SAINT LUCIA:

IN THE HIGH COURT OF JUSTICE

Suit No. 983 of 1999

BETWEEN:

NEVILLE CENAC
JULITA CENAC

Plaintiffs

and

DAVID TATE
DEBRA TATE

Defendants

Miss Cybelle Cenac for Plaintiffs
Miss Estelle George for the Defendants

2000: October 13;
November 29.

JUDGMENT

[1] **d'AUVERGNE J:** By Summons dated 8th March 2000 and filed on the 9th March 2000 the Defendants' application sought the following: *that the Judgment filed in default of defence on the 27th day of January 2000, the order dated 1st February and the Writ of Execution filed on the 28th January 2000 be set aside, or struck out and or dismissed or stayed, and that the Defendants be granted leave to file and serve their defence out of time and that the matter thereafter take its normal course, and that the cost of the application be cost in the cause.*

[2] The Summons was supported by an affidavit of the first-named Defendant who deposed that his original solicitor in St. Lucia was Mr. Dexter Theodore, the nephew of the first-named Plaintiff; that the said solicitor

executed an agreement for sale between the Plaintiffs and the Defendants where it is stated by clause 2 that *"before the closing date the property shall have passed an independent inspection to the satisfaction of the purchaser."* He deposed that no such inspection ever took place and moreover the property was plagued with faults which were detailed in a letter (exhibited) to Mr. Theodore dated 20th October 1999.

[3] He further deposed that the first-named Plaintiff was claiming the "deposit" of EC$100,000.00 whereas by paragraph 3 of the said agreement the first-named Plaintiff then the first-named vendor acknowledged receipt of the said deposit meaning the sum of EC$100,000.00, that the Plaintiffs were fully aware of the numerous faults existing with the property but rather misrepresented and induced the Defendants to purchase the property. He concluded by stating that the Defendants had a good and arguable defence and a good chance of success.

[4] I pause here to note that a draft Defence and Counter-Claim was exhibited with the application.

[5] On the 14th day of April 2000 three affidavits were filed on behalf of the Plaintiffs, one of which was deposed to by the first-named Plaintiff. The gist of his thirty-three paragraphed affidavit is that the first-named Defendant depended on the income he would have earned as a financier from Caribbean islands he worked for and that not knowing whether his enterprise would have thrived he placed an *"escape clause"* in the agreement and manufactured the serious faults he complained of; that he used various tactics to get his belongings out of St. Lucia but which were only returned because of a Writ of Seizure.

[6] He said that the Defendants owed him a few months rental and never paid the deposit of $100,000.00 or any part of it. He concluded by stating that

the Defendants were not resident in St. Lucia and that their behaviour in endeavouring to remove from St. Lucia their only assets therein without paying arrears of rent in respect of the said house and also without paying the deposit indicated that they did not intend to pay them and therefore would urge the Court to order the applicants to pay the amount of the judgment including costs should the judgment be set aside.

[7] Peter Felix a building Contractor and plumber of Bonne Terre deposed that he visited the house in question and found absolutely no water seeping through the roof or the walls.

[8] Timothy James deposed that the first-named Defendant contacted him through his "St.Lucia one stop" website and that he in turn introduced him to the first-named Plaintiff and visited the property along with the first-named Defendant.

[9] On the 17th day of April 2000 Dexter Theodore barrister-at-law deposed to an affidavit stating when and how he met the first-named Applicant, of his promise to deposit the EC$100,000.00 into his (Theodore's) clients' account but he never deposited the same or any part thereof and that it was seven months after meeting the first-named Defendant that the first-named Plaintiff informed him of the arrears of rental by the Defendants and requested permission to withdraw rental from the "deposit" whereupon he informed him that the "deposit" had ever been paid.

[10] On the 30th May 2000 Notice of Intention to cross-examine Defendant David Tate was filed and served. The day after a report of Mr. Lester B.R. Arnold, Civil Engineer was filed in support of the Plaintiff.

[11] At the hearing, Learned Counsel for the Defendants told the Court that the claim was founded on an agreement dated 29th December 1999 which the

Defendants are alleged to have breached and judgment was obtained in default on the basis of the Plaintiff's claim. She said that there were many serious issues to be tried for example, the property in question should have been inspected and upon inspection were found to have numerous defects.

[12] She further informed the Court that at the time of the alleged breaches the parties were represented by the same solicitor and it was thereafter the Defendants had to seek a change of solicitor. She quoted the case of:

(i) **Evans v Bartham** 1937, 2 ALL ER Vol2, page 646;
(ii) **Royal Bank of Canada vs Benetton (St. Lucia) Ltd. v Traci Betts** 143 of 1995;
(iii) **Order 13 Rule 9/14 of United Kingdom Supreme Court Practice 1995**

[13] Learned Counsel for the Plaintiffs commenced her argument by informing the Court that the affidavit of Davit Tate, the first-named Defendant filed on the 9th March 2000 was invalid under **Article 38 of the Code of Civil Procedure** which states that an affidavit from any Country must bear the "*Common Seal of such country, Borough or Incorporated town"*. She, however told the Court that she would waive that point.

[14] She said that the Draft Defence filed was without merit and gave a summary of the affidavits filed on behalf of the Plaintiffs and then concentrated on the affidavit of Neville Cenac, first-named Plaintiff. She said that the latter never induced the Defendants to rent his premises, that with regard to the inspection of the premises she argued that no closing date had been set and, moreover, there was no indication as to who would carry out the inspection and that either of the parties could have carried out the inspection through someone qualified to do so, not by the first-named Defendant himself.

[15] She argued that it was undisputed that Defendants commenced occupation of the property from 1st July 1999 and it was only upon approval of the first-named Defendant's Alien's Landholding Licence that he started outlining alleged defects which he never showed to the Plaintiff's; that he had sufficient time to put in his defence, but he only did so when the Writ of Seizure was filed.

[16] She concluded by urging the Court to dismiss the application with costs or alternatively that the Defendants be asked to make payment into Court as security for costs. She said that the Defendants were not residents of St. Lucia and are not easily located.

Conclusion

[17] At page 6 of the **St. Lucia Case Suit 143 of 1995 namely Royal and Benetton (St.Lucia) Ltd and Traci Betts** *Matthew J.* as he then was enumerated the principles which Courts apply in setting aside default judgments. I adopt and reiterated those principles.

[18] Learned Counsel for the Plaintiffs spent a long time arguing, giving reasons why the application should be dismissed with costs. These arguments therefore led me to the conclusion that there is a case to answer. I then considered the draft defence filed with the application in order to ascertain whether the defence has merits to which I should pay heed and why was the default allowed to occur.

[19] Having examined the defence in accordance with the principles laid down in **Saudi Eagle 1986** 2LLR 221; 223. I find that there is "*a real prospect of success"* with *"some degree of conviction"*. In the **Saudi case** [supra] it was found that the Defendants had taken a deliberate decision not to defend the Plaintiffs' claim because the Defendants had no assets but upon remembering that the Plaintiffs had earlier obtained security in

respect of the matter and were holding a bond, they applied to set aside the judgment.

[20] The present case, in my judgment, can be distinguished in that the application to set aside was done within a reasonable time and that the Defendants have set up defences which show a real prospect of success, that is, if the evidence is forth coming. However, because of the difficulty involved in locating the Defendants which, a perusal of Sheriff's Minutes on file will show, I think it prudent to order the Defendants to pay into Court Security for Costs. (Case of **Allen v Taylor** [1992] PIQR 255 considered).

[21] As stated earlier, I think the defence has merit and that the Defendants should have a proper adjudication on the merits.

[22] **My Order is as follows:**

(1) In the exercise of my discretion I set aside the default judgment filed by the Plaintiffs on the 27th day of January 2000 and I grant leave to the Defendants to file and serve their defence on the Plaintiffs within twenty-eight (28) days.

(2) That the Defendants do deposit the sum of EC$100,000 as security within twenty-eight (28) days of this judgment

(3) Failure to adhere to (1) and (2) above will result in judgment and costs to be taxed in favour of the Plaintiffs.

(4) That the Defendants do pay costs in any event to the Plaintiffs occasioned by the setting aside of the default judgment to be agreed or otherwise taxed.

SUZIE d'AUVERGNE
High Court Judge