

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE

GRENADA

SUIT NO. GDAHCV2006/0587

BETWEEN:

Ashandi Edwards

(By his mother and next friend Alma Edwards)

Claimant

AND

[1] Rholda Bhola

[2] Lenore Bhola

Defendants

2011: DECEMBER 1st

2012: JANUARY 24TH

DECISION

[1] MASTER TAYLOR-ALEXANDER: This is an application by [1] Rholda Bhola and [2] Lenore Bhola to set aside a default judgment that the Claimant obtained against them.

CHRONOLOGY OF AGREED FACTS

[2] On 28th November 2006, Alma Edwards as the next friend of the Claimant (a minor), filed a claim against the Defendants. The claim is one for damages as a result of a mauling of the Claimant by a dog owned by the Defendants.

[3] The Claim Form and the Statement of Claim were personally served on the Defendants. An Acknowledgement of Service was filed on the 7th December 2006 and within the period of 14 days

as stipulated by Part 9.3(1) of CPR 2000 by a legal practitioner on behalf of the Defendants. By notice issued by the court on the 13th December 2006, the Claimant was duly notified.

[4] On the 28th March 2007, the Claimant requested the entry of default judgment on the basis that:-

- (a) The time for the Defendants to file and serve a defence had expired;
- (b) No defence or counterclaim has been served on the Claimant; and
- (c) The Defendants had not paid any monies in settlement of the claim.

[5] On the 28th of March 2007 (although erroneously dated the 28th March 2006), the court made an order for entry of judgment; for General Damages to be assessed, Special Damages of \$2802.80 together with interest on that amount to be calculated at the rate of 6% per annum from date of judgment to date of payment, on the basis that there had been no service of the acknowledgment of service.

[6] There is no evidence of service of the default judgment on the Defendants or their Attorneys.

[7] On 13th July 2010 the case was set down for assessment of general damages pursuant to Part 16.2 of the CPR 2000, where submissions were requested of the Claimant to determine the quantum of damages to be awarded.

[8] The Claimant's submissions were filed and served on the Defendants' Attorney on the 8th September 2010.

[9] On the 7th October 2010 the Defendants' Attorney filed an application pursuant to Part 63 to be removed from the record as legal practitioner for the Defendants. There is no evidence of notification of the application on the Claimant or their Counsel or on the Defendants themselves, as is required by Part 63.

[10] On the 27th October 2010 and at the instance of Master Pearletta Lanns the default judgment was set aside on the grounds of irregularity pursuant to Rule 13.2 of the CPR 2000. The Master ordered

that the matter was to be relisted upon entry of judgment in default of defence, as was requested by the Defendants in the request filed on the 28th March 2007.

[11] On the 27th October 2010, a request was made for entry of default judgment on identical grounds as had been articulated in the earlier request.

[12] Judgment in default of defence was entered against the Defendants on the 27th October 2010 with damages to be assessed. This, it is agreed was served on the Defendant's Attorney on the 28th October 2010. I have seen the affidavit of service and admittedly I am confused as to who had been served, as the document states that service was effected at Grenlaw's Chambers on one Roxanne Bubb of the firm of Wilkinson, Wilkinson and Wilkinson who was served as the Attorneys for the Claimant.

There has nevertheless been no dispute as to service on the Defendant's legal practitioner of the newly filed default judgment and with the exception of paragraph 9 and 15 of the factual matrix filed in the submissions of the 21st October 2011, the Defendants have not disputed the facts as articulated by the Claimant.

[13] On the 2nd of December 2010, the Claimant filed an affidavit in support of assessment together with a certificate of exhibits and it is agreed that the same was served on the Defendants' Attorney on the 3rd December 2010.

[14] Judgment on assessment was delivered on the 20th May 2011, and on the 6th June 2011 the Claimant's Attorney wrote the Defendants' Attorney requesting satisfaction of the judgment debt.

[15] On the 10th June 2011 the Defendants' Attorney filed an amended notice of application to be removed from the record as legal practitioner for the Defendants. This time the application was served only on the Claimant's legal practitioner.

[16] On the 31st August 2011 the Claimant applied for and an order was given for the oral examination of the Defendants on the 28th September 2011.

- [17] On the 1st of September 2011, the Defendants' with new Attorneys applied to the court to set aside the default judgment. In support of the application, the Second Named Defendant deposed to an Affidavit in which she stated the reasons for the delay.
- [18] It is agreed that on the 2nd September 2011, a notice of change of solicitor was served on the Claimant.
- [19] On the 11th of October 2011, the notice of application to set aside the default judgment was served on the Claimant's legal practitioner.
- [20] The matter came on for hearing on the 3rd November 2011.

THE PARTIES CONTENTION

- [21] In their affidavit in support of application to set aside the default judgment, the Defendants' admit that they were served with the Claim Form and Statement of Claim in 2006. They state that they retained Counsel and an Acknowledgement of Service was filed on their behalf.
- [22] Despite this, they allege that judgment was entered in default of Acknowledgment of Service and the Claimant proceeded to assess damages.
- [23] Despite retaining counsel the Defendants' allege no Defence was filed on their behalf.
- [24] The Defendants' admit the chronology of the facts developed above, but state that apart from the Claim in 2006 no other document had been served on them personally.
- [25] The Defendants allege that despite numerous attempts to meet their legal practitioner they were unable to do so for 5 years, despite their own legal practitioner's submission that he was unable to get in touch with them.

- [26] The Defendants allege that the first they knew of the judgment was when they were served with a letter demanding payment of the judgment in June 2011, and despite steps to contact their Counsel they were not able to see him until July 2011, when they allege he informed them of the state of the proceedings.
- [27] The Defendants allege that they retained new legal practitioners on the 24th August 2011, and by 1st September 2011 had filed an application to the court to set aside the default judgment.
- [28] The Defendants further submit that they applied to the court as soon as reasonably practical after finding out that judgment was entered; that they have given a good reason for their failure to file a Defence and they have stated that they have a real prospect for successfully defending the claim. They pray that the default judgment is set aside; that they be given an opportunity to defend the action, to strike out the claim against the First Named Defendant and for relief from sanctions.
- [29] The Claimant opposes the application. The Claimant's submission states that 5 years have elapsed since the filing of the claim. He states that the Defendants have not provided the court with any good reasons for the delay and further states that in any event the Defendants have not shown any real prospect of successfully defending the claim.
- [30] The Claimant submits that relying on the authority of Caribbean Civil Court Practice at page 131 that the criteria guiding the court's consideration as set out Part 13.3(1) are conjunctive requiring that each must be satisfied before the court may set aside the default judgment.
- [31] The Claimant submits that it is well settled by authorities that acts or omissions on the part of the legal practitioner are not considered as good explanations for a party's failure to comply with the rules.
- [32] The Claimant submits that for those reasons the court should not exercise its discretion in favour of the Defendants.

ISSUE

- [33] I must consider whether to exercise my discretion and set aside the default judgment against the Defendants or alternatively against the first named Defendant.

LAW

- [34] The court agrees with the submissions of the Claimant that the requirements of Part 13.3(1) of CPR 2000 are conjunctive. The provision provides useful guidance for the exercise of my discretion. The rule provides that 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 the judgment had been entered;
- (b) gives a good explanation for failure to file an Acknowledgment of Service or Defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.

- [35] Rule 13.3 (2) provides that in any event the court may set aside a judgment entered under part 12 if the Defendant satisfies the court that there are exceptional circumstances.

Applies Soon As Reasonably Practicable

- [36] This provision requires the applicant to apply as soon as reasonably practicable. The court is therefore required to examine the circumstances of the case to determine whether the applicant has satisfied the requirement of the rule.

- [37] In addressing the issue of reasonably practicable, the Defendants submit that they became personally aware of the judgment in June 2011, but urged the court to calculate the time from the

12th July 2011 when they were able to have counsel with their legal practitioner. A delay they submit of 6 weeks. I cannot accept that contention in view of the wording of the rule. I find as a fact that there was a delay of 11 weeks from when by letter dated the 6th June 2011, the Defendants' personally became aware of the judgment to the date when they filed an application to set the judgment aside. I am satisfied as well that their legal practitioner would have been aware of the regularly filed judgment for some 9 months preceding the application to set aside the default judgment.

[38] No specific time period is given in the rules as to what constitutes a reasonably practicable time frame. I am satisfied therefore that reasonableness, depends on the facts of the case. See *Louise Martin (as widow and executrix of the Estate of Alexis Martin, deceased) v Antigua Commercial Bank*. I am also satisfied that reasonableness under this limb does not only include the length of the delay but the conduct of the parties once they found out about the existence of the judgment. I am not satisfied of the diligence of the Defendants on finding out about the existence of the judgment

[39] In the circumstances and in my judgment, the delay of over 80 days from notification of the judgment and the filing of the application to set aside the default judgment was unreasonable.

[40] The court need not go on to consider the second ground, however the court will nevertheless proceed to briefly consider the second and third limb, and Rule 13.3 (2).

Good Explanation for not Filing a Defence

[41] I have considered the reasons advanced by the Defendants for not filing a Defence. The submissions of the Defendants do not in my view account for the Defendants' approach to the proceedings during the five year period that they were ongoing. The Second Named Defendant states at paragraph 4 of the Affidavit that on the 30th October 2006 having not seen their counsel they merely instructed a defence and left the matter in the hands of their attorney assuming a defence had been filed. Despite their many calls over a five year period being fruitless the Defendants never sought to instruct other legal practitioners or to demand that they be given their

file. There did not seem to be a concern on the part of the Defendants to assist in the management of the case.

[42] The Defendants stated that they had had difficulty meeting their Attorney yet they admit to seeing him regularly on weekends when he came in to the First Defendants' supermarket to buy watercress and to use a bucket to put his recently purchased fish.

[43] In my judgment the Defendants have not overcome the second limb of the rule.

Real Prospect of Successfully Defending the Claim

[44] I am satisfied that the Defendants obligation is to show not merely an arguable defence but a real prospect of successfully defending the claim, as they are seeking to deprive the Claimant of a regular judgment validly obtained. See the authority of *Alpine Bulk Transport Co v Saudi Eagle* [1986] 2 Lloyds Rep. 221 at page 223. I am not satisfied that the draft defence as disclosed has satisfied this criteria and has provided the court with reason sufficient to conclude a real prospect of the successful prosecution of the claim.

Exceptional Circumstances

[45] The application to set aside the default judgment was filed before the promulgating of the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules Act Number 92 of 2011, and understandably there was no reference to it in the application. Though the submissions were filed after, the Defendants' did not advance that there were exceptional circumstances to excite the court's discretion and despite the absence of regional authorities to guide my discretion under this rule, I am of the view that the circumstances identified in the affidavit filed on the 1st September 2011, do not speak to exceptionally circumstances.

Claim Against The First Named Defendant

[46] The Notice of Application requested that the claim be struck out as against the First Named Defendant. The claim had pleaded that the dogs were owned and or controlled by the Defendants.

In the affidavit in support of the application to set aside the default judgment, the First Named Defendant claimed to be the owner of the dogs and stated that the Second Named Defendant should not be a party to the action. This in my view ought to have been an issue raised in a defence to the action and I cannot without more, strike out the claim against the First Named Defendant. In any event the Defendants are still challenged by the threshold criteria of Part 13.3(1).

Conclusion

[47] In the premises, the Defendants' application to set aside the default judgment or alternatively to set aside the application against the Second named Defendant is dismissed.

[48] Costs to the Claimant/Respondent in the sum of \$500.00

Master Taylor-Alexander