

EASTERN CARIBBEAN SUPREME COURT  
SAINT VINCENT & THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2011/0466

BETWEEN:

KENLYN PAMELA CLOUDEN  
Administratrix of the Estate of  
GARY CLOUDEN

Claimant

and

[1] PHIL CULZAC  
[2] PHILIPJAMES

Defendants

Before:

Ms. Agnes Actie

Master [Ag.]

Appearances:

Ms. Patricia Marks of counsel for the claimant

Miss Vilette Benjamin of counsel for the 2<sup>nd</sup> Defendant

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2014: June 2.

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Reasons for Decision

[1] **ACTIE, M [AG.]:** This is a matter pursuant to CPR Part 13. 2 which provides for cases where the court *must* set aside a default judgment.

[2] The claimant qua administratrix, filed a claim form with statement of claim on 22<sup>nd</sup> December 2011 for damages against the defendants for causing death of Gary Nelson as a result of a vehicular accident which occurred on 3<sup>rd</sup> September 2006. The second defendant owns the vehicle which was being driven by the first defendant at the time of the fatal accident.

- [3] The second defendant filed an acknowledgment of service on 19<sup>th</sup> January 2012.
- [4] The Registrar by order dated on 19<sup>th</sup> June 2012 granted judgment in default of defence pursuant CPR 12.10 with a preamble "*No defence having been filed by the defendant*". The default judgment did not indicate which of the two defendants' judgment was entered against.
- [5] The second defendant filed a defence and ancillary claim on 17<sup>th</sup> December 2013.
- [6] Upon further review it was discovered that the claim form had not been served on the first defendant, the main tortfeasor.

#### **THE LAW**

- [7] CPR 12.5 provides the conditions to be satisfied for entry of default judgment for failure to defend the claim. Proof of service of the claim form must be established before the court can grant judgment in default.

CPR 12.5(1) states:-

"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
- (b) ... ."

- [8] The court office must be satisfied that there has been valid proof of service on the defendants before entry of judgment in default for failure to file an acknowledgement of service or defence. There was no evidence of service on the first defendant.
- [9] Secondly, the court office does not have jurisdiction to enter judgment in default against one defendant in a claim against more than one defendant except with the consent of the parties. An application for default judgment in cases where there are more than one defendant must be referred to the judge. The Registrar does

not have the jurisdiction to bifurcate the claim. It is a matter for a judge to determine on law and evidence.

[10] CPR 2000 12.9 provides for default of judgment against more than one defendant.

“(1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one or two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants then if the claim:

(a) can be dealt with separately from the claim against the other defendants:-

(i) the court may enter judgment against that defendant; and

(ii) the claimant can continue proceedings against the other defendants, or

(b) cannot be dealt with separately from the claim against the other defendants, the court –

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes of the claim against the other defendants.”

[11] The court may enter judgment in default against one defendant where the claim is against more than one defendant but only if the claim can be dealt with separately from the claim against the other defendants. The claim herein is for damages for causing death in motor vehicular accident against the first defendant who was the driver of a motor vehicle owned by the second defendant. The claim alleges that the death of the deceased was as a result of the negligence of the first defendant. The liability of the second defendant as owner of the vehicle rests on the liability of the driver, the first defendant. The first defendant who is the main tortfeasor has not been given an opportunity to give his version of facts. There is no evidence of any attempt to serve the first defendant.

- [12] The court notes that the second defendant has, without the court's permission, filed a defence and ancillary claim against the first defendant after the judgement in default was granted. The court, although not validating the defence and ancillary claim filed on 17<sup>th</sup> December 2012, notes that the second defendant contends that he has no knowledge of the first defendant's alleged negligence which the claimant claims to have caused the death of the deceased. The claim therefore cannot be separated in the circumstances before the liability of the first defendant is proven.
- [13] Further whereas CPR 12. 4 and CPR 12.5 state that the "*Court Office*" (Emphasis added) at the request of the claimant must enter judgment for failure to file an acknowledgment of service or failure to defend respectively. CPR 12.9 states that "*The Court*" may enter a judgment against one of two or more defendants if the claim can be dealt with separately. The language in CPR 12.9 is dissimilar to the provisions in CPR 12.4 and CPR 12.5 as to jurisdiction. "*The Court*" in such an instance means a Judge of the High Court or a Master in Chambers but does not include the Registrar or the Court Office. It is axiomatic that the Registrar or Court Office does not have jurisdiction to enter judgment in default against one defendant in a claim where there is more than one defendant.
- [14] The claimant having failed to serve the first defendant, the main tortfeasor, is now seeking to enforce damages against the second defendant. The entry of judgment in default by the Registrar against the 2<sup>nd</sup> defendant on 19<sup>th</sup> June 2012 is erroneous, irregular and cannot stand.
- [15] CPR Part 13. 2 provides for cases where the court *must* (Emphasis added) set aside default judgment. The Rule provides;
- "(1) The Court must set aside a judgment entered under part 12 if judgment was wrongly entered because 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 judgement under this rule on or without application.”

[16] CPR 13.2 mandates that a judgment ‘wrongly entered’ must be set aside. The court has no other option but to set aside an irregular judgment obtained under CPR 12.

**ORDER**

[17] For the foregoing reasons and pursuant to CPR 13.2, the judgment in default of defence against the second defendant granted by the Registrar on 19<sup>th</sup> June 2012 was set aside.

**Agnes Actie**  
Master [Ag.]