SAINT LUCIA

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

SUIT NO. 62 OF 1995

BETWEEN:

SAINT LUCIA CO-OPERATIVE BANK LIMITED

Plaintiff

and

1. MICHAEL MOLINARO
2. THERESA MOLINARO

Defendants

Mrs. B. Floissac-Fleming for Plaintiff
Mr. P. I. Foster for Defendants

1996: July 24;
November 4.

J U D G M E N T

d'Auvergne J. (In Chambers).

By a writ of summons indorsed with a statement of claim filed on the 24th of January, 1995 the Plaintiff claimed the following.

(a) the sum of $195,974.20

(b) interest thereon at 14% per annum from 3rd November 1994 to date of payment.

(c) 10% collection fee and

(d) the costs hereof.

On the 8th of February 1995 an appearance was filed and on the 28th March, 1995 an affidavit of service was filed which stated that the first named Defendant had been served on the 30th of January 1995.

Default Judgment dated 28th March 1995 was filed on the 28th April, 1995 and reads as follows:

"No defence having been served by the defendants herein, it is this day adjudged that the defendants do pay the Plaintiff the sum of $195,974.20 interest thereon at the rate of 14% per annum from 3rd November, 1994 to date of payment, 10%

Collection fee and Costs."

On the 5th day of January, 1996 an application to set aside the Judgment by Default supported by an affidavit of Michael Molinaro, the first Defendant was filed.

The said affidavit reads as follows:

I MICHAEL MOLINARO of Vieux-Fort in the State of Saint Lucia, doth make oath and say as follows to wit:-

1. That my wife Theresa Molinaro (now residing in the U.S.A.) and I are the Defendants in this suit, and that I am duly authorised to swear to this Affidavit.
2. That we have been sued by the Plaintiff herein for the sum of $183,909.53 allegedly due and owing at 2nd November, 1994 as well as for interest in the sum of $12,064.68 to 2nd November, 1994.
3. That we are not owing these sums of monies since we have repaid sums totalling about $200,000.00.
4. That we doth honestly and verily believe that we have a good Defence with a chance of success which sheweth that the Plaintiff's accounts in mistakenly incorrect, more particularly, as we have never been shown these accounts as to any payments against principal and those against interests.
5. I humbly ask that the said Judgment entered by Default be set aside.

The matter was set down to be heard on the 26th of January, 1996 and after four (4) adjournments was eventually heard on the 24th of July, 1996.

Meanwhile, on the 5th of June, 1996 a Defence was filed on behalf of the Defendants (herein after referred to as the Draft Defence).

On the 10th of July, 1996 an Affidavit in Reply was filed by Robin Seales, branch manager of the Plaintiff and on the 23rd day of July, 1996 a Supplementary Affidavit by Alnita Simmons, Managing Director of the Plaintiff was filed.

The latter affidavit was supported by an exhibit namely Hypothecary Obligation dated 25th April, 1984 by Michael Vivian Molinaro, Theresa Molinaro (Elritha Molinaro as Surety) in favour of The Saint Lucia Co-operative Bank Limited. To secure "Debts and liabilities" up to a limit of $150,000.00 with interest thereon at the rate of 14% per annum.

At the trial learned Counsel for the Defendants informed the Court that to date the Judgment obtained in default of Defence on the 28th day of March and filed on the 28th day of April 1995 had not been served upon the Defendants.

By the application to set aside the Judgment by Default, the Supporting Affidavit and the draft defence, the Defendants appear to be denying that they owe the Plaintiff the sums claimed.

The affidavit in reply by Robin Seales, the branch manager of the Plaintiff indicates that the Defendants was granted an original loan (registered on the 3rd May, 1984 in Vol. 137a No. 143964) for the sum of $150,000.00 repayable over 10 years at the monthly payment of $2,420.00, that from the inception the Defendants never met the required monthly repayments of the said $2,420.00 which resulted in an increase of the mortgage loan, that the Defendants queried the balance, the mortgage loan was recalculated by the Plaintiff and an amount of $29,871.09 which had been overcharged in interest was refunded in reduction of the mortgage loan and the monthly payment on the mortgage loan was recalculated so that the required monthly payment was reduced to $1,982.27; that despite the reduction the Defendants have failed to meet the said payment, but have been paying an average monthly payment of $1,037.34 which is

insufficient and has thus increased the mortgage loan balance and that despite the fact that the Defendants have made more than 10 years of mortgage payments, that on the 22nd day of November, 1995 the mortgage loan stood at $207,406.45 and was made up as follows:

(a)	Interest payments	$174,063.10
(b)	Principal payments	$ 33,343.35
		$207,406.45

and that the balance on the 9th July, 1996 is as follows:

(a)	Principal	$186,109.53
(b)	Interest	$ 36,617.51
		$219,717.04

The Supplementary Affidavit of Alnita Simmons, Managing Director of the Plaintiff is in fact a reply to the draft defence filed on the 5th June, 1996.

In that affidavit Alnita Simmons denies every paragraph of the Defence and further states that any installment payments made in the period 1985 - 1987 were duly recorded and that the defendants' loan account was accordingly adjusted and that the contentions raised in the defendants' defence does not justify the grant of leave to the defendants to set aside the Judgment entered by default and that the application by the defendants be dismissed.

Learned Counsel for the defendants (from his written skeleton arguments) submitted that Order 19 of the Rules of the Supreme Court 1970 provides for the setting aside or the varying of any Judgment entered in default of Defence.

He commenced his arguments by repeating the position as stated in the classic case of **Evans v. Bartlam 1937 AC 473**. He referred to **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.** reported at 1986 2 Lloyd's Rep. 221 and the recent decision of the Court of Appeal of Barbados in **Bank of Nova Scotia v. Emile Elias & Co. Ltd.** reported in (1992), 46 WIR Page 33.

The decision held in that case is that in order to set aside a Default Judgment a Defendant must show not merely that it has an arguable case but that its defence has merits to which the Court must pay heed.

Learned Counsel submitted that the defendants have an arguable case He said that the plaintiff is firstly, charging the defendants compound interest instead of simple interest and asserts that it is entitled to do so when in fact it is not and secondly, that it is claiming an amount well in excess of what it should be claiming.

Learned Counsel quoted Halsbury's Laws of England, Vol. 26 - 4th Edition, Paragraph 559 which states:-

> *"When a judgment in default of appearance or defence has been entered . . . . . or it has been entered for a greater amount than is due . . . . . it will be set aside ex debito justitiae, apart from any consideration as to whether there is a good defence on the merits."*

He further referred to Paragraph 519 of the above stated volume of Halsbury's and in particular footnote 6 which reads:-

> *"The plaintiff may show by Affidavit in Reply that the Defence set up is a sham or is unfounded in fact, but in order to succeed he must make this clear beyond all reasonable doubt by conclusive documentary or other evidence."*

Learned Counsel submitted that there are substantial questions of law to be tried and investigated with reference to the interest rate method of interest charges whether it was simple interest or compound interest and referred to Articles 1009 and 1685 of the Civil code, and substantial questions of fact (which he enumerated) to be investigated.

Learned Counsel for the Plaintiff commenced her arguments by stressing that the judgment that learned Counsel for the Defence

was trying to set aside is a regular judgment.

She argued that it was not only whether the defendants have "an arguable case" the standard indicated in **Evans** v. **Bartlam** but as Sir Roger Ormrod said in the "**Saudi Eagle**" case, the "arguable" defence must carry some degree of conviction.

She contended that the defendant's defence does not demonstrate a likelihood of success. She said that the 10% Collection Fee is for services by Counsel for debt collection and has been accepted by the Bar of St. Lucia and pointed out that collection fee was claimed in the prayer and quoted paragraph 396 and 397 of Vol. 37 of Halsbury's Laws of England, 4th Edition. She quoted Article 1009 of the Civil code referred to earlier and urged the Court to note the Hypothecary Obligation tendered as an exhibit. At letter (e) "The Debts" means all sums of money (up to a limit of one hundred and fifty thousand ($150,000.00).
e(iii) "Charges for interest discount commission and other usual banking charges."
(iv) "all costs charges and expenses which the mortgage may incur in obtaining payment or discharge of monies owed by the Principal Debtor to the mortgagee or any part thereof or in paying any rent rates taxes . . . . . ."

She said that the agreed rate varies, it is not static and in this instance it varied from 11% to 14%.

She argued that the defence being sought to be filed was a sham and the application should be dismissed, that in the alternative the judgment should be set aside on terms and quoted Order 13, Rule 8 of the Rules of the Supreme Court of the West Indies Associated States 1970 and Order 13, Rule 9 sub-paragraph 14 of the United Kingdom Supreme Court Practice 1995.

She concluded her arguments by repeating that the application

should either be dismissed or the defendants should be ordered to pay into Court part of the judgment debt as the Court thinks fit, if the application be upheld.

Having listened to the arguments, I have arrived at the conclusion that the defendants have demonstrated that they have a likelihood of success and therefore in the exercise of the discretionary powers invested in me, I grant leave for the defendants to refile and re-serve the defence on the plaintiff by the 11th of November, 1996. I have ordered to refile and re-serve since the defendants have already done so, albeit without the authority of the Court failing which judgment and costs to be taxed shall be granted to the plaintiff.

The defendants are to pay costs in any event to be agreed or otherwise taxed occasioned by the setting aside of the default judgment.

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SUZIE D'AUVERGNE
Puisne Judge