

must obtain the court's permission. □□

- *Part 59 deals with proceedings against the Crown. □*

- *Part 23 deals with proceedings involving a minor or patient.*

(2) A claimant who wishes to obtain judgment in default of acknowledgment of service against a diplomatic agent who enjoys immunity from civil jurisdiction by virtue of any relevant enactment relating to diplomatic privileges must obtain the court's permission.

(3) An application under paragraph (1) or (2) must be supported by evidence on affidavit. □

- *Rule 12.9(2) contains restrictions on a default judgment where it is sought against some but not all defendants*

- [11] It is not stated that permission of the court is required to obtain judgment in default when there is more than one defendant. However, at the end of the section it is stated:

“Rule 12.9(2) contains restrictions on a default judgment where it is sought against some but not all defendants.”

- [12] **CPR 12.9** states:

Claim against more than one defendant

12.9 (1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants – (i) the court may enter judgment against that defendant; and (ii) the claimant may continue the proceedings against the other defendants;

(b) cannot be dealt with separately from the claim against the other defendants, the court – (i) may not enter judgment against that defendant; and (ii) must deal with the application at the same time as it disposes of the claim against the other defendants.

- [13] I digress to note that **CPR 12.9** states that where the claim is for money or delivery of goods a claimant may apply for judgment in default against one of the defendants and proceed with the claim against the other defendants. This may suggest that in other kinds of claims if an application is made for judgment in default against one of several defendants the claimant *may not* proceed with the claim against the other defendants. I make no finding on this issue since it has not arisen for consideration in this application.

- [14] Returning to the issue under consideration, it appears to me from the wording of **CPR 12.9** that at least one of the restrictions contemplated where judgment in default is sought

against one of several defendants is that **an application** should be made **to the court** rather than a *request to the court office*. I say this because the rule states that if a claimant **applies** for default judgment, “*then if the claim (a) can be dealt with separately from the claim against the other defendants – (i) **the court** may enter judgment ... (b) cannot be dealt with separately... **the court** – (i) may not enter judgment...*” The section thus contemplates that “the court” as distinct from the “court office” may enter judgment in default against one of several defendants.

- [15] In my view there is valid and important reason why an application should be made to the court for judgment in default against one of several defendants. Where there is a single defendant the court office is simply required to be satisfied that the conditions of **CPR** 12.4 or 12.5 are satisfied to enter judgment in default. Where there are several defendants and judgment in default is sought against one a determination has to be made whether the claim can be dealt with separately from the claim against the other defendants. This involves a more complex analysis than that required under **CPR** 12.4 and 12.5.
- [16] In this case the claim is against two defendants. Mr. Atassi and Ms. Atasi sought judgment in default against LIVE only by filing a request for judgment in default at the court office. In my view the **CPR** requires an application to be made to the court rather than a request to the court office and does not give the court office the power to determine whether or not to enter judgment against one of several defendants. The **CPR** requires the application to be made to the court so that the court can determine whether to enter judgment in default against one of several defendants.
- [17] In the circumstance I am satisfied that there are exceptional circumstances for setting aside the judgment in default.
- [18] I note that LIVE has filed a defence outside of the time fixed by the **CPR** but has not made an application for an extension of time. Counsel for LIVE indicated that such an application

will be filed and counsel for the Mr. Atassi and Ms. Atasi indicated the intention to oppose such an application.

[19] It is therefore ordered as follows:

1. The judgment in default entered against the 2nd defendant on 10th February 2016 is set aside.
2. No order as to costs.
3. The 2nd defendant shall file and serve an application for an extension of time to file a defence within 7 days.
4. If the application is opposed, the claimants shall file and serve an affidavit within 14 days of service of the application.
5. The parties shall file and serve all submissions upon which they intend to rely at least 7 days before the hearing.
6. The matter is adjourned to 14th June 2016 for consideration of the application and further case management.
7. Counsel for the defendants shall have carriage of this order and shall file same within 7 days,

Fidela Corbin Lincoln
Master