SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 879 of 1994

BETWEEN:

DAVIJEAN INVESTMENTS LTD.

Plaintiff

v.

FRANCIS FELIX MARQUIS

Defendant

Mr. K. Monplaisir Q.C. and Miss H. Ali for Plaintiff
Mrs. C. Malaykan for Defendant

1996: July 17;
October 2.

J U D G M E N T

MATTHEW J. (In Chambers).

On November 16, 1994 the Plaintiff filed a writ of summons indorsed with statement of claim asking for damages for trespass to land, an order that the Defendant pull down, demolish and remove buildings on the Plaintiff's land, injunctive relief and further or other relief.

The Defendant was served with the writ of summons on February 28, 1995 and an appearance was entered on behalf of the Defendant on March 10, 1995.

On November 16, 1995 judgment in default of defence for damages to be assessed was entered against the Defendant.

There were other interlocutory proceedings between the Parties but they do not pertain to the present application by the Defendant to set aside the default judgment.

On April 23, 1996 the Defendant took out a summons to set aside a judgment in default of defence entered on January 16, 1996 and

filed an affidavit in support by Cornelius Daniel, a clerk in the employment of Peter I. Foster and Associates. In that affidavit he refers to a summons by the Defendant filed on October 30, 1995 and he alleges his belief that judgment in default of defence would not have been entered until the determination of that summons.

That allegation is preposterous. Further than that as submitted by learned Counsel for the Plaintiff and conceded by learned Counsel for the Defendant the decision in respect of the summons filed on October 30, 1995 given on January 16, 1996 did not deal with any application in respect of a judgment in default of defence. At the hearing learned Counsel for the Defendant specifically did not pursue an original application that the Defendant be granted leave to file and serve his defence.

At paragraph 6 Cornelius gives hearsay evidence as to what the Defendant told him to the effect that he was not aware that judgment in default had been entered against him. Assuming that this allegation is allowable it has merit only to the extent that the Plaintiff obtained judgment and did not serve the Defendant with a copy of the order.

But even if the judgment was not served on the Defendant it was a regular judgment which was entered. Nothing followed that caused any prejudice to the Defendant save a factor which will arise below.

In my view the default judgment entered could be regarded as regular. The Defendant despite this has submitted a draft defence which it will be necessary to examine before the Court's discretion can be invoked to set aside the default judgment.

In the course of her submissions learned Counsel for the Defendant submitted that he had a good defence. In reply to the submissions of learned Counsel for the Plaintiff she was of the view that

estoppel did not lie to prevent the Defendant from raising the present application.

Learned Senior Counsel for the Plaintiff resisted the application of the Defendant on three grounds. First of all he said there was too lengthy a delay between the filing of the judgment on November 16, 1995 and the application to set it aside made on April 23, 1996. A little while ago I referred to a factor which could have prejudiced the Defendant if he had not been served with a copy of the default judgment. There has been no response to paragraph 6 of the affidavit of Cornelius Daniel. If in fact the Defendant was not served with the default judgment promptly or at all then it could hardly be said that the delay taken in presenting this application is long.

Counsel for the Plaintiff then submitted that there were no merits in the defence to support an arguable case. In a fuller judgment to be delivered on October 2, 1996 I went into the principles which the Courts apply in setting aside default judgments. I set out in full paragraph 13/9/14 of the United Kingdom Supreme Court Practice 1995 and I went into the judgment of **ALPINE BULK TRANSPORT CO. INC. v. SAUDI EAGLE SHIPPING CO. INC.** That case showed that it is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". It stated that the Court must form a provisional view of the probable outcome of the action.

The decision also took into consideration the conduct of the Defendants in the case in deliberately ignoring the proceedings In my judgment an inordinate delay after the entry of a default judgment could be regarded as conduct to be taken into account but as indicated above I could not be in a position to say how long was the delay in this case.

Turning to the merits of the case learned Counsel for the Plaintiff submitted that there was not sufficient specificity in the defence to determine the relevant issues. To my mind it cannot be said that the statement of claim is any more specific. In earlier proceedings the Defendant had asked to strike out the Plaintiff's claim as disclosing no cause of action and one of the reasons stated for this was the fact that the statement of claim failed to state the title under which the Plaintiff claims to be the owner of the property and failed to refer to the nature of the deeds by which he held the land.

Although the Defendant failed to have the statement of claim struck out there was much merit in the criticism of the statement of claim. The defence must be considered along the statement of claim and I am not prepared to hold that the Defendant could not have a real prospect of success on the pleadings. By paragraph 2 of the defence he said he had been in possession of the property since 1965 and therefore has an overriding interest and that has not been denied.

Thirdly, the Plaintiff alleges that the Defendant is estopped from asking the Court to set aside the judgment. As authority for that proposition Counsel referred to Civil Appeal No. 20 of 1989 between **SUZANNA ISIDORE** and others against **CHRISTOPHER GEORGE**, a decision of Moe J.A. especially at pages 4 - 5 and to paragraph 1529 of Volume 16 of the Fourth Edition of Halsbury's Laws of England.

The case of Suzanna refers to "a wider principle . . . . . often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before a court in the earlier proceedings and which he chose not to put forward."

The heading of the paragraph of Halsbury is "Doctrine applicable wherever same cause of action determined on the merits."

The way in which Counsel seeks to base the principle is as follows: In previous interlocutory proceedings the Defendant had taken out a summons filed on October 30, 1995 asking for an order (1) that the injunction granted against him on March 8, 1995 be set aside; (2) that the statement of claim be struck out as disclosing no cause of action; (3) in the alternative that the Defendant be granted leave to file and serve his defence.

In the course of the hearing of the summons Counsel for the Defendant did not pursue the application for leave to file and serve the defence despite the Court's reminder of it to Counsel.

There was not a determination of the third matter on the merits in the previous proceedings and in my view estoppel does not lie to prevent the Defendant making the present application.

All that has been said above would be in the context that the default judgment was a regular judgment. A fortiori, if the judgment was irregular the Defendant should have the right to have the judgment set aside. This takes me to Order 19 of the Rules of Court - Default of pleadings.

I am of the view that Rule 7 of Order 19 would apply. The Plaintiff has made against the Defendant a claim of a description not mentioned in rules 2 to 5. The prayer to the Plaintiff's claim refers to an injunction which is not covered by Rules 2 to 5. The prayer also asks for an order that the Defendant do forthwith pull down demolish and remove the buildings erected on the Plaintiff's land. That too is not covered by Rules 2 - 5.

It is to be noticed that under rules 2 - 5 the Plaintiff is empowered to enter judgment against the Defendant. No such power is granted under Rule 7. Under that rule he can only apply to the Court for judgment and on the hearing of the application the Court shall give such judgment as the Plaintiff appears entitled to in

his statement of claim. Rule 7(3) states that such an application must be by summons or motion.

The Plaintiff cannot avoid the rule by entering judgment for damages to be assessed. Rule 7 applies where the Plaintiff makes a claim other than claims covered by Rules 2 to 5 and Suit 879 of 1994 was such other claim.

In the exercise of my judicial discretion I set aside the default judgment filed by the Plaintiff on November 16, 1995. I grant leave to the Defendant to file and serve his defence on the Plaintiff within 10 days failing which final judgment and costs to be taxed shall be entered in favour of the Plaintiff.

I order the Defendant to pay to the Plaintiff costs in any event to be agreed or taxed occasioned by the setting aside of the default judgment.

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A.N.J. MATTHEW
Puisne Judge