

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0042/2007

BETWEEN:

LYSTRA OMAR EWEN

(as Personal Representative of the Estate of SHEBA JONES, deceased)

Claimant/Respondent

And

CHARLES SYLVESTER LIDDIE

Defendant/Applicant

Appearances:

Mrs. Tara Ruan for Defendant/Applicant

Ms. Eustella Fontaine for Claimant/Respondent

2010: October 30th

DECISION

[1] **BLENMAN, J:** This is an application by Mr. Charles Sylvester Liddie to set aside a Default Judgment that Mr. Lystra Omar Ewen (as Personal Representative of the Estate of Sheba Jones, deceased) obtained against him. The application is strenuously opposed by Mr. Ewen.

Background

[2] On 3rd August 2007, Mr. Lystra Omar Ewen, in his capacity as the Personal Representative of the Estate of Sheba Jones, deceased, filed a claim against Mr. Charles Liddie. The claim is one for damages as a result of a vehicular accident which resulted in fatal injury.

- [3] The Claim Form and the Statement of Claim were personally served on Mr. Liddie on 20th January, 2008. He failed to file an Acknowledgement of Service within the period of 14 days, as stipulated by Part 9.3(1) of CPR 2000.
- [4] On the 14th of November 2008, Mr. Ewen applied for a Judgment in Default and this was granted on the 17th of April 2009, for an amount to be determined by the Court together with costs.
- [5] Mr. Ewen caused the Default Judgment to be personally served on Mr. Liddie on the 23rd April 2009.
- [6] On 25th August 2009, Mr. Liddie applied to the Court to set aside the Default Judgment. In support of the Application, Mr. Liddie has deposed to an Affidavit in which he states the reasons for his delay.
- [7] Mr. Ewen opposes the application. In support of his opposition, Ms. Sarah Evans has filed an affidavit. Ms. Evans stated that the Default Judgment was personally served on Mr. Liddie on 23rd April 2009. She further states that there has been a delay of 4 months since the personal service of the Default Judgment. She says that Mr. Liddie has not provided the Court with any good reasons for the delay and neither has he provided the Court with a good explanation for his dilatory conduct of the matter.
- [8] She said that the Court should not exercise its discretion in favour of Mr. Liddie.

Issue

- [9] The issue that arises for the court to resolve is:
- Whether the court should exercise its discretion and set aside the Default Judgment.
- [10] In his Affidavit in Support of Application to set aside the Default Judgment, Mr. Liddie states that he was served with the Claim Form and Statement of Claim on 30th January 2008. He said that he took the papers to Astaphan Chambers since he was represented in another suit by those chambers. He contends that he was advised by the Attorney-at-Law that it was a claim and that he would attend to his claim.
- [11] In July 2008, the lawyer referred him to another lawyer, Mr. Michael Bourne of Caribbean Juris Chambers. He took the file to Mr. Bourne around 1st July 2008 and signed a retainer agreement.
- [12] It was not until several months after, and at the beginning of 2009, that Mr. Bourne realized that he (Mr. Liddie) had given him files that were in effect related to the new claim (the present claim).
- [13] He contacted Caribbean Juris Chambers about the 2nd week in January 2009, and gave them instructions in relation to the claim. He was advised that a defence would have been filed in the claim. He believed that a defence would have been filed.
- [14] He said that around 23rd day of April 2009, Mr. Michael Fleming brought a document which he did not know was a Default Judgment, which he told Mr. Fleming to serve on Caribbean Juris Chambers. It was taken to Caribbean Juris Chambers.

- [15] On the 19th day of August 2009, he received a call from Caribbean Juris Chambers. On the 20th August 2010 he met with the lawyers in Caribbean Juris Chambers and was advised that Mr. Bourne had left Anguilla and that the matter was still outstanding.
- [16] It was only then, at the August meeting, that he was advised that a Default Judgment was entered in favour of Mr. Ewen on 17th April 2009, where upon he gave immediate instructions for the application to be filed to set aside the Judgment in Default.
- [17] On the 25th August 2009, he caused a Notice of Application to be filed in order to have the Default Judgment set aside. Mr. Liddie has filed a Draft Defence together with his application to set aside the Default Judgment.
- [18] Mr. Liddie says that the document was left at his lawyer's chamber, that is, Caribbean Juris Chambers, and it was only in August 2009 that he (Mr. Liddie) became aware of what it was a Default Judgment.

Law

- [19] Part 13.3(1) of CPR 2000 provides as follows:
- (a) the defendant must have applied to the court as soon as reasonably practicable after finding out the Judgment had been entered.
 - (b) the defendant has given a good explanation for failure to file an Acknowledgment of Service or Defence; and
 - (c) the defendant has a real prospect of successfully defending the claim.

Applicant/Defendant's Submissions

- [20] Learned Counsel, Mrs. Ruan implored the court to exercise its discretion in favour of Mr. Liddie. Mrs. Ruan, Learned Counsel asked the court to accept that though Mr. Liddie was served with the Claim Form and the Statement of Claim on 30th January 2008. Mr. Liddie was referred to new counsel in July 2008 and presented new counsel with a package of documents including "papers from a previous suit". It was only in early 2009 that his counsel became aware that the papers consisted of this further suit.
- [21] There were a number of delays as stated in Mr. Liddie's affidavit filed on 25th August, 2009. Mrs. Ruan, Learned Counsel argued that Mr. Liddie applied to the court as soon as reasonably practicable, after finding out about the Default Judgment in order to have it set aside.
- [22] In those circumstances, Mr. Liddie asks the Court to set aside the Default Judgment insofar that he has good reasons/explanation for the delay. He also says that he has good prospects of defending the claim.
- [23] Learned Counsel, Mrs. Ruan, quite correctly stated that in order for the court to exercise its discretion to set aside the Default Judgment, the three conditions as provided in Part 13.3(1) of CPR 2000 must be fulfilled:
- (a) the defendant must have applied to the court as soon as reasonably practicable after finding out the Judgment had been entered;
 - (b) the defendant has given a good explanation for failure to file an Acknowledgment of Service or Defence; and
 - (c) the defendant has a real prospect of successfully defending the claim.

Applies Soon As Reasonably Practicable

- [24] In addressing the issue of reasonably practicable, Learned Counsel, Mrs. Ruan urged the court to calculate the time from the period of August 2009, since that was the time when Mr. Liddie became aware that the document was in fact a Default Judgment. In support of her argument, Learned Counsel relied on *Cuthwin Webster v Preston Bryan*, Claim Number 0020/2008.
- [25] Learned Counsel, Mrs. Ruan argued that Mr. Liddie was able to satisfy the requirements of this limb of the rule.
- [26] In providing the evidential basis for this argument, Learned Counsel said that the bailiff Mr. Fleming served the Default Judgment on Mr. Liddie on 23rd April 2009 and Mr. Liddie requested that it be served on his solicitors. He was unaware that it was a Default Judgment. In all of the circumstances, he has filed the application to set aside the Default Judgment as reasonably practicable after finding out about the Default Judgment.

Delay in filing the Acknowledgment of Service or Defence

- [27] Learned Counsel, Mrs. Ruan, submitted that the reasons that were provided in Mr. Liddie's affidavit indicates that he left the matter in the hands of his solicitors and had presumed that his instructions would have been followed and a defence filed. Mrs. Ruan asked the court to accept that Mr. Liddie had no reason to believe that his Attorney-at-Law did not file an Acknowledgment of Service or Defence on his behalf.
- [28] Mrs. Ruan, Learned Counsel therefore stated that there is a good explanation for the delay in filing the Acknowledgment of Service or Defence.

Real Prospect of Successfully Defending the Claim

[29] Learned Counsel, Mrs. Ruan asked the court to accept that Mr. Liddie has a very good prospect of defending the claim.

[30] Claimant/Respondent's Submissions

Learned Counsel, Ms. Fontaine urged the court not to exercise its discretion to set aside the Default Judgment.

[31] Learned Counsel, Ms. Fontaine submitted that in accordance with Part 13.3(1) of CPR 2000 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 an Acknowledgment of Service or a Defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.

[32] Ms. Fontaine stated that the matters set out in Part 13.3(1) of CPR 2000 are conjunctive and therefore all of the criteria set out in the rule must be satisfied if the court is to exercise its discretion to set aside the Default Judgment. Learned Counsel referred the court to *Doreen Leslie v Bradley Davis* Civil Appeal No. 13 of 2006.

Applies As Soon As Reasonably Practicable

- [33] Ms. Fontaine, Learned Counsel said that Mr. Liddie was personally served with the Default Judgment on the 23rd April 2009 and applied to the court on 25th August 2009 in order to have set aside.
- [34] Ms. Fontaine stated that 122 days had elapsed before Mr. Liddie applied to the court to set aside the Default Judgment. In all of the circumstances of the case he has not applied to the court as soon as reasonably practicable after finding out that judgment had been entered. Mrs. Fontaine maintained that Mr. Liddie has not acted with reasonable promptness in applying to have the Default Judgment set aside.
- [35] Ms. Fontaine stated that a delay of 15 days was held to be reasonable in *Louise Martin v Antigua Commercial Bank* Antigua and Barbuda Claim No. 0115/1997. However, Ms. Fontaine, Learned Counsel maintained that a delay of 122 days ought not to be considered as reasonable.
- [36] Accordingly, Learned Counsel, Ms. Fontaine argued that Mr. Liddie has not satisfied the threshold requirement of Part 13.3(1)(a) of CPR 2000.

Good Explanation for failure to file an Acknowledgment of Service or Defence.

- [37] Ms. Fontaine urged the court to find that the explanation given by Mr. Liddie for his failure to file an Acknowledgment of Service or a Defence is not good explanation.
- [38] Ms. Fontaine told the court, that based on Mr. Liddie's own evidence he is no stranger to the court and therefore he sought to have been aware and should have taken the necessary steps to have his matter dealt with, with the requisite promptness.

[39] Learned Counsel, Ms. Fontaine said that the case at bar should be distinguished from *Cuthwin Webster v Preston Bryan* Anguilla, Claim No. 0020/2008 since in that case the defendant had taken certain steps to assist his solicitors to pursue and follow through with the matter. In the present case, Mr. Liddie was not diligent.

[40] Ms. Fontaine reminded the court that Mr. Liddie took almost one year before he gave his solicitors the necessary instructions. Ms. Fontaine, Learned Counsel said that Mr. Liddie is no stranger to the court. Therefore and in view of all of the circumstances of the claim, he has failed to satisfy the threshold requirement of Part 13.3(1)(b) of CPR 2000.

[41] Ms. Fontaine urged the court to discuss the application together with costs.

Court's Analysis

[42] The court has reviewed the very lucid submissions of both Learned Counsel and has carefully perused the pleadings in the matter.

[43] The court agrees with the submissions of Learned Counsel, Ms. Fontaine. The requirements of Part 13.3(1) of CPR 2000 are in the conjunctive. An applicant who seeks to have a Default Judgment set aside must satisfy all three of the conditions that are stated in Part 13.3(1) of CPR 2000.

Applies As Soon As Reasonably Practicably

[44] Part 13.3(1)(a) of CPR 2000 does not stipulate any specific time frame within which an applicant must apply to the court after finding out about the Default Judgment, in order to have it set aside. The rule however requires the applicant to do so as soon as reasonably practicable. The court is therefore required to

examine the circumstances of each individual case in order to determine whether the applicant has satisfied the requirement of the rule.

[45] In the present application, the court has no doubt that the period of time at which Mr. Liddie had notice of the Default Judgment must commence from 23rd April 2009 when it was served on him. In this regard, the court accepts that the Default Judgment was served on Mr. Liddie and that he told the bailiff to take it to his Lawyers' Chambers. He therefore, cannot be properly heard to say that he only became aware of the Default Judgment in August 2009.

[46] The court accepts Ms. Fontaine's submissions that in all of the circumstances of the case, a period of 122 days cannot be said to be as soon as reasonably practicable after finding out about judgment. *Louise Martin v Antigua Commercial Bank* *ibid* contrasted.

[47] By way of emphasis, the court is of the considered view that this period of time is unduly, lengthy and does fall within the provisions of Part 13.3(1)(a) of CPR 2000. In fact it fails to meet the threshold of the provision.

[48] This is fatal to Mr. Liddie's application.

[49] The court need not go on to consider the second ground, however due to the importance of the claim; the court will nevertheless proceed to consider the second limb. Good explanation for not filing an Acknowledgment of Service or Defence.

Good Explanation for not Filing an Acknowledgment of Service or Defence

[50] The court has given deliberate consideration to the reasons advanced by Mr. Liddie for not filing an Acknowledgment of Service or a Defence. The court is of the considered opinion that the arguments advanced by Ms. Fontaine are

attractive and persuasive. Despite the very good efforts of Learned Counsel, Mrs. Ruan to persuade the court to the contrary, the court is not of the respectful view that the explanation given by Mr. Liddie is a good explanation for his failure to comply with the dictates of Part 13.3(1)(b) of CPR 2000. They have fallen far short of the required threshold.

[51] Accordingly, Mr. Liddie's application to set aside the Default Judgment fails.

[52] For sake of completeness, the court does not propose to consider the third condition as stated in Part 13.3(1)(c) of CPR 2000.

Conclusion

[53] In the premises, Mr. Charles Sylvester Liddie's application to set aside the Default Judgment that Mr. Lystra Omar Ewen obtained (as Personal Representative of the Estate of Sheba Jones, deceased) is dismissed.

[54] Costs are agreed in the sum of US\$500.00.

[55] The court gratefully acknowledges the assistance of both Learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla

