**EASTERN CARIBBEAN SUPREME COURT**
**ANTIGUA & BARBUDA**

**IN THE HIGH COURT OF JUSTICE**
**CLAIM NO: ANUHCV 2013/0587**
**Between**

**DAPHNE SIMMONS**

**As Attorney of Theresa Emmanuel**

**Claimant/Respondent**

**and**

**WENDELLA WRAY**

**Defendant/Applicant**

**APPEARANCES:**
Denise Parillon for the claimant/respondent
Hugh Marshall along with Kema Benjamin for the defendant/applicant

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2014: February 10;

April 29

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**RULING**

[1] **GLASGOW M (ag):** The defendant/applicant (hereinafter the applicant) has applied to this court by way of application filed on December 20, 2013 for an order setting aside the default judgment obtained by the claimant/respondent (hereinafter the respondent) on October 28, 2013. The application is supported by an affidavit filed by the applicant on December 30, 2013. The applicant has attached a draft defence and draft counterclaim to the application.

The respondent filed two affidavits in which she opposes the setting aside of the default judgment.[1]

## BACKGROUND

[2] Sometime in June 2012, the applicant and one, Theresa Emmanuel signed a written agreement whereby the applicant would have the rental use of certain premises owned by Ms. Emmanuel. The lease agreement provided for rent to be paid monthly;

[3] On September 16, 2013, the respondent filed a claim form along with a statement of claim in which it is claimed that the applicant breached the lease agreement by failing to pay –

(1) rent for (8) months;
(2) late fees on those outstanding rents; and
(3) electricity charges for the leased premises[2].

[4] The respondent sought relief of $25,610.00, damages, interest and costs. On September 25, 2013, the applicant visited the offices of counsel for the respondent and the claim form was served on her by counsel. An affidavit of service sworn by counsel and filed on October 17, 2013 is on record along with an affidavit of one, Claudia Christian, filed on October 4, 2013 wherein she states that she was in counsel's office at the time the claim was served on the applicant. She witnessed the entire event.

[5] The applicant did not file an acknowledgement of service or defence. The respondent then requested and was granted the default judgment on October 28, 2013. The applicant applied on December 20, 2013 to have it set aside.

[1] The affidavit of the claimant/respondent filed on February 6, 2014 and that of Theresa Emmanuel filed on June 26, 2014.

[2] Oddly, the statement of claim does not state in what capacity the respondent has filed this claim since it is apparent that she was not one of the parties or in any way privy to the lease agreement.

## THE ARGUMENTS

[6] The application has been made pursuant to Part 13.3(1) of the Civil Procedure Rules 2000. In her application and supporting affidavit, the applicant asserts that -

(1) Counsel for the respondent served her with a copy of the claim form, statement of claim and other required documents on September 25, 2013. The respondent's counsel did not explain the nature of the documents. When the applicant read the documents, she did not recognize the respondent's name nor did she understand the contents of the documents. The respondent's attorney advised her to seek counsel but the applicant did not appreciate that there was a limited time to do so;

(2) Due to impecuniosity, she could not consult an attorney. She did consult with attorneys sometime in October 2013 to obtain advice regarding possible breaches of the agreement by the landlord. It was not until a meeting with the lawyers in mid-November 2013 that the applicant informed counsel that she had been previously served with the claim. Counsel then called the court office and was informed that a default judgment had been entered against the applicant for failing to respond to the claim ;

(3) The default judgment was served on her on November 30, 2013. The applicant immediately took it to her lawyer's office. However, due to impecuniosity, a partial payment of the lawyer's retainer was not made until December 16, 2013. Thereafter the present application was filed;

(4) There is a good defence to the claim. The applicant's story is that while she owes for rent and late fees, the landlord did not provide her with any statement of charges for electricity. Additionally, the respondent's complaints fail to include the fact it is the landlord's actions that led to any delinquency on the applicant's part;

(5) There were issues with access to the building including the fact that other tenants put locks on the main entrance gate. The applicant was effectively shut out of her business and had to resort to mobile sales outside of the very premises for

which she was paying rent. The applicant repeatedly complained to the landlord about this state of affairs. It was not until a letter was sent to the landlord from the applicant's lawyer that the landlord took action to demand that the other tenants remove the locks from the main gate. Thereafter the landlord changed the locks and gave each tenant keys to the main gate but the applicant's key never worked. The applicant sought permission to put signage at the main entrance directing her clients to alternative access but this was denied. The access issue was never resolved;

(6) From the beginning of the lease, the applicant was compelled to fix the washroom on the leased premises, clear the entrance of debris and garbage and paint both the exterior and interior of the premises. During the lease, the landlord failed to maintain the premises. Maintenance of the leased premises was left to the applicant. All these factors led to the applicant's delinquency. The applicant therefore counterclaimed for breaches of the landlord's obligations and seeks damages and other relief, including for loss of business;

(7) There are issues with the pleadings. The respondent was not the person with whom the applicant contracted. The pleadings do not disclose the capacity in which the respondent is bringing the claim. Additionally, the lease should have been stamped in accordance with the Stamp Act, Cap 410 of the revised laws of Antigua and Barbuda 1992 ( hereinafter the Act). The respondent cannot rely on the lease "*at trial and it cannot be pleaded or admitted or annexed to any pleadings by reason of Section 21 of the Stamp Act, Cap. 410*".

[7] The respondent opposes the application on the grounds that the applicant has not met any of the requirements of Part 13.3 of the Civil Procedure Rules 2000 (CPR) for the setting aside of the default judgment. The gravamen of her submission is that the applicant failed to apply to set aside the default judgment in a timely manner. There was also no good reason for failing to respond to the claim. In the respondent's estimation, the supporting plea of impecuniosity has not been substantiated in any manner and as such, it cannot be accepted as the reason for either the failure to

apply to set aside the default judgment in a timely manner or as a good explanation for failing to respond to the claim.

[8] The respondent also submits that there is *"no defence whatsoever the … claim".* The respondent opines that the complaint of a failure to plead the capacity in which the claim is brought by the respondent is not fatal since it can be cured by a simple amendment before case management. The respondent also submits that the applicant's admission of the rents owed as pleaded and the admission of an unspecified sum for late fees make the claim indefensible. There is also not much to be made of the denials regarding electricity charges since it was the applicant's obligation to ensure that these charges were paid regardless of whether the respondent provided the utility bills. The applicant could easily have gone to the utility company to retrieve the information. This was a contractual obligation. Much also does not turn on the applicant's complaint that a notice to quit was not served on her because there is evidence that this was indeed done. The complaint about the stamp duties on the lease could also be easily dispatched with. The affidavit of Theresa Emmanuel filed on June 26, 204 attaches the duly stamped copy of the lease. Therefore, the document may now be received in evidence pursuant to section 20 of the Act, notwithstanding the fact that it was stamped after the filing of the claim;

[9] The draft counterclaim is also attacked by the respondent as having no merit. The applicant's complaint of difficulty with access to the leased premises is refuted by the respondent's assertion that it is indeed at the very premises that the applicant was served with the landlord's notice on September 13, 2013. With regards to the counterclaim for moneys expended to improve and maintain the premises, the respondent observes that the applicant *"has not produced any agreement, authorization from the landlord or even notice to the landlord concerning the same…"*

## THE LAW

[10] The application is brought pursuant to Part 13.3(1) of the CPR 2000 which provides –

> ***Cases where the court may set aside or vary default judgment***

*13.3(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 acknowledgement of service or a defence as the same case may be; and*

*(c) Has a real prospect of successfully defending the claim.*

*(2) 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.*

*(3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.*

[11] The requisites of that rule regarding the setting aside of a default judgment and the manner in which the court is to apply it are by now well-known and well-rehearsed. Barrow JA in **Kenrick Thomas v RBTT Bank Caribbean Limited**[3] offered this guidance-

*"The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further that the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. 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 pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the Court has no discretion to set aside."*

[3] Civil Appeal No. 3 of 2005 (Saint Vincent and the Grenadines)

## ANALYSIS

### Has the applicant applied as soon as reasonably practicable?

[12] The applicant became aware of the default judgment sometime in mid-November 2013 when her lawyer contacted the court office. It was served on her personally on November 30, 2013. The application to set aside the default judgment was filed on December 20, 2013. The rules provide that the applicant should apply *"as soon as reasonably practicable after finding out that judgment had been entered…"* By the applicant's admission, she became aware of the judgment on the day that her attorney called the court office to enquire whether a judgment had been entered against her. It may be said that time began to run against her from that moment. However, using the most generous approach, I would calculate the time from the date of service of the default judgment, that is, on November 30, 2013. I would not find in this case that a period of twenty days was an unreasonable period within which to apply to set aside the default judgment. Clearly, much more prompt action could have been taken. This is especially considering that the applicant had already identified counsel to deal with her issues with the landlord. The lawyer could have been asked to act much sooner to make the setting aside application. Nonetheless, the applicant appears to have taken active steps by seeking to engage the lawyer once she was served with the default judgment and by paying the deposit on the retainer. The rules require her to act "as soon as reasonably practicable…" I find that in all the circumstances, the applicant has met this requirement.

### Has the applicant given a good reason for failing to respond to the claim?

[13] On September 25, 2013, the applicant was served with the claim form, statement of claim, and the acknowledgment of service, defence and counterclaim and application to pay by

installments forms. The applicant's story is that she did not understand the nature of the documents with which she was served and the respondent's counsel who served her with the documents did not explain the nature of those documents to her. The applicant was also unable to file an acknowledgment of service and/or defence as she was unable to secure representation due to her impecunious state of affairs;

[14] Before commenting on the viability of the reasons provided by the applicant, I must make some observations on the affidavit of service. Before the court decides that the default judgment may be set aside pursuant to Part 13.3, it must satisfy itself that the default judgment is not one that it must set aside in accordance with Part 13.2 of the CPR 2000. Part 13.2 reads –

***Cases where court must set aside default judgment***
*13.2 (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because in the case of –*
*(a) a failure to file an acknowledgment of service – any of the conditions in rule 12.4 was not satisfied; or*
*(b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied.*
*(2) The court may set aside judgment under this rule on or without an application*

[15] The default judgment was entered for failure to file a defence. In this context, if it is to be found that Part 13.2 of the rules does not apply, then Part 13.2 (1)(b) requires that evidence must be shown that the conditions set out in Part 12.5 were satisfied. Part 12.5 reads -

***Conditions to be satisfied – judgment for failure to defend***
*12.5 The court office at the request of the claimant must enter judgment for failure to defend if –*
*(a) (i) the claimant proves service of the claim form and statement of claim; or*

*(ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;*
*(b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
*(c) the defendant has not –*
*(i)filed a defence to the claim or any part of it (or the defence has been struck out or is*
*deemed to have been struck out under rule 22.1(6)); or*
*(ii) (if the only claim is for a specified sum of money)filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or*
*(iii) satisfied the claim on which the claimant seeks judgment; and*
*(d) (if necessary) the claimant has the permission of the court to enter judgment.*

[16] The affidavit of service is part of the evidence before the court that the judgment was properly entered pursuant to Part 12.5. The affidavit is sworn to by counsel for the respondent who appears to argue the matter. Counsel's view is that this evidence is uncontroverted since the applicant has not challenged the issue of service of the claim form and other documents.

[17] Counsel is correct that the applicant has not challenged the issue of service of the claim and accompanying documents and as such service has been acknowledged. However, I am of the view that the caution against counsel swearing to an affidavit in a matter in which he or she appears is not restricted to whether the affiant, in this case counsel, is challenged on the evidence before the court. The fact is that evidence sworn by counsel is given as proof in a matter in which counsel appears and makes representation. The affidavit sworn by counsel is evidence before the court of matters on which the respondent relies. Counsel should have avoided swearing to an affidavit in those circumstances or have another attorney appear to argue her client's cause if she could not avoid swearing to the affidavit. In view of the matters to be considered on this application, it puts the court in an embarrassing position of having to consider counsel's credibility. This is indeed my understanding of the caution set out in the authorities of **Casimir v Shillingford and**

**Pinard**[4] and **Gregory Knight v First Caribbean International Bank Ltd.**[5] If it is the case that the respondent did not need or wish to rely on this evidence as proof of service, then it should not have been placed before the court.

[18] In respect of the reasons for failing to respond to the claim in a timely manner, I find the reasons to be unconvincing. As the respondent correctly submits, when a claim form is served on a defendant it clearly tells the defendant what to do and specifies the consequences for failing to comply. The Notes to the defendant are very prominent on a claim form. Even if this was not the case, the applicant accepts that the respondent's attorney advised her to seek legal counsel. She admits that she only met with her lawyers in mid-November 2013 to complain of her own issues with the landlord. This is not acceptable. Legal proceedings are serious matters. Even if the applicant did not understand the documents, at the very least, the notice to the defendant attached to the claim form should have informed her of the need to seek legal advice;

[19] Regarding the claim of impecuniosity, I also agree with counsel for the respondent. There is simply no evidence of the applicant's means before the court other than the statement that she is a single mother of (2) children who earns a certain sum of money per week. The range of earnings set out in the affidavit is not supported by any proof. Even if the statements in the affidavit were to be accepted without more, the evidence does not support the plea of impecuniosity. The applicant's evidence is that she approached her lawyers in late October 2013 to instruct them to pursue her issues with the landlord. The meeting took place in mid-November 2013. It was only at this time that the applicant informed counsel of receipt of the claim which had been served on her since September 25, 2013. Impecuniosity did not prevent the applicant from retaining

[4] [1967] 10 WIR 270

[5] HCVAP 2012/007; See also Caribbean Consultants & Management Ltd v AG of Belize et al Claim No. 333 of 2008

legal counsel to pursue her own issues with the landlord. A similar regard for the legal process previously served was not demonstrated. I find therefore that there is no good explanation for the failure to respond to the claim;

**Does the applicant have a real prospect of successfully defending the claim?**

[20] Having failed to provide a good explanation for failing to defend the claim, the application must be refused. However, I will consider this latter condition of Part 13.3(1) for completeness. The concept of a real prospect of successfully defending a claim has also been helpfully elucidated on a number of occasions in our court. Thomas J puts it this way in **Louise Martin v Antigua Commercial Bank**[6]

> In BLACKSTONE'S CIVIL PRACTICE 2002 at paragraph 34.10 the matter is addressed in these terms in relation to summary judgment under Rule 24.2 of the English Civil Procedure Rules. However, this provision contains the phrase "real prospect of succeeding" hence the relevance. "In *Swain* v *Hillman* [2001]1 All ER 91, Lord Woolf said that the words 'no real prospect of succeeding' did not need any amplification as they spoke for themselves. The word 'real' directed the Court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. Nor does it mean that summary judgment will be granted if the claim or defence is 'bound to be dismissed at the trial '. The Master of the Rolls went on to say that the summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. A claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based *(Three Rivers District Council v Bank* of *England* (No.3)). The judge should have regard to the witness statements and also to the question of whether the case is capable of being supplemented by evidence at the trial. Specifically to the issue of setting aside a default

[6] ANUHCV 1997/0115

judgment, the learned authors of BLACKSTONE'S1 at paragraph 20.11 record the following learning: "The wording of rule 13.3 (1) (a) mirrors the test established in *Alpine Bulk* Transport Co. Inc v *Saudi Eagle Shipping* Co. *Inc* [1986] 2 Lloyd's Rep 221 that the defendant must have a case with a reasonable prospect of success, and that it is not enough to show a merely arguable defence."

[21] The terms of the defence have been set out above in this judgment. I agree with the applicant that it is highly improper for the respondent to fail to plead the basis on which the action was brought against the applicant. The respondent in this case was not the landlord. If she is to claim against the applicant for damages pursuant to an agreement to which she was not a party, it is more than trite that she recites the basis on which she is entitled to seek relief.

[22] In respect of questions regarding the admissibility of the lease due to the respondent's noncompliance with the Act, the respondent has complied with the requirements of the Act, subsequent to the filing of the claim and as such the lease is now admissible pursuant to section 20 of that Act[7]. This complaint does not assist the applicant;

[23] Regarding the applicant's failure to pay rent, or electricity, the landlord's alleged breaches of the obligation to provide access and to maintain the premises should not be pleaded as a defence thereto. The obligation remained that of the applicant to pay rent during her occupation of the premises. The charges for electricity were also a contractual obligation as set out at clause 1(b) of the lease which provides that the applicant agreed *"to pay all charges every month for electricity and water whether or not a bill has been received at the Chambers of Jonas Parillon & Co, factory Road, St. John's, Antigua***".**

[7] 20. (1) Upon the production of any instrument chargeable with any duty as evidence in any Court of Civil Judicature in Antigua and Barbuda, the officer whose duty it is to read the instrument shall call the attention of the Judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty and the penalty payable by law on stamping the same, as aforesaid, and of a further sum of one dollar and twenty cents, be received in evidence, saving all just exceptions on other grounds.

[24] In my view, the only pleading in the defence which is of some substance is the applicant's complaint about the respondent's capacity to bring the claim. While I agree that the pleadings are wholly unsatisfactory in this regard, the applicant's challenge is not insurmountable and may be met by the requisite amendment. I find therefore that the applicant's prospects of successfully defending the claim are dubious.

## CONCLUSION

[25] It was the applicant's burden to satisfy this court that the conditions in CPR 13.3 have been met to set aside the default judgment. The applicant has failed to do so. The application is therefore refused. The applicant is to pay the respondent's cost on this application in the sum of $500.00.

……
**Raulston Glasgow**
Master(ag)