

SAINT LUCIA

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

SLUHCV 2007/0998

BETWEEN:

1st NATIONAL BANK OF ST. LUCIA LIMITED

Claimant

AND

**(1) UNIVERSAL FISHING AND TRADING COMPANY LIMITED
(2) ALOYSIUS HYACINTH also known as AL HYACINTH
(3) PHILIPPE ZELIE**

Defendants

Appearances:

**Ms. Sardia Cenac and with her Mr. Geoffrey Duboulay for the Claimant.
Mr. Eghan Modeste for the First and Second Defendants.**

2010: OCTOBER 28th & 29th.

RULING

- [1] **WILKINSON J.:** The Second Defendant, a director of the First Defendant filed a notice of application on 19th October 2010 and therein sought an order that the judgment in default of defence entered 30th March 2009, be set aside and that the notices of judicial sale of the Second Defendant's property in issues 35 and 36 of the Gazettes dated 30th August 2010 and 6th September 2010, respectively be withdrawn by the Claimant.
- [2] The matters set out as grounds in the application and affidavit of the Second Defendant in support related primarily the history of the suit, the winding up of the First Defendant and appointment of a liquidator. The first notable ground stated was that by virtue of section 394 of the Companies Act,

Chap. 3.01, when a winding-up order has been made or a provisional liquidator appointed, no action or proceeding ought to be proceeded with or commenced against the company, without the leave of the court. The winding up order was a stay of all proceedings against the First Defendant and so the default judgment ought not to have been entered, and the notices for judicial sale published.

Facts

- [3] This suit was filed 21st November 2007, and the claim form and statement of claim were served on the First Defendant's managing director, the Third Defendant on 22nd November 2007 for the First Defendant, and served on the Second Defendant on 24th November 2007. The First Defendant filed an acknowledgment of service on 4th December 2007, the Second Defendant filed an acknowledgment of service on 12th December 2007.
- [4] The Claimant filed a request for judgment in default of defence on 14th December 2007, against all of the Defendants, and the judgment in default of defence was entered 30th March 2009 against all of the Defendants.
- [5] In the period intervening between when the request for judgment in default of defence was applied for and entered, an order was made on 13th May 2008, winding up the First Defendant and a liquidator was appointed by the Court on 19th November 2008.

Issues

- [7] The issues arising are:
1. Whether the Second Defendant is the party to make the application for setting aside of the default judgment while there is a court appointed liquidator.
 2. Whether section 394 of the Companies Act acted as a bar against judgment being entered against the First Defendant.
 3. Whether the Court must set aside the default judgment or could vary the default judgment so as to enter it only against the Second and Third Defendants.

Findings

- [8] The Companies Act at section 404 provides that where a winding-up order has been made or a provisional liquidator has been appointed, the liquidator, or the provisional liquidator, as the case may be, shall take into his or her custody, or under his or her control, all the property and things in

action to which the company is or appears to be entitled. Section 406 provides for the powers of the liquidator in a winding-up by the court. These powers are stated to include bringing or defending any action or other legal proceeding in the name and on behalf of the company and appointment of an attorney-at-law or other agent to assist him or her in the performance of his or her duties.

[9] In light of the provisions cited I find that the proper party to bring the application to set aside the default judgment is the court appointed liquidator.

[10] Notwithstanding my finding that the proper party to bring the application before the Court for the First Defendant is the liquidator, since the application is before the Court, I will address the additional issues arising.

[11] In relation to the second issue arising, the Companies Act at section 394 states:

“ 394. ACTIONS STAYED ON WINDING-UP ORDER

When a winding –up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.”

The provision is perfectly clear. The Court has not been informed that leave of the Court was received to enter the default judgment against the First Defendant. The net result is, when section 394 is applied to the facts, the Registrar could not have entered a default judgment against the First Defendant as she did on 30th March 2009. The matter however, does not end there. The issue now arises of whether the Court could vary the order of 30th March 2009. This issue straddles Civil Procedure Rules 2000 Parts 12 and 13.

[12] The Civil Procedure Rule 2000 rule 12.4 states:

“12.4 The court office at the request of the claimant must enter judgment for the failure to file an acknowledgment of service if –

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the defendant has not filed –
 - (i) an acknowledgment of service; or
 - (ii) a defence to the claim or any part of it;
- (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;’
- (d)
- (e)
- (f) (if necessary) the claimant has the permission of the court to enter judgment.”

On the facts before the Court, I have already found that the permission of the Court was necessary but none was had, before default judgment could have been entered against the First Defendant. This leaves the Second and Third Defendants.

[13] The Civil Procedure Rules 2000 rule 12.9 provides:

“12.9 (1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants -

(i) the court may enter judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants;....”

It is clear that Rule 12.9 gives the Claimant and the Registrar the power to respectively apply for, and enter judgment against the Second and Third Defendants without having regard to the First Defendant.

[14] Part 13 provides:

“13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –

(a) a failure to file an acknowledgement of service – any of the conditions in rule 12.4 was not satisfied; or

(b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.

(2) The court may set aside judgment under this rule on or without an application.

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 has 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.”

Having found that the Registrar is cognizant of the winding-up order ought not to have entered judgment against the First Defendant, and so the default judgment against the First Defendant cannot stand pursuant to rule 13.2.(1) (b), but that the Registrar could have proceeded to enter default judgment against the Second and Third Defendants, and there being no applications before the court for consideration under rule 13.3(1), I will vary the default judgment entered 30th March 2009, so that the judgment in default of defence is entered against the Second and Third Defendants only.

[15] It is ordered that the judgment entered in default of defence on 30th March 2009, is varied by deletion of "Defendants" and insertion of "First and Second Defendants". No costs is awarded since I did find that the Second Defendant was not the correct party to pursue the application under consideration.


Rosalyn E. Wilkinson
High Court Judge