IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2007/0372

BETWEEN:

PETER JOSEPH

Claimant/Respondent

And

CLETUS EDWARDSON

Defendant/Applicant

Appearances:
David Moyston for Claimant/Respondent
Horace Fraser for Defendant/Applicant

2008: November 18;
2009: January 22.

DECISION

[1] **GEORGES, J.:** Pursuant to Parts 11 and 13 of the Civil Procedure Rules 2000 the applicant by Notice of Application filed 2nd October 2008 applied to the Court for the following orders namely:

(1) That the Judgment in Default of Defence dated the 22nd November 2007 be set aside.

(2) That the case management order dated 4th February 2008 be vacated and/or set aside.

(3) That leave be granted to the Defendant to defend these proceedings and to file and serve a defence herein.

[2] The grounds for the application are:

(a) That the Applicant has a good defence which goes to the whole of the Claimant's Claim on merit.

(b) The Applicant did all that he could have done to ensure that he file his defence in these proceedings.

(c) The Applicant made a timely application to have the said Judgment in Default set aside but his application was dismissed but not on merit.

[3] Rule 12.5 of the CPR sets out the conditions which must be satisfied by a claimant to obtain entry of judgment for failure to defend and states insofar as this application is concerned that:

"The court office at the request of the claimant must enter judgment for failure to defend if –

(a) (i) the claimant proves service of the claim form and statement of claim; or

(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(c) the defendant has not –

(i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)).

[4] Rule 13.2 (1) (b) states that:

> The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –
>
> (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

[5] Rule 13.3 (1) stipulates that:

> (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 acknowledgment of service or a defence as the case may be; and
>
> (c) has a real prospect of successfully defending the claim.

[6] It is imperative therefore that a defendant applying to set aside a default judgment must come within the ambit of rule 13.3 (1). The power of the court is discretionary and must be exercised in keeping with the overriding objectives of Part 1 of these rules.

[7] Perusal of the case file shows that the claim form and statement of claim which were filed on 11th May 2007 were duly served on the defendant personally on 25th June 2007 who through Counsel then acting on his behalf filed an acknowledgment of service on 4th July 2007. The defendant would therefore have had 28 days after 25th June 2007 to file his defence.

[8] In his reply to the applicant's notice to set aside the default judgment and case management order and for leave to defend counsel for the claimant states at paragraphs 4, 5 and 6 that following filing of the acknowledgment of service:

> (4) That Counsel acting on behalf of the Applicant/Defendant requested orally on two (2) occasions extensions of time to file a defence.
>
> (5) That Counsel for the Respondent/Claimant in a letter dated the 5th day of September 2007 acceded formally by means of a letter to Counsel for the Applicant/Defendant to those requests by granting an extension of, "a further seven (7) days hereof to file the said defence."
>
> (6) That prior to filing the Request for Entry of Judgment in Default on the 9th day of November 2007 a search was conducted by the legal clerk of Counsel for the Respondent/Claimant, MIKE CELESTIN revealing no defence had been filed up to and including the above-mentioned date.

[9] On 22nd November 2007 Master Cheryl Mathurin duly entered judgment for the claimant with terms to be decided by the Court on application. By notice filed 7th December 2007 the Defendant applied to have the default judgment set aside and for liberty to file and serve a defence (albeit out of time).

[10] In paragraphs 4, 5 and 6 of his affidavit in support the defendant avers that:

> (4) After the said Appearance was entered there began a series of negotiations between the solicitor of the Claimant and the Defendant with a view to clarify issues and dealing and settling any outstanding sums. This period of negotiation co-instead (sic) with the court holidays.
>
> (5) The series of negotiations aforesaid, precluded the Applicant from filing a Defence as this was contrary to the spirit and intendment of the

negotiations. Notwithstanding this, a Defence was made available to the Solicitor for the Claimant.

(6) That contrary to the spirit and intendment of negotiations as aforesaid the Claimant sought and obtained a Judgment in Default of Defence against the Applicant on the 22nd November 2007.

[11] That in my view hardly affords a good explanation for failure to file the defence bearing in mind that time for so doing had already expired and had been further extended by the claimant to 12th September 2007. Up to 22nd November 2007 no defence had yet in fact been filed although if the defendant is to be believed one had been prepared for some time.

[12] After careful perusal of the draft defence exhibited with the affidavit in support I felt at pains to discern even an arguable defence let alone a real prospect of successfully defending the claim which is the criteria to be met by rule 13.3 (1) (c) and constitutes the major consideration in applications of this kind.

[13] On 30th January 2008 Justice Brian Cottle refused the application filed 7th December 2007to set the default judgment set aside with neither counsel for the defendant nor the defendant himself being present to prosecute the application. On 4th February 2008 upon the application of the claimant to determine the terms of the judgment entered on 22nd November 2007 and after hearing counsel for the parties Master Pearletta Lanns adjudged that the defendant pay the claimant the sum of $33, 255.56 inclusive of interest and costs and ordered the return of the claimant's vehicle in a roadworthy condition within 6 months. And there the matter rested until the instant application was filed on 2nd October 2008 by different counsel now acting for the defendant.

[14] The application was stoutly resisted by Mr. David Moyston Counsel for the claimant/respondent who after summarizing the history of the matter submitted

that it was palpably plain that the applicant had completely failed to give a good explanation for his failure to file a defence within the time prescribed by Rule 10.3 (1) of the CPR i.e 28 days after the date of service of the claim form on him which had been personally effected on 25th June 2007.

[15] At paragraphs 4 and 5 of his affidavit in support of his application to set aside the default judgment the defendant/applicant avers:

> 4. That I am advised by Mr. Nicholas Jean Baptiste and verily believe that he and counsel for the Claimant entered into a series of negotiations as regards settling these proceedings amicably and this precluded him from filing a defence, though it was drafted and was ready for filing.
>
> 5. That I am further advised by Mr. Nicholas Jean Baptiste and verily believe that he made a copy of the defence available to counsel for the Claimant and he held firm to the view that no further steps were going to be taken by the Claimant because of ongoing negotiations. But contrary to the spirit and intendment of the negotiations the Claimant sought and obtained a judgment in default of defence against me without any indication or warning that the negotiations option was closed.

[16] I am persuaded to believe and accept that counsel for the applicant on two occasions orally requested extensions of time to file a defence and that counsel for the claimant by letter dated 5th September 2007 formally acceded to those requests by granting an extension of a further seven days to file the said defence from that date.

[17] Having regard to all the circumstances it is difficult to imagine how ongoing negotiations towards settling the proceedings amicably could have precluded counsel for the defendant from filing a defence ("though it was drafted and ready for filing" and a copy had been made available to counsel for the claimant) within

the extended time granted for so doing. This is clearly negated by the fact that by letter dated 5th September 2007 counsel for the claimant had written to counsel for the defendant granting an extension of "a further seven days to file the said defence." Neither counsel for the defendant nor the defendant himself can in my view seriously maintain that they had been lulled into believing that the defence ought not to have been filed when it should. Indeed the need to comply with time limits and generally to act promptly is a feature of the CPR.

[18] Even as late as 9th November 2007 when the Request for Entry of Judgment in Default was filed no defence had yet been filed. I am therefore satisfied that the inordinate delay and total failure to file a defence within the prescribed period as well as the extension granted for so doing coupled with failure to give a good explanation therefor are fatal to this application.

[19] And more seriously is the failure of the applicant to put forward a defence with a real prospect of successfully defending the claim which is the major consideration here. For close examination of the draft defence exhibited with the present application reveals that it is by and large simply a replication of the draft defecne which was exhibited with the application filed on 7th December 2007 which came before Cottle J on 30th January 2008 and which I held at paragraph 12 does not even show an arguable defence let alone a real prospect of successfully defending the claim.

[20] Learned Counsel for the defendant contended that the present application had been filed because the merits of the case had not been decided upon and in this regard he relied on the Court of Appeal decision of Trinidad & Tobago in Martin v Chow (1985) 34 W.I.R. He further contended that failure to file the defence was the attorney's fault and that the defendant had done everything he could and should have done. I do not agree that blame for failure to file the defence should be attributed to the defendant's attorney alone or substantially for that matter in light of all the circumstances set out in the defendant's affidavit in support.

[21] The case of Martin v Chow is in my view readily distinguishable from the instant case in that in granting a third application for an extension of time in which to lodge an appeal the Court of Appeal held that although earlier applications had been struck out they had not been dismissed on their merits and that the respondent could not accordingly plead res judicata so as to preclude the applicant from making a third application. Moreover the applicant had advanced good and substantial reasons for the delay and had shown that exceptional circumstances existed which entitled him to relief which certainly in my judgment is not the case here.

[22] It is my considered view that the ratio in that case is not applicable to the facts of the instant case. The issue here is failure on the part of the defendant to give a good explanation for not filing a defence pursuant to Rule 13.3(1) (b) CPR after an acknowledgment of service had been filed on his behalf and more importantly failure to demonstrate that he had a real prospect of successfully defending the claim pursuant to Rule 13.3 (1) (c) to warrant interference by the Court. And the interests of justice requires no less.

[23] Application to set aside judgment in default of defence dated 22nd November 2007 and case management order dated 4th February 2008 is dismissed. Leave to defend is refused. Costs to the claimant/respondent in the amount of $1500.00 in accordance with Rule 65.11 (7) CPR.

EPHRAIM GEORGES
HIGH COURT JUDGE (AG.)