EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2011/030

BETWEEN:

[1] ANISON RABESS
[2] JOYCE RABESS

Appellants

and

NATIONAL BANK OF DOMINICA

Respondent

Before:
The Hon. Mr. Don Mitchell Justice of Appeal [Ag.]

On written submissions:
Mr. Lennox Lawrence for the Appellants
Mr. Kevin J. Williams for the Respondent

2012: July 13.

Civil appeal – Judgment in default – Judgment not served – Judgment alleged to be in wrong amount – Master dismissing application to set aside default judgment on the basis that the application was not timely nor was a draft defence exhibited – Whether master right to apply CPR 13.3 and 13.4

The Bank brought a claim against Mr. and Mrs. Rabess for a certain sum with interest and costs. Mr. and Mrs. Rabess filed an acknowledgment of service admitting part of the debt but indicating they intended to defend the claim. They filed no defence. The Bank applied to the Registrar for and obtained a default judgment in a different sum from that claimed. The Bank did not file an affidavit of service of the judgment, nor did it at any time assert that it had served the judgment on Mr. or Mrs. Rabess. The Bank applied to sell a mortgaged property in satisfaction of the judgment debt. Mr. and Mrs. Rabess applied for the judgment in default to be set aside on the basis that it had been entered for an excessive amount and it was the duty of the judgment creditor, not the judgment debtor, to apply to correct a judgment entered for an excessive amount. The master, in dismissing the application of Mr. and Mrs. Rabess and ordering they give up vacant possession of the property held that the court was not satisfied that the criteria in CPR 13.3 and 13.4 had been met, given CPR 12.13.

Held: allowing the appeal and quashing the order of the master and awarding costs in the court below and in the Court of Appeal to the applicants, that:

1. If a default judgment is to be capable of being enforced it must be personally served on the defendants: CPR 42.6 applies. There being no evidence that the default judgment in this case had been served on the defendants, it was not capable of being enforced by an order for the sale of property.

2. If it is alleged by a defendant that a default judgment has been entered against him for an excessive amount and that the judgment ought to be set aside, CPR 13.3 and 13.4 do not apply to limit the discretion of the master. CPR 13.3 limits a defendant's right to set aside a default judgment when it is intended to file a defence. CPR 13.4 requires a draft of the proposed defence to be filed with the application.

3. A claimant who observes that he has obtained a default judgment in an excessive amount has the principal duty to apply to set it aside and to enter in its place a corrected judgment. A defendant who has not had the default judgment served on him is entitled *ex debito justitiae* to apply at any time up to and including an application for the enforcement of the judgment, to have the judgment set aside on the basis that it has been entered for an excessive amount.

   Muir v Jenks [1913] 2 KB 412 as cited by Edwards J in **Anthony Eugene v Joseph Jn Pierre and Joseph Jn Pierre (No.1) et al v The Attorney General et al** Saint Lucia High Court Claim Nos. SLUHCV 2004/0097 and SLUHCV 2006/0708 (delivered 21st February 2007) applied.

JUDGMENT

[1] **MITCHELL JA [AG.]**: On 20th April 2006, the National Bank of Dominica filed a claim in the High Court against Anison and Joyce Rabess for the sum of $99,066.17, contractual interest at the rate of 10% per annum from 1st March 2006 to the date of satisfaction, and costs, to a total of $102,380.09. On 12th May 2006 Mr. and Mrs. Rabess filed an acknowledgment of service admitting part of the claim. They filed no defence, nor offered to pay any part of the debt. On 4th July 2006 the Bank applied to the Registrar of the High Court for a default judgment to be entered against Mr. and Mrs. Rabess in the sum of $99,066.17 together with court fees on filing the claim of $220.00, solicitor's fixed cost on issue of $2,000.00, interest from 1st March 2006 to date in the sum of $8,518.40, court fees on entering judgment of $20.00, and solicitor's fixed costs on entering judgment of $400.00 to a total of $110,224.57. On 13th July 2006 the requested judgment in

default of defence in the sum of $110,224.57 was entered on the file by the Registrar. There is on file no affidavit of service at any time of this judgment on Mr. and Mrs. Rabess or on anyone else.

[2] On 21st September 2007, the Bank made an application to the Court, supported by an affidavit, to have articles of sale of Mr. and Mrs. Rabess' property settled and for vacant possession. The grounds of the application included the obtaining by the Bank of the default judgment, the conversion of an equitable mortgage held by the Bank into a legal mortgage pursuant to section 66 of the Title by Registration Act,[1] and the service on Mr. and Mrs. Rabess of a Notice to Pay off and Act of Seizure. This application was served on Mr. and Mrs. Rabess, who on 25th October 2007, swore and filed an affidavit in reply. They protested that the Bank had kept its judgment for over a year without informing them of it and that to that date they had never been served with a copy of the alleged judgment.

[3] On 18th July 2008, the master settled the articles of sale and ordered the land to be sold by public auction at an upset price of $32,830.00. The attempt to get the property sold appears not to have been successful, because on 20th March 2009 the Bank filed another application to fix a new date of sale and to reduce the upset price to the level of $16,660.00 which was the value their expert had set. On 13th May 2009 the master gave new directions accordingly. On 4th June 2009, an affidavit was filed exhibiting the notices for sale published in the local paper as ordered. No successful bid having been received, the Bank next applied on 24th March 2010, for permission to sell the property by private treaty at the same price. The master granted the necessary order on 7th May 2010.

[4] On 18th May 2011, Mr. and Mrs. Rabess began the proceedings that culminate in this appeal. They filed an "(Ex parte) Notice of Application", supported by two affidavits, for a stay of proceedings and to set aside the default judgment. Now, the term "Ex parte" is an obsolete term meaning "without notice", which conflicts with the meaning of the following three words "Notice of Application". Notice is

[1] Chap. 56:50, Revised Laws of Dominica 1990.

given of an application when it is served on the other side, which suggests that this application was intended to be served on the Bank.[2] What the meaning of the title to their application can have been intended to be is anybody's guess. On 31st May 2011, Mr. and Mrs. Rabess filed an "Amended Notice of Application" in which they set out their calculations showing the mathematical errors allegedly made by the Bank in calculating the amount for which the default judgment was entered. They also claim that the Bank was compounding the interest in question, which they claim is contrary to the law of Dominica.[3] They appear to have served their application since, on 22nd June 2011, the Bank filed an affidavit in reply.

[5] The Bank protests that nowhere in the affidavits in support of the application to set aside the judgment in default did Mr. and Mrs. Rabess give any explanation for their failure to file a defence or deny that they were indebted to the Bank and show a good prospect of successfully defending the claim, as required by rule 13.3(1)(b) and (c) of the Civil Procedure Rules 2000 ("CPR"). Nor did they exhibit a draft of their proposed defence as required by CPR 13.4(3). The master in considering their application had to bear in mind CPR 13.3(1)(a) which requires that their application is to be made as soon as reasonably practicable after finding out that judgment has been entered.

[6] The application by Mr. and Mrs. Rabess before the master was not seeking to contest the claim at this late stage. Contrary to the argument put forward by the Bank, they were not seeking to file a defence. They were applying to set aside the default judgment on the basis that the amount was calculated wrongly. They submitted authorities and argument to the effect that it was the duty of a claimant whose claim is not defended to ensure that any resulting default judgment is

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[2] It is to be noted that the Form 6 Application at the back of the Civil Procedure Rules 2000 is correctly titled "Application". However, mid-way through the form there is another heading "Notice of Application". This second heading is probably a printing error for the single word "Application". The Notice in question is found on the second page of the form, where the other party is given notice of the date, time and place of the hearing of the Application. It would appear that as a result of this misprint the practice has grown up of referring to an Application as a "Notice of Application" which expression makes no sense when it relates not to the notice but to the Application itself.

[3] They rely on Dominica Agricultural and Industrial Development Bank v Mavis Williams, Commonwealth of Dominica High Court Civil Appeal No. 20 of 2005 (delivered 29th January 2007).

entered for the correct amount of money, failing which the claimant will not be permitted to enforce their default judgment. The principal duty rests on the successful claimant to correct default judgment in an excessive amount. This is a principle long established in civil procedure.[4]

[7] Mr. and Mrs. Rabess also complain against the enforcement of the default judgment that it was never served on them. They say they found out about its existence after making inquiries at the court office. Such an inquiry by a defendant does not substitute in law for the service of a judgment or order as required by the rules. It is a long established principle of civil procedure that a final judgment or order may not be enforced unless it is served personally on the party against whom it is sought to be enforced. This principle finds modern reflection in CPR 42.6. This provides that, unless the court otherwise directs, the court office is to serve every judgment or order on the parties to the claim. In this context, "unless the court otherwise directs" does not confer a discretion as to whether or not to serve the judgment on the unsuccessful party. The provision gives the court a discretion, which is frequently exercised, of ordering one of the legal practitioners instead of the court office to serve the judgment or order. The court office does not have the resources in every case to seek out the parties and to serve them personally. The provision in CPR 42.2 that a party who is notified of the terms of an order by telephone, etc., is to be bound by the terms of the order whether or not it is served has relevance to contempt and other similar proceedings. This does not provide an alternative to the requirement for service in CPR 42.6.

[8] On 12th October 2011, the master dealt with Mr. and Mrs. Rabess' application to set aside the default judgment in Chambers and made a ruling. This was to the effect that the application was refused on the grounds that the criteria in CPR 13.3 and 13.4 had not been met, given CPR 12.13. The master gave consequential orders for vacant possession of the property to be given to the Bank.

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[4] Muir v Jenks [1913] 2 KB 412 as cited by Edwards J in Anthony Eugene v Joseph Jn Pierre and Joseph Jn Pierre (No.1) et al v The Attorney General et al, Saint Lucia High Court Claim Nos. SLUHCV 2004/0097 and SLUHCV 2006/0708 (delivered 21st February 2007).

[9] CPR 13.3 deals with setting aside a default judgment when it is intended to file a defence. CPR 13.4 requires the proposed defence to be filed. CPR 12.13 deals with the right of a defendant to be heard after a default judgment has been entered. None of these rules had any relevance to the application of Mr. and Mrs. Rabess to set aside the default judgment on the ground that it had been wrongly entered for a wrong amount. This was not a matter for exercising a discretion under CPR 13.3 and 13.4. This was a matter for the master to determine whether Mr. and Mrs. Rabess were correct that (a) the default judgment had not been served on them as they claim; and (b) as a matter of mathematical calculation, whether the amount for which default judgment had been entered was excessive. In either of these cases, the Bank would not be permitted to enforce the default judgment until they had applied to correct the judgment and/or after it had been served properly on Mr. and Mrs. Rabess. The master did not determine based on the application of Mr. and Mrs. Rabess whether the money judgment obtained by the Bank was in the correct amount.

[10] I note an "Amended Notice of Appeal" filed by Mr. and Mrs. Rabess on 23rd March 2012. It is not accompanied by any affidavit of service on the file. CPR 62.4(7) deals with amending the grounds of appeal. It provides a limited window for an appellant to file an amended Notice of Appeal in cases other than interlocutory appeals. In the case of an interlocutory appeal, there is no provision for filing an amended Notice of Appeal, and it is likely that such a filing is not permitted by the rules.[5] I shall ignore this amended Notice of Appeal on the basis both that there is no evidence it was served on the Bank and was in any event filed contrary to the rules.

[11] I also note in passing that the Bank complains that the Notice of Appeal is defective in that it does not comply with CPR 62.10 in stating in the heading that it

[5] As a footnote I mention that this purported "Amended Notice of Appeal" was delivered for filing at the Court of Appeal addressed to "Mrs Ianthia Leigertwood-Octave as Chief Registrar of the Court of Appeal." The person in question referred to has for approximately the past decade been the Hon. Justice Ianthea Leigertwood-Octave of the High Court bench and has not been, during that time, the Chief Registrar of this Court.

is an interlocutory appeal. Nor does it state, in compliance with CPR 3.6(3)(b) the name, business address, telephone number and fax number (if any) of the person filing it. Nor does it, in compliance with CPR 3.6(3)(e), state the name of the party on whose behalf it is filed. Legal practitioners are reminded that it is important to use the correct form provided in the rules for filing court documents. Non-compliance will one day, in a suitable case, cause a filing to be ignored or disallowed by the court.

[12] The Bank has not denied that the default judgment was never served on Mr. and Mrs. Rabess, far less has it provided the court with proof of service. In the circumstances, I would consider that omission to be an admission that the judgment was not in fact served. All proceedings consequent to the entering of the judgment would then be defective, null and void and of no effect. If the Bank is satisfied that the judgment is correct, it must serve it on Mr. and Mrs. Rabess, file the appropriate proof of service, and proceed from there.

[13] I am satisfied that the master did not deal with the applications of the Bank and of Mr. and Mrs. Rabess appropriately. A defendant who has not had a default judgment served on him may apply at any time, up to and including an application for the enforcement of the judgment, to have the judgment set aside on the basis that it has been entered for an excessive amount. It would be for the master to deal with such an application on its merits. I would allow the appeal and quash the order made on 5th January 2012. The pending applications of the Bank and of Mr. and Mrs. Rabess should be dealt with on their merits by another master.

[14] Mr. and Mrs. Rabess are entitled to their costs before the master and in the Court of Appeal. I have no submissions on costs from the parties, but would assess the amount in the High Court at $2,000.00 and in the Court of Appeal at two thirds of that amount to be paid by the Bank to Mr. and Mrs. Rabess in accordance with CPR 65.13.

Don Mitchell
Justice of Appeal [Ag.]