THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COUR T OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 284 OF 2011

BETWEEN:

SYDNEY JOSEPH

Claimant

V

THOMAS ADOLPHUS MCTAIR

Defendant

Appearances:

Ms. Patricia Marks for the Claimant.
Ms. Samantha Robertson for the Defendant.

2012: July

DECISION

[1] **JOSEPH, MONICA J (Acting):** This is an application filed on 23rd May 2012 to set aside a default judgment. On the 29th June 2011, the Claimant filed a claim against the Defendant for breach of contract in the sum of $22,000.00. On 29th September 2011, the Defendant filed an acknowledgment of service. On 31st October 2011, the Claimant filed an affidavit of service of the claim form.

[2] On 7th November 2011, the Claimant obtained judgment in default of defence in the sum of $24,164.90 inclusive of fees and interest. That judgment was served on the Defendant on 17th November 2011. On 16th December 2011, the Defendant filed an affidavit in support of an application to have the judgment set aside. The Notice of application was not filed on the same date as the affidavit, but was filed on 23rd May 2012. No draft defence was exhibited with the affidavit. A draft defence was filed on 27th June 2012.

[3] On 19th February 2012, the Claimant filed a judgment summons in the sum of $24,980.35. On 24th May 2012, the court made an order that the supporting affidavit be deemed to be attached to the notice of application.

[4] On 14th June 2012, written submissions were to be filed on 26th June 2012. The Claimant complied by filing submissions on 26th June 2012 and the Defendant filed on 27th June 2012. The Defendant filed a supplementary affidavit on 27th June 2012. Court invited counsel to Court on 12th July 2012 for confirmation that it had been served on the Claimant.

ISSUE

[5] The issue was presented: Whether or not the Defendant's failure to file the Notice of application at the same time with the affidavit in support of the application is a fundamental requirement and shuts out the Defendant from having his application heard. As the Court deemed that to be regarded as having filed on the same date.

THE LAW

[6] Under Order 26.9 of CPR 2000, the court ordered that the supporting affidavit filed on 16th December 2011 be deemed to be attached to the notice of application filed on 23rd May 2012. That rule reads:

> (2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

The effect of this Court order is that the notice of application although now being attached to the affidavit, is regarded as having been filed on the earlier date, that is 16th December 2011.

[7] Under the CPR13.3, the court may set aside the default judgment 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 failure to file his defence; and
c) has a real prospect of successfully defending the claim.

[8] Under CPR 13.4, the procedure to be observed is:

(2) An application must be supported by evidence on affidavit.
(3) The affidavit must exhibit a draft of the proposed defence.

[9] In ***Kenrick Thomas v RBTT Bank Caribbean Limited*** Civil Appeal No. 3 of 2005, it was held that all three conditions must be satisfied. I consider whether they are satisfied.

[10] Was the application to set aside made as reasonably practicable after finding out that judgment has been entered? Judgment was entered on 17th November 2011. In his affidavit filed on 16th December 2011 the Defendant deposed that he was served with the claim form and a statement of claim. He avers that he is deeply remorseful as he acted promptly when he received the claim form.

[11] He is silent as to date he received the judgment in default of defence. An affidavit of service by Bailiff of the High Court M. Mulcaire filed on 18th November 2011 indicates that the Defendant was personally served with the judgment in default on 17th November 2011. The Defendant filed a notice of application to set aside the default judgment on 23rd May 2012, some six months later. That period of time is too long. There is no exceptional circumstance existing to cause that passage of time to be regarded as reasonable.

[12] Has he given a good explanation for the failure to file a defence in time? The Defendant's explanation for that failure is that he was in the process of locating his witness. He did not realize that time had passed and the requisite time for filing his defence had elapsed until he was served with the judgment in default of defence.

[13] A look at his draft defence, filed in the absence of an order for late filing, mentions that the Claimant approached him with two other guys whom he did not know. If he does not know them how does he propose to locate them? I do not regard that explanation as a good one.

[14] The third condition is that he believes that he has a real prospect of successfully defending the claim. He believes he has acted promptly to have the judgment set aside. He is asking the court to set aside the judgment entered in default of a defence and to allow the defence filed with this application to stand as it has merits and he has a realistic prospect of success.

[15] On 27th June 2012, the Defendant filed a supplemental affidavit. Court invited counsel into Chambers to ascertain whether the filed affidavit was served on the Claimant. Service was confirmed. In his affidavit, the Defendant deposed that he swore a draft defence and affidavit, but by inadvertence the notice of application and draft defence were not filed at the same time.

[16] He avers in his affidavit that, if his draft defence is not admitted, he will have to pay a judgment entered against him. The Defendant deposed that he signed a draft defence on 16th December 2011. A look at the draft defence shows that his signature appears at the foot of the certificate of truth appended to the draft defence, but there is no date below the signature.

[17] In the draft defence he alleges that the Claimant sought his help in performing an illegal activity. There is a prospect of successfully defending the claim. However, he has not

fulfilled all the conditions required. In the outlined circumstances I do not exercise my discretion in the Defendant's favour. I do not grant his application to set aside judgment in default. In ***Kenrick Thomas v RBTT Bank Caribbean Limited*** case Barrow JA said at paragraph 10:

> ".....The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing preconditions for setting aside a default judgment. If the preconditions are not satisfied the court has no discretion to set aside. "

ORDER

[18] (a) The application to set aside the default judgment is not granted. Costs are awarded to the Claimant.

(b) Agreed costs $1,000.00.

MONICA JOSEPH
HIGH COURT JUDGE (Acting)
13th July 2012.