TERRITORY OF THE VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO BVIHCV2012/332

In the Matter of Milliner Enterprises Limited
And a Claim for Breach of Contract

AND

In the Matter of Part 8 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000

BETWEEN:

MILLINER ENTERPRISES LIMITED

Respondent/Claimant

AND

[1] DON CAMERON
[2] DYNAMIC DEVELOPMENT GROUP LIMITED

Applicants/Defendants

Appearances

Mr Jamal Smith for the Applicants/Defendants
Mr Jerry Samuels for the Claimant/Respondent

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2013: February 20; June 12
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RULING

Introduction

[1] LANNS, M: This is an application by the Defendants Don Cameron (Mr Cameron) and Dynamic Development Group Limited (DDGL) filed on 21st January 2013 for an order setting aside the default judgment entered against them on 2nd January 2013.

[2] The grounds of the application are stated to be:

1. The Claim Form and Statement of Claim were served on the Defendants at least about 13th December 2013.

2. The First Defendant has been travelling intermittently over the latter half of 2012 and was unable to meet with any legal practitioner to give proper instructions during the business week following the service of the Claim Form and Statement of Claim, as he was preparing for a business trip on 22nd December 2012;

3. The First Defendant returned to the Virgin Islands briefly to spend Christmas with his family before leaving again on 25th December 2012 which did not afford him any opportunity to meet with any legal practitioner;

4. The First Defendant again returned to the Virgin Islands only briefly towards the end of the week on or about 28th December 2012, which did not afford him any opportunity to meet with any legal practitioner over that holiday week-end;

5. The First Defendant again left the Virgin Islands on 31st December 2012 and upon returning for the New Year was expecting to finalize his business with the main aspect of the deal and then meet with a legal practitioner;

6. The Claimant requested a default judgment on 2nd January 2013 which was granted and served on the Defendants on or about 10th January 2013.

7. The First Defendant then immediately sought to meet with a legal practitioner with the first such meeting on the morning of Friday 11th January 2013, which was rescheduled for the morning of Tuesday 15th January 2013 and further on Wednesday,16th January 2013 to provide proper instructions;

8. As soon as the First Defendant was served with the Default Judgment, he did everything practicable to expeditiously apply to the court to have the default judgment set aside;

9. The Claimant's claim for damages is wholly unfounded as it is the Defendants who have suffered loss as a result of the illegal and improper actions of the Claimant, either itself or by its directors, authorised representatives and /or agents, and the Defendants will be seeking damages for its losses despite their desire and intention to complete the proposed works.

[3] The application is supported by the affidavit of Don Cameron, sworn to and filed on 21st January 2013.

Brief Background

[4] The action was brought against the Defendants on 5th December 2012. The action concerns allegations of breach of a construction contract entered into between the parties on 19th February 2010, for the construction of the first floor of a commercial building on land known as Parcels 29 and 30, Block 1440B, Jost Van Dyke Registration Section and located at Great Harbour, Jost Van Dyke.

[5] Mr Cameron is a building contractor.

[6] DDGL is a construction company registered in the BVI. Mr Cameron is a director of DDGL.

[7] MEL is represented as a family owned real estate holding company incorporated in the BVI.

[8] Mr Cameron was served with the Statement of Claim on 12th December 2012, as evidenced by Affidavit of Service of Ripton Jack filed 14th December 2012. DDGL was served with the Statement of Claim on 6th December 2012 as evidenced by Affidavit of Service of Jerome Faulkner filed on 13th December 2012.

[9] Mr Cameron and DDGL failed to file an Acknowledgement of Service or a Defence within the time limited by the rules and thus, on 2nd January 2013, MEL applied for and obtained Judgment for failure to file an Acknowledgement of Service. The amount of the judgment is $61, 223.00 inclusive of Legal Practitioner's Fixed Costs on issue; Legal Practitioner's Fixed Costs on entering Judgment and Court Fees on Claim.

[10] Mr Cameron and DDGL now come to the court seeking an order setting aside the Default Judgment entered against them on 2nd January 2013. The application is vigorously opposed.

Bases upon which an application can be made to set aside a default judgment

[11] There are two bases upon which a default judgment can be set aside. The first is where the Defendant can establish that the correct procedures have not been followed in obtaining judgment in which case normally the Defendant can have judgment set aside as of right without the requirement of establishing a defence to the Claimant's claim [1]. Here the court may set aside judgment on or without an application[2]

[12] On the other hand, if the judgment is regularly obtained and the Defendant is asking the court to exercise its discretion under CPR 13.3 to set aside the default judgment and allow the Defendant to defend the Claimant's claim, a number of conditions must be satisfied.

[13] In relation to the first situation which is in the context of CPR13.2, it has not been suggested that the Judgment in default of Acknowledgment of Service was irregularly

[1] (CPR 13.1)
[2] (CPR 13.2 (2); (Royal Trust Corporation of Canada v Dunn 60 OR 3rd 468)

obtained. So we now look to see whether the Defendants have satisfied the conjunctive requirements of CPR 13.3. None of the requirements trumps the other. So failure to satisfy any one, will bar the Defendants from relief under CPR 13.3 unless they can satisfy the court that there are exceptional circumstances.

CPR 13. 3 (1) (a) : Whether the Defendants have applied to the court as soon as reasonably practicable after finding out that judgment had been entered against them

[14] The Default Judgment was served on Mr Cameron on 10th January 2013 as evidenced by the Second Affidavit of RIPTON JACK filed on 11th January 2013; and on DDGL on 9th January 2013 as evidenced by the Second Affidavit of JEROME FAULKNER filed on 9th January 2013.

[15] The Defendants' joint application was filed on 21st January 2013, eleven days (in the case of Mr Cameron) and 12 days (in the case of DDGL) after becoming aware that the Judgment had been entered against them.

[16] Mr Smith posited that the application was filed as soon as reasonably practicable after becoming aware that the default judgment had been entered. In support of this submission, counsel cites the case of Louise Martin v Antigua Commercial Bank[3] wherein the High Court of Antigua and Barbuda held, on the facts before it that a delay of 15 days between service of the default judgment and the filing of the application was reasonable. Counsel also cites the case of Earl Hodge and Albion Hodge[4] wherein the High Court of the Virgin Islands held that a delay of 13 days was reasonable.

[17] Mr Samuels has seriously challenged Mr Smith's submissions on this issue. He submitted, among other things that the Defendants' evidence conveys a deliberate disregard for the process and procedures of the Court in deliberately putting off consultation with a solicitor despite having more than enough time to so. It was counsel's further submission that there is no general principle that eleven or twelve days is in all circumstances considered 'as soon as reasonably practicable. Counsel contends that having regard to the particular facts of this case, and the burden of proof on the Defendants, the Defendants' evidence does not demonstrate that any of them acted as soon as reasonably practicable after becoming aware that Judgment had been entered against them.

Finding on First Condition

[18] The court is in agreement with the submission put forward by Mr Samuels that there is no general principle that a delay of eleven or twelve days must be considered as soon as reasonably practicable. Nonetheless, the Court is of the view that the case of Louise Martin v Antigua Commercial Bank supra, is persuasive authority. In that case, Thomas J decided that 15 days was as soon as reasonably practicable for the purposes of CPR 13.3 (1) (a). In the view of the Learned Judge, there need not be much debate on the

[3] Claim No ANUHCV1997/0115, delivered 13TH August 2007

[4] Claim No BVIHCV2007/0098, delivered 12th March 2008

issue since the evidence reveals that a period of 15 days elapsed between being served with the judgment and the filing of the Application to set it aside. In the instant case, I am satisfied, and there is no dispute that periods of 11 and 12 days passed between being served with the Default Judgment and the filing of the application. I am content to adopt the approach of Thomas J and consider 11 or 12 days to be 'as soon as reasonably practicable' for the purposes of CPR 13.3 (1) (b). The first threshold has been cleared.

CPR 13.3 (1) (b): Whether the Defendants have given a good explanation for their failure to file an acknowledgement of service

[19] The reason for the failure to file an Acknowledgment of Service is contained in the Affidavit of Mr Cameron sworn to and filed on 21st January 2013. The salient paragraphs are paragraphs 7 to 11, the gist of which is that Mr Cameron was constantly travelling to and from the Virgin Islands in relation to a joint business venture which caused him to be unable to dedicate time to instruct legal counsel which he had hoped to do "had the Statement of Claim not been filed at the worst time of the year."[5] (Emphasis mine). So he decided to "put it off" until he returned, so he could 'focus' on the joint venture. Additionally, he "prevailed under the assumption that the deadline in relation to the Statement of Claim had not passed" and he could still meet with a legal practitioner after he had concluded the entire transaction.

[20] Learned Counsel Mr Smith submitted that the Defendants have given good explanations for their failure to file an Acknowledgement of Service. He sought to reinforce the explanation set out in Mr Cameron's Affidavit, submitting that Mr Cameron was travelling extensively on business during the month of December 2012. Further, he submitted that there was very limited possibility for Mr Cameron to instruct counsel during that period, and as soon as he was able to instruct counsel, he was served with the Default Judgment. It was Counsel's further submission that, considering the time of year when the Court was about to go on vacation, and the pre-existing business obligations overseas, the situation was not a frivolous one whereby Mr Cameron did not want to acknowledge service. It was merely a matter of timing, counsel submitted. So far as Mr Smith is concerned, the explanation given for the failure to file an Acknowledgement of Service amounts to exceptional circumstances, having regard to the timing of the filing of the claim and the fact that Mr Cameron had to travel back and forth on business trips.

[21] In replying to Mr Smith's submissions, Mr Samuels carefully dissected Mr Cameron's Affidavit and submitted, among other things that

(a) The reasons given fail to meet the threshold of good explanations since they amount to no explanation at all.

(b) The requirement to file an Acknowledgement of Service is one of the most straightforward and least onerous under the CPR. It does not require extensive hours of consultation with lawyers.

[5] See paragraph 17 (b)

(c) A litigant becomes aware of the requirement and the deadline to file an Acknowledgement of Service, immediately upon being served with Form 1 A (being Notes for the Defendant served with the Claim);

(d) The Defendants' evidence is void of any explanation of their failure to have at least preliminary consultations with any solicitor immediately after being served prior to expiration of the deadline for filing an Acknowledgement of Service and prior to Mr Cameron's departure on the first trip.

(e) Any prudent businessman in Mr Cameron's position would have immediately informed his solicitor that he was served with a claim, and make it clear that due to other commitments, he could not address the details immediately, and find out if there was anything he needed to do immediately to protect his position pending full consultation. Instead of taking this simple, logical and reasonable step, Mr Cameron deliberately "put it off" as stated in paragraphs 7 and 8 of his affidavit evidence.

(f) Contrary to the Defendants assertions, the evidence is strong that they had have more than enough time to file an Acknowledgement of Service since the Default Judgment was only entered 6 days after expiry of Mr Cameron's deadline, and 12 days after expiry of DDGL's deadline. Mr Cameron had 6 additional days and DDGL had 12 additional days after expiry of the respective deadlines to acknowledge service.

(g) Mr Cameron's evidence is conspicuously vague about the date of his return from the USVI on Trips 2 and 3. Consequently, the court cannot assume that there was not enough time between these trips for him to meet urgently and briefly if possible with solicitors.

(h) Even if Mr Cameron's travel plans made it difficult for him to meet with a solicitor in December, (which MEL does not accept) he has failed to explain why a simple phone call or an email to a solicitor while in transit would not have sufficed.

(i) The Defendants' evidence is void of any explanation on behalf of DDGL. All of the reasons put forward in evidence attempt to explain Mr Cameron's failure for not acting promptly and for not filing an Acknowledgement of Service. The Notice of Application which purports to be made on behalf of both Defendants is void of any grounds upon which DDGL can reasonably rely in support of the application. This is in breach of Part 11.7 of the CPR.

(j) There can be no suggestion that Mr Cameron's travels hampered DDGL since Mr Cameroon is not the only controlling mind or

authorised natural person capable of effecting DDGL's wishes. The Defendants' own evidence confirms that Mr Cameron is only a director of DDGL. Consequently, there is no reason and certainly no good explanation why DDGL could not have filed an Acknowledgement of Service.

(k) The Defendants have failed to give any explanation and certainly no good explanation for their failure to file an Acknowledgement of Service.

Finding on Second Condition

[22] The Court is not of the view that the Defendants have cleared the threshold requirement of CPR 13.3 (1) (b) in that they have not provided any good explanation for their failure to file an Acknowledgement of Service.

[23] Based on his affidavit, Mr Cameron seemed to consider his purported business venture more important than responding to the Claim. He showed no regard for the procedures and processes of the court, ignoring the action brought against him and focusing on his business venture.

[24] The court is totally unimpressed with the suggestion that Mr Cameron was operating on the assumption that time had not passed and that he would have been able to meet the deadline. It should have been obvious to Mr Cameron from the "Notes" appended to the Claim Form as to what action he should take on receiving the Claim Form. These Notes also inform a Defendant of the rights of the Claimant if the Defendant chose not to acknowledge service or file a Defence within the stipulated time.

[25] Even if Mr Cameron had planned business trips in relation to a joint venture (of which there is little or no proof), the mere fact that he was served with papers, should have brought home to him that out of an abundance of caution he ought to take immediate steps to consult a lawyer who no doubt would have advised him that time was of the essence.

[26] Additionally, there is no plausible explanation why in these days of cell phones, fax and emails, scanners that a businessman of Mr Cameron's calibre could not have contacted a lawyer with a view to soliciting advice and giving instructions pertaining to the papers served on him. He treated the matter with utmost disregard.

[27] The consequence of failure to file an Acknowledgement of Service or Defence is the entry of default judgment. However, a Defendant may file an Acknowledgement of Service, notwithstanding the time for doing so has expired, provided that he does so before a request to enter judgment is filed.[6]

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[6] Richard Frederick v Comptroller of Customs and Anor, HCVAP2008/037, per Her Ladyship Mde Justice of Appeal, Janice Georges-Creque, (now the Hon Dame Janice Pereira, Chief Justice).

[28] At the time of filing of the Request for Judgment, 12 days had passed after the expiry of the deadline in the case of DDGL. In the case of Mr Cameron, 6 days had passed. So the Defendants must be taken to have had ample time to take appropriate steps to file an Acknowledgment of Service even before the Request for judgment had been filed. I am not satisfied. The result is that I am in agreement with the submissions advanced by counsel for MEL to the effect that neither Mr Cameron nor DDGL has given a good explanation for their failure to file an Acknowledgement of Service within the time limited by the rules or at all.

Exceptional Circumstances

[29] It is uncertain as to whether the Defendants are relying on exceptional circumstances. At paragraph 7 of his written submissions, Mr Smith stated "The Defendants are not seeking to rely on any exceptional circumstances except that a good explanation as required by CPR13.3 (1) (b) may itself be considered an exceptional circumstance."

[30] During the course of oral arguments, Mr Smith took the position that the court is permitted to look at exceptional circumstances and went on to submit that the fact that Mr Cameron had to be away, and had to go back, would be an exceptional circumstance.

[31] Mr Samuels, on the other hand, took the position that there are no exceptional circumstances. He stressed that there is no mention of any illness - no extenuating circumstances. He pointed to paragraph 7 of the written submissions on behalf of the Applicants/Defendants and went on to submit that if the Defendants are relying on a good explanation as the exceptional circumstance, since there is no good explanation, then there can be no exceptional circumstance.

Discussion

[32] I am not sure where Mr Smith's submission on the issue of exceptional circumstances takes the Defendants. Although there is no definition in our rules of the phrase 'exceptional circumstances; and no Practice Direction to guide the court as to what constitutes 'exceptional circumstances' the court, is of the view that exceptional circumstances may arise, for example where a litigant has fallen seriously ill; hospitalization; or where there are other unforeseen factors outside one's control which has a negative impact on one's ability to respond to the Claim, like death of a close relative; serious personal disruption like fire, burglary; extreme weather. The court is not of the view that going "back and forth" (as Mr Smith puts it) would make it an exceptional circumstance that prevents the Defendants in this particular case from filing an Acknowledgement of Service of the Claim Form and Statement of Claim.

[33] On the totality of the evidence, I am not of the view that Mr Cameron's explanation can be characterized as an exceptional circumstance. That submission accordingly fails.

[34] Having found that no good explanation has been tendered for the failure to file an Acknowledgement of Service, and given the conjunctive requirements set out in CPR 13.3 (1), the court need not go any further to determine whether the Defendants have any real prospects of successfully defending the Claim. And the court declines to do so.

Conclusion

[35] As one of the three pre-conditions that would excite the court's discretion to set aside the Judgment in Default of Acknowledgement of Service has not been satisfied, the Court is unable to accede to the application by the Defendants to set aside the Default Judgment. Accordingly the Default Judgment stands.

[36] The Court therefore orders that

1. The application by the Applicants/Defendants Mr Don Cameron and DYNAMIC DEVELOPMENT GROUP LIMITED be and is hereby dismissed with costs to the Claimant MILLINER ENTERPRISES LIMITED in the sum of $1500.00.

[37] Each Counsel has presented me with helpful submissions and authorities. I thank them for their assistance.

Pearletta E Lanns
Master