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

GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2010/0436

BETWEEN:

GORDON ALPHONSUS ST. BERNARD
(Beneficiary and Personal Representative of the Estate
of James Domingo St. Bernard, Deceased)

Claimant

AND

FRANKLYN ST. BERNARD
JOAN ST. BERNARD
YVONNE DENNETT
MOREEN HOSKIN

Defendants

Appearances:
Mr. Dwight Horsford for the claimant
Mr. Alban John and Mrs. Afi Ventour DeVega for the defendants

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2013: February 17, 25

DECISION

[1] HENRY, J.: By application filed July 26, 2011, the defendants Franklyn St. Bernard, Joan St. Bernard, Yvonne Dennett and Moreen Hoskin all apply to the court for an Order that:

1. The default judgment obtained herein on the 15th July, 2011 be set aside and the defendants be given leave to defend the claim; and

2. Relief from sanctions be granted to the defendants.

[3] The application is supported by the affidavit of Veronica Plenty also filed on 26th July, 2011 and the affidavit of the 3rd defendant Yvonne Dennett filed 25th January, 2012.

[4] The grounds of the application are that:

1. The defendants received the claim in or about the month of October or November 2010, at a time when they were once again, without an Attorney in Grenada, relations having broken down between themselves and their then Attorneys on record. The defendants were therefore at a loss as to whom they could get to represent them;

2. The defendants, through the third defendant, approached Attorneys in the United Kingdom to represent them in the matter and did not discover until sometime in May or June 2011, that nothing was done by those Solicitors and that the Firm was in the process of being shut down by the Solicitors Regulations Authority in the United Kingdom;

3. The defendants verily believe that they have a good defence to the claim. A draft defence is exhibited;

4. The defendants are advised that the default judgment included a claim in respect of funds held in Account No. 24863 at the Grenada Co-operative Bank, over which funds, the claimant has no right or claim. The defendants verily believe that the judgment is unlawful and ought to be set aside as of right.

The application is brought pursuant to Rules 13.3 (1) and (2), 26.8 and 26.1 (2) (k) of CPR 2000.

The Law

[5] Section 13.3 provides:

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 had been entered;

(b) Gives a good explanation for the 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.

(1) If this rule gives the court power to set aside a judgment, the court may instead vary it.

[6] Barrow J.A. in Kenrick Thomas v RBTT Bank Caribbean Limited[1] concluded that the "Only if" in the rule "can only mean that if the three matters are not present then the court may not set aside a default judgment." The learned Justice of Appeal compared section 13.3 with its English counterpart and made the following observation:

> "The difference between the English equivalent and the provision in CPR 2000 lies in the discretion. The discretion in the English CPR 13.3 is significantly unlimited; it specifies only one matter to which the court must have regard and does not even make fulfillment of that matter a condition that the defendant must satisfy. In contrast, the discretion in CPR 2000 is severely limited; it specifies three conditions that the defendant must satisfy before the court is permitted to set aside a default judgment."

[7] The defendants submit that they meet all three requirement of Rule 13.3 and are therefore entitled to have the default judgment set aside.

Preliminary Point

[8] Although the instant application is made on behalf of all defendants, the default judgment obtained on 15th July, 2011 was entered against the second, third and fourth defendants only. The court was dissatisfied with the evidence of service on the first defendant. Accordingly default judgment against him was denied. His inclusion as an applicant in the instant application is a mistake. The court therefore will proceed with the application of the other three defendants.

[1] Civil Appeal No 3 of 2005, St. Vincent and the Grenadines at para 7

The First Limb

[9] The court accepts that the defendants have met the condition set out in 13.3 (a) in that the defendants applied to the court as soon as reasonably practicable after finding out that judgment had been entered.

The Second Limb

[10] The defendants' position is that they have also given a good explanation for their failure to file acknowledgment of service.

[11] By order of the court dated 11th October, 2010 permission was granted to serve the claim form and other documents on each defendant out of the jurisdiction. The order provided that the second defendant be served at her address in Toronto Canada, the third defendant at her address in West Sussex, United Kingdom and the fourth defendant in New Zealand. Each defendant was given thirty-five days to file acknowledgement of service and fifty-six days to file defence. Each of the three defendants was served in accordance with the order.

[12] In the affidavit in support of the application, it is alleged that the second, third and fourth defendants were served "in or about the month of October or November 2010, at a time when they were once again, without an Attorney in Grenada. . . Defendants were therefore at a loss as to whom they could get to represent them." The affidavit further alleges that through the third defendant, they approached Attorneys in the United Kingdom to represent them in the matter and did not discover until sometime in May or June 2011, that nothing was done by those solicitors. The Firm they discovered was in the process of being shut down by the Solicitors Regulation Authority. They submit copies of emails dated June 8th, 9th and 27th, 2011 between the third defendant and the Solicitors, the said third defendant and Susie Dryden of the Solicitors Regulation Authority and the third defendant and her siblings.[2]

[2] Paragraph 3 of the Affidavit of Veronica Plenty filed July 26, 2011

[13] It is further alleged that the defendants were not aware of the implications of the failure of their UK Solicitors until the third defendant contacted Mr. Alban M. John via telephone two weeks before the filing of the application seeking representation. She was then advised that an Application for a default judgment may have been lodged in the claim.[3]

[14] The return of service submitted by the claimant on his application for entry of default judgment shows that FedEx deliverer the court document to Joan St. Bernard, the second defendant on 26th November, 2010; DHL delivered the court documents to Yvonne Dennett, the third defendant on 26th November, 2010 and FedEx delivered to Moreen Hoskins the fourth defendant on 29th November, 2010.

[15] The affidavit does not disclose when the defendants ceased being at a loss as to whom they could get to represent them, and when actual contact with the UK Solicitors was made. However, all the copies of the emails submitted were dated in the month of June 2011, long after the time for filing acknowledgement of service would have passed. The order of the court granting permission to serve the claim form and other court documents out of the jurisdiction was also served on each defendant. They well knew the time limits within which to file the necessary documents. An action in the High court was not new to them. Each defendant was a party in an earlier action before the court, at which time they were represented by Counsel. Having decided to retain UK Counsel, they were under a duty to monitor the situation and be sure that in fact they were being represented before the court.

[16] The application for entry of default judgment pursuant to Part 12 or CPR was not filed until 5th May, 2011. No acknowledgement of service had been filed up to that time. The e-mails in June 2011 cannot assist the defendants. The record indicates that the defendants failed to move with the degree of urgency that the matter required. Just as in "desperation" they retained Mr. John, Counsel of their choice could have been retained earlier to replace the UK Solicitors, had they been "on top of things". The defendants knew the consequences of their failure to comply with the time limits, same having been set out in the notes accompanying the claim form.

[3] Paragraph 4 of the Affidavit of Veronica plenty filed July 26 2011

[17] Accordingly, I find that the reasons given by the defendants do not amount to a good explanation for their failure to file an acknowledgment of service within the time required.

The Third Limb

[18] The defendants assert that they believe that they have a good defence to the claim.

[19] In his claim form herein the claimant sought a declaration that the defendants had wrongfully and unlawfully interfered with the assets of the Estate of James Domingo St. Bernard, deceased. Claimant also sought an order for the repayment to the said Estate of funds wrongfully taken or withdrawn in the sum of $84,778.89. Damages for breach of the Agreement contained in the Consent Order of 19th October, 2007 in Claim No. GDAHCV 2007/0207 are also sought along with interest and costs.

[20] Paragraph 4 of the said Consent Order in that claim provides:

> "The claimant and the second, third, fourth and fifth defendants agree that Rupert Agostini, Chartered Accountant, will carry out an enquiry and accounting into and for all funds held in accounts in the names of the claimant and the defendants or any of them, at all Banks established by James Domingo St. Bernard and the First Defendant from the sale of property out of the Estate of the said Millicent Farray and provide the second, third, fourth and fifth defendants with a report of such accounting, the cost of such accounting exercise to be borne by the claimant;

[21] Paragraph 6 provides:

> "Distribution of the balance of funds held in any of the accounts after allowing for the establishing of the account referred to in paragraph 2 hereinabove will take place following the accounting report Rupert Agostini;

[22] The essence of Mr. Agostini's enquiry and accounting was to locate and give account of all the funds from the sale of property out of the Estate of Millicent Farray which were being held in any banks accounts established by James Domingo St. Bernard and Florence St. Bernard, whether those accounts were in the names of the claimant or defendants.

[23] Mr. Agostini filed his report in GDAHCV2007/0207 on 18th December, 2008. At Appendix 9, three Bank Accounts were identified as Estate Accounts. Account No. 24863 at Grenada Co-operative

Bank in the name of Florence St. Bernard and Joan St. Bernard is one of the three. The amount Mr. Agostini found standing in that account at the time of his report was $80.95[4].

[24] The defendants assert that the default judgment included a claim in respect of funds previously held in Account No. 24863 at the Grenada Co-operative Bank and that the claimant has no right or claim to these funds. According to the affidavit, the account from its inception until closure in 2007, was in the joint names of Florence St. Bernard, and the first and second defendants. By operation of law, upon the death of Florence, the funds passed to the first and second defendants absolutely, thus entitling either of them to withdraw same. It is therefore submitted that the defendants have a real prospect of successfully defending the claim in that the judgment is unlawful and ought to be set aside as of right.

[25] The Agostini Report clearly identified this account as one of this account as one of the Estate accounts. The defendants never challenged the Report. Other than the allegation, no evidence has been submitted to contradict Mr. Agostini's conclusions. The court must accept the Agostini Report and the terms of the Consent Order entered into by the parties. The Court finds no basis for the submission that the Judgment is unlawful.

[26] The Court finds that the defendants have failed to satisfy the conditions of Rule 13. 3 (b) and (c) accordingly, the application to set aside the default judgment is denied with costs to the claimant of $750.00.

Clare Henry
HIGH COURT JUDGE

[4] See also the letter dated June 30, 2008 from the said Bank to Mr. Agostini