SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2012/0902

BETWEEN

RICHARD FREDERICK

Claimant

AND

STANLEY FELIX

Defendant

Appearances:

Mrs. Lydia Faisal for the Claimant
Mr. Gerard Williams for the Defendant

2014: July 9th, August 28th, September 5th

JUDGMENT

[1] TAYLOR-ALEXANDER M: The claimant in the substantive case has sued the defendant for words he alleges the defendant spoke of him, defamatory of his character. The claim was not defended and the claimant applied for judgment. The defendant has now filed an application dated the 31st July, 2013 to set aside the judgment entered. Both applications were fixed for hearing on the 9th July 2014.

Procedural History

[2] An appreciation of this case's procedural history is relevant to understanding the applications currently before the court.

[3] On the 30th day of October, 2012, the claimant filed the instant claim against the defendant. The claim was served on the defendant on the 2nd day of November, 2013 at 9:00 am. An Acknowledgment of Service was filed on the 9th of November, 2012. A defence should have been filed on or before the 1st December, 2012.

[4] A defence was not filed and thus, on the 4th day of December 2012, the claimant requested judgment in default of defence. The request was denied. The Registrar in refusing the judgment concluded that the claim being one for a remedy other than a remedy to which Part 12.10 (a) (b) or (c) referred, judgment could not be by request, but only by application to the court. The request form with the attached note was sent to the claimant's counsel on the 7th day of January, 2013. On the 8th day of January 2013, one day after the Registrar's note was received, the claimant applied for judgment.

[5] A defence was filed on the 10th day of January 2013. It was then five weeks out of time and there was already an application for judgment pending before the court. The defendant also filed an application for an extension of time within which to file his defence. This application was subsequently dismissed after an earlier hearing in the proceedings at which time the court determined that the claimant was entitled to judgment. The defendant subsequently filed an application to set aside a default judgment after judgment had been entered for the claimant.

The evidence submitted by the claimant Stanley Felix

[6] He states that he is a Minister of Government in the Ministry of Physical Development, Housing and Urban Renewal, a portfolio formerly held by the Respondent/Claimant under the former government. He acknowledged having being served with the originating process and that he personally completed the Acknowledgement of Service and caused it to be filed on the 2nd November, 2012. At that time he listed the Chambers of Peter I. Foster & Associates as his

Attorneys as they had been representing him in other proceedings in SLUHCV2012/0487 where he was suing the claimant for defamation. He however states that he never formally instructed them on the matter. He avers that on or about the 12th November, 2012, he gave instructions to his driver, Mr. Claudius Oliviere to deliver the documents with which he had been served to the chambers of his counsel and colleague Mr. Gerard R. Williams whom he had instructed. At that time the defence would have been due on or before the 3rd December, 2012. He claims that he had spoken to his counsel and further informed him that he should proceed to sign the certificate of truth to the defence on his behalf, since his schedule required him to be out of state during the last two weeks of November 2012. He had satisfied himself and verily believed that all deliveries that he had given Mr. Oliviere that day, including the originating process were made in accordance with his instructions and which he presumed were correctly done.

[7] On or about the 4th of January, 2013 and following Christmas and New Year's break, he had further discussions with his attorney. It was only then that he discovered that Mr. Williams had not received the documents pertaining to this matter and as a consequence, his defence had not been filed. Mr. Williams informed him that having not received the documents as previously arranged he assumed that alternate arrangements had been made for the filing of the defence. His counsel thereafter searched the court file on the 7th January 2013 and it was discovered that a request for default judgment had been filed on the 4th December, 2012.

[8] The claimant states that he made enquiries of his driver on the 4th January, 2013 and it was only then that he realised that the originating process were wrongly delivered to the Chambers of Alberton Richelieu & Associates.

[9] He avers that he has since communicated with attorney Alberton Richelieu who informed him that he recalled receiving the documents during the month of

November 2012. He explained that he had intended to raise the matter with the claimant since he had received no instructions on the documents. However and given his very busy schedule at that time, the matter completely slipped him and was never raised.

[10] He states that his application to set aside judgment is being made promptly upon the granting of the respondent/claimant's application for default judgment on the 24th July, 2013. The late filing of his defence was not intentional neither does it prejudice the respondent/claimant. He states that he has profound interest in defending the claim brought against him for defamation and that this matter ought to be tried before the courts, as there is a public interest in having such matters tried.

Evidence averred by Alberton Richelieu states:—

[11] He is an attorney-at-law and the principle of the law in the law firm, Alberton Richelieu & Associates. He knows both the applicant and respondent. He states that his knowledge of this matter is very limited and he has not been retained by any party to represent their interest.

[12] He avers that he recalls having received the Claim Form, Statement of Claim and supporting documents at his chambers in this matter, during the early part of November, 2012. It was delivered by someone representing the applicant/defendant to these proceedings. Having received no instructions concerning this matter, he took no steps on the matter. He avers that it was his intention to contact the applicant/defendant with respect to the documents received. However he had had no idea of the urgency of the matter. This, the absence of any instructions and the fact that he had been otherwise occupied during that period of time, he failed to do so.

[13] He confirmed these particulars later with the defendant who contacted him with respect to the location of his documents.

Evidence submitted by Claudius Oliviere states:—

[14] He is a Public Officer employed with the Ministry of Physical Development, Housing and Urban Renewal as a driver. He is attached to the office of the Minister, the Honourable Stanley Felix.

[15] He recalls that on or about the 12th November, 2012, he was instructed by the Minister to deliver a package to the chambers of Gerard R. Williams. That assignment was in keeping with his general duties which, in fact, included the delivery of several other packages that day.

[16] He states that during the weekend of 4th January, 2013, he was informed by the Minister that Mr. Williams never received the package which he was instructed to deliver to him. It was only at that moment that he recalled the specific instructions for delivery and acknowledged that the package was in fact delivered to the chambers of Alberton Richelieu rather than the chambers of Mr. Gerard R. Williams. He states that the delivery of this package to the chambers of Mr. Alberton Richelieu was a genuine mistake as he had on many occasions in the past visited those chambers to deliver documents.

Evidence of the Defendant Richard Frederick:—

[17] He states that there being no defence filed to his claim, he instructed his legal representative to file an application for default judgment in accordance with the Civil Procedure Rules. He states that he knows that the defendant filed an application for an extension of time to file his defence and to set aside the application for judgment in default.

[18] He states that after reading the affidavit of Mr. Richelieu which formed part of the defendant's application, he telephoned him, to determine the veracity of the Defendant's claim that the documents were sent to Mr. Richelieu's chambers in

error. When subsequently they spoke, Mr. Richelieu informed him on Saturday January 5th, 2013 he met Mr. Gerard Williams at the Rodney Bay and who asked him whether the defendant had contacted him in relation to the preparation of a defence in these proceedings. Mr. Richelieu had told Mr. Williams that the Defendant had not spoken to him and further, he, Mr. Richelieu preferred not to become involved in this matter.

[19] The claimant states that Mr. Richelieu believed that the documents were sent to him for action but having indicated that he was not getting involved no instructions were forthcoming and the file remained with him until it had been retrieved by the defendant.

[20] The claimant states that the defendant is a lawyer by profession and is very well aware of the rules regarding the filing of a defence. He could therefore ably file his defence himself rather than allow time to elapse. As such he avers that the defendant's application to set aside judgment should be dismissed because there appears to be an intention to mislead the court by placing before it untrue allegations.

Issue to be Resolved

[21] The ultimate question having regard to the application filed is whether the judgment now entered for the claimant should be allowed to stand or whether the defendant's defence filed on the 10th January 2013 is to be allowed to be entered as validly filed in accordance with CPR 2000, in effect setting aside the judgment entered.

Submissions of Defendant

[22] According to his submissions, the defendant applied within 3 days of his knowledge of the entry of judgment.

[23] On the question of whether the defendant has given a good explanation for his failure to file within the requisite time frame the defendant relies on the case of

Michael v. Danny Ambo HCVAP 2010/016 at Paragraph 14, where Edwards J as she then was considered that there were some specific explanations that may be offered by a defendant which would not amount to a "good explanation" to excuse non compliance of the rules. Of these the learned judge cited misapprehension of the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial, incompetence or inadvertence. The defendant submits that the explanation offered is of genuine error which is not categorized by Edwards J.

[24] On the question of prospect of success the defendant submits that the defence contends that even if the words alleged to have been uttered were defamatory, which is denied, the statement in itself lies in fact. That is to say, the claimant's diplomatic and visitor's visas were in fact revoked and that the reasons for such revocation are also defined by the happening of certain events. On that basis there is a strong defence to the claim as the claimant is incapable of proving that the words he alleged were uttered were defamatory.

[25] On the basis of the above the Applicant/Defendant believes that he has met the strict criterion of Rule 13.3(1) of the CPR in his application to set aside the Respondent/Claimant's judgment obtained in default.

The Claimant's submissions

[26] The defendant challenged the truth of the claimant's evidence, and submits that there was an obligation on the defendant beyond instructing his counsel and have the originating process delivered, to do follow up on the status of the proceedings, and that it is not sufficient enough an excuse the evidence of the defendant that he followed up in early January after the Christmas break. In addition the claimant states that the defendant has provided no evidence in relation to the third limb of rule 13.3 (1). On that basis the application to set aside the judgment should be refused.

Procedural requirements as regards the entry of judgment on claims for "some other remedy"

[27] Part 12.10(4) and (5) of CPR 2000 come under the general heading of default judgments and reads as follows:—

> "(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply."

[28] CPR part 12.10 (4) and 12.10(5) are provisions that address the nature of the default judgment that is to be entered. This provision acknowledges that there may well be certain cases where the guidance on the form of judgment provided for in 12.7, 12.8 and 12.10 (1) may not assist other cases where the form of judgment is not as straight forward. In such instances, the claimant is entitled to judgment, with the court's obligation being to determine the terms of the judgment on application of the claimant.

[29] The wording of our CPR differs in context to the UK CPR referring to a similar provision, and is therefore unhelpful in offering clarity to the provision. In my view the wording of the UK CPR 12.4(2) is expressed so as to give the court a discretion on the question of whether judgment is to be entered and on the terms of the judgment. It provides:—

> " The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment –
> (a) on a claim which consists of or includes a claim for any other remedy; or
>
> (b) where rule 12.9 or rule 12.10 so provides,
> and where the defendant is an individual, the claimant must provide the defendant's date of birth (if known) in Part C of the application notice."

[30] Under our CPR 2000, a request for default judgment where the claim is for a remedy not provided for in 12.7, 12.8 of 12.10 (1) should be for judgment with the terms thereof to de determined on application to the court. As such the claimant was entitled to judgment being entered in default as of the date of his request on the 4th December 2012.

[31] When the proceedings next came before the court, the defendant application for an extension of time was dismissed. The court in keeping with the request for judgment and application to determine the terms of judgment under CPR 12.5 and 12.10 (4) and (5), entered judgment for the claimant.

The application to set aside judgment pursuant to CPR 13.3(1)

[32] I have considered the evidence submitted by the parties in support of their respective submissions. I have also placed considerable reliance on the evidence of Mr. Richelieu who is an independent witness as it were. His evidence serves to confirm the evidence of the defendant that the originating process was initially sent to his chambers, and that he had not been formally retained in relation thereto. I accept Mr. Ollivere's evidence that he, in error wrongly transmitted the originating process to the offices of Alberton Richelieu rather than to the law offices of Gerrard Williams and it is as a consequence of their evidence that I form the view that the claimant has advanced a good explanation for his failure to file a defence.

[33] I disagree with the claimant that there is an obligation on the defendant under CPR 13.3 (c) to certify the strength of his defence by affidavit. Under rule 13.3(c) the question of whether there is a good defence is not limited to proof by affidavit, and certainly these can be received by submissions. I accept the submissions of the defendant that in relation to the claim and the defence the question of whether the words spoken were defamatory is a question of fact to be resolved by evidence. That is a matter for trial and in the circumstances of a case for defamation, I consider that it is a good defence.

[34] My conclusions in relation to this issue and in regard to the other conditions of rule 13.3 (1) convince me that this is a case where my discretion should be exercised in favour of setting aside the default judgment.

[35] I further direct that the defence filed on the 10th day of January, 2013 be allowed to stand and that these proceedings are referred for case management conference in November 2014

Costs

[36] Costs are awarded to the claimant in the sum of $1000.00 to be paid within 14 days hereof.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER