THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 552 OF 2002

BETWEEN:

DIANE C. O'NEAL

Claimant

AND

IVAN O'NEAL

Defendant

Appearances:
Mr. S.E. Commissiong for the Claimant
Mr. Emery Robertson for the Defendant

2007: April 4th

DECISION

[1] **COTTLE, M.**: On 18th December, 2002 the Claimant applied for an injunction to restrain the defendant from building on lands described as Lot 18 on deed 1539/98. The injunction was granted by Alleyne J, as he then was on the undertaking of the Claimant to file a claim form by 20th December 1998.

[2] The Claimant filed the claim form on 19th December 1998. On 6th January, 2003 the defendant filed an acknowledgement of service admitting that he had been served on 30th December, 2002. No defence was filed by the defendant.

[3] On 21st October, 2004 the Claimants applied for judgment to be entered for the Claimants in terms of the statement of claim on the basis that the defendant had failed to file any

defence. The application was supported by an affidavit of the Claimant with exhibits attached including deed 1539/98 which showed the legal title in Lot 18 to vest in the Claimants. The application, with the supporting affidavit and exhibits , was served on the defendant on 28th October, 2004.

[4] The parties appeared before me in chambers on 3rd November, 2004. The defendant was unrepresented. The matter was adjourned to permit the defendant to put in a defence. He was ordered to file a defence by 24th November, 2004. He was advised to seek legal advice.

[5] On 18th November, 2004 the defendant filed a affidavit in reply to the application for judgment. He still did not file any defence.

[6] At the hearing on 30th November, 2004 the defendant was present. He was still not represented by Counsel. I granted the Claimant application for judgment in terms of the statement of claim.

[7] On 16th February, 2006 the defendant filed the present application seeking to have the judgment set aside. Alternatively he seeks an order that his affidavit filed on 19th November, 2004 "stand as a pleading in this matter".

[8] The Defendant is now represented by Counsel. On his behalf Mr. E. Robertson now suggests that the judgment entered for the Claimant be set aside on several grounds.

[9] Firstly, he says, The Claimants sought and were granted a declaration. This should not be done as according to Megarry VC in Metzger et al v Department of Health and Social Security (1977) 3 All ER 444, declarations by the Court are only to be made after proper arguments. With the greatest respect for Counsel I do not agree that the effect of this authority is as he urges. Megarry VC was speaking of declarations of Law. This claim has to do with a declaration of fact. Here the Claimants aver in their pleadings that they are the fee simple owners of parcel 18. They exhibited a deed evidencing this. Despite

having been permitted time to put in a defence the defendant failed to do so. In the circumstances I am convinced that it was proper to grant the Claimants such relief as it appeared they were entitled to obtain on the pleadings.

[10] Secondly, Mr. Robertson goes on, the Court should view the matter as a simple administrative judgment in default of defence and consider the factors laid down in CPR 2000 par 13.3 and grant the defendant relief.

[11] Part 13.3 requires the Court to consider three factors when deciding whether to set aside a judgment in default. The defendant should give a good reason for his failure to defend in time. He must apply to have the judgment set aside promptly. He should demonstrate that he has a defence with merit.

[12] In the instant case the defendant has not applied to have the judgment set aside as soon as reasonably practicable. The defendant was present when the judgment was given against him on 30th November, 2004. The application to set aside was not made until 16th February, 2006. In this affidavit in support the defendant says that he did not apply to have the judgment set aside as he had been trying to persuade the Claimants "that they were proceeding in a wrong direction". I do not consider this to provide a good explanation for his failure to apply promptly to have the judgment set aside.

[13] The defendant in his affidavit offers no explanation for his failure to defend at all despite the adjournment to permit him to defend.

[14] Mr. Robertson for the defendant cites the case of Thorne plc v Mc Donald 1999 CPLR 660 where the United Kingdom Court of Appeal approved principles to be considered when the Court is deciding whether to set aside a judgment in default. He argues that the primary considerations are whether there is a defence with a real prospect of success and that justice should be done;

[15] It is important, when considering this aspect of Mr. Robertson's submission, to bear in mind that the language of part 13.3 of the CPR 2000 differs markedly from that of the United Kingdom rule. Part 13.3 (1) of the United Kingdom Civil Procedure Rules permits a Court to set aside a regularly obtained default judgment if

(a) The defendant has a real prospect of successfully defending the claim or

(b) it appears to the Court that there is some other good reason why

(i) The Judgment should be set aside or varied ; or
(ii) The defendant should be allowed to defend the claim.

The relevant provisions of our CPR 2000 reads

13.3 (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 had been entered;
(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
(c) has a real prospect of successfully defending the claim.

[16] I have no difficulty in agreeing with the proposition that the existence of a valid defence is the factor to which a court may decide to attach the most importance. However where the defendant , as in the instant case, has not applied promptly and offers no good explanation for his failure to defend in time, he operates at a significant disadvantage.

[17] I do not consider that the defendant has been able to overcome that disadvantage. I consequently decline to set aside the judgment obtained for his failure to defend.

[18] I award the Claimant costs of this application in the amount of $1,400.00.

BRIAN S. COTTLE
MASTER