

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SUIT NO: NEVHCV2015/0132

Glenford Roberts Claimant

and

SK Nevis Resort LLC Defendant

DECISION

WILLIAMS. J

[1] This Court gave an oral decision in this matter on the 2nd March 2016 on the Applicant/Defendant's Application to set aside a Judgment in Default of Defence obtained by the Claimant on the 5th January 2016.

The Application was determined on the written submissions and Affidavits filed by both parties and the Court dismissed the application to set aside the said Judgement. The following are my reasons for that decision.

[2] The Applicant/Defendant's Application to set aside the Default Judgment was based on two contentions:

(I) That the Judgment in Default of Defence is irregular as there was no proper service of the Claim. The Defendant is a limited liability Company registered in the United States of America and the Claim was purportedly served on an individual in Nevis who has no connection to the Defendant.

(II) The Assistant Registrar was misguided in Law by entering the Default Judgment for a specified sum since there was no evidence before the Court to support the sums claimed; and furthermore the Claim was not for a specified sum.

- [3] Learned Counsel for the Applicant Ms Kalisia Isaacs submits that the Court ought to exercise its discretion and set aside the Default Judgment and grant an extension of time to file a Defence and relief from sanctions.
- [4] Counsel for the Applicant also submits that the Applicant/ Defendant is a limited liability Company incorporated and registered in the State of Delaware in the United States of America which manages and/or operated a separate corporate entity called Four Seasons Resort Nevis.
- [5] Respondent Counsel for the Claimant Mr Jeffery Nisbett contends that the Judgment is correctly entered because the Claim is one in Damages for wrongful dismissal; and the measure of Damages for wrongful dismissal is the amount which the Employee would have earned if the employment had been properly terminated.
- [6] Counsel for the Claimant submits that service of the Claim was effected by serving the Claim pursuant to the CPR 57 (c) (d) under which, the Claim can be served "personally on an Officer or Manager of the Company at any place of business of the Company with a real connection with the Claim" or " by serving the Claim Form personally on any Director, Officer of the Company."
- [7] Mr Nisbett contends that the Claim Form was served on the Assistant to the General Manger of the Four Seasons Resort who describes himself in the draft Defence as "the appointed Agent for the Defendant Company." Thus the service of the Claim was effected on an officer of the Company holding a position of trust, authority and command.
- [8] Counsel for the Claimant /Respondent submits further that the Court has the authority to make an order to put matters right under CPR 26.9 if there was an error of procedure which the Claimant/Respondent does not admit.
- [9] Learned Counsel for the Claimant/Respondent also contends that if any failure occurred in the service of the Claim, it was because of the Applicant/Defendant's flagrant breach of the Nevis Companies Ordinance.

The Law - The Default Judgment

[10] Rule 12.5 of the Civil Procedure Rules 2000 states as follows;

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 if necessary the Claimant has the permission of the Court to enter Judgment.

[11] Part 13.2 of the Civil Procedure Rules 2000 states as follows:

13.2 (1) the Court must set aside a Judgment entered under Part 12 if the Judgment was wrongly entered in the case of

(2) Judgment for failure to defend any of the conditions in Rule 12.5 was not satisfied.

[12] Part 13.3 of the Civil Procedure Rules 2000 goes further and states:

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 the Judgment had been entered;
- (b) gives a good explanation for the failure to file a defence and
- (c) has a real prospect of successfully defending the Claim.

[13] Rule 13.(3) (2) states

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.

[14] Learned Counsel for the Defendant submits that the Defendant has met the threshold under Civil Procedure Rules 2000 13.3 (1) in that:

- (a) There was no delay in making the Application to set aside the Judgment since the Default Judgment was served on the Defendant's on the 6th January 2016 and the Application to set aside the Judgment was filed on the 6th January 2016.
- (b) That the determination of whether an explanation for failure to file a Defence is a good one is a subjective exercise and should be weighed against any delay.
- (c) That the defence has a real prospect of success not a fanciful one in that Counsel was not able to secure instructions with respect to responding and preparing the a Defence because the person providing the instructions was out of the jurisdiction and in a different time zone.

[15] Learned Counsel for the Claimant while not disputing that there has been promptitude by the Defendant in applying to the Court to set aside the Judgment, contends that the Applicant/Defendant has not given a good explanation for its failure to file the Defence.

Counsel submits that the explanation put forward in the affidavit of Ms Elliott-Griffin is woefully inadequate, and lacking specifics. Further in this age of technology and instantaneous communication,

being in a different time zone does not affect a Party's ability to instruct Counsel and to file a Defence within 28 days.

[16] Mr Nisbett states further that there are no exceptional circumstances which may permit the Court to set aside the Judgment regularly obtained out of the High Court.

[17] Learned Counsel Mr Nisbett also referred to The Nevis Companies Ordinance Chapter Division B – External Companies at Section 338 which stated as follows:

External Companies carrying on Business

An external Company carries on business in Nevis

(a) If business of the Company is regularly transacted from an office in Nevis or used for that purpose...

(c) If the Company owns, possess or uses assets situated in Nevis for the purpose of carrying on or pursuing its business, if it obtains or seeks to obtain from those assets, directly or indirectly profit or gain whether realised in Nevis or not.

[18] Counsel also referred to Section 340 of the said Ordinance which provides that

"(i) No External Company shall begin or carry on business in Nevis until it is registered under this Ordinance and;

Section 357

"(i) An External Company that is not registered under this Ordinance may not maintain any action, suit or other proceedings in any Court in St. Christopher and Nevis made in whole or in any part within Nevis in the course of or in connection with the carrying on of any business by the Company in Nevis (my emphasis).

[19] Learned Counsel submits that there is no entity entitled "SK Nevis Resort LLC" registered within the Registrar of Companies in Nevis. However according to Counsel it cannot be disputed that the Company is carrying on business in Nevis according to Section 338 of the said Companies Ordinance.

Further the said Company in describing itself as the Manager of Four Seasons Resort Nevis has an office in Nevis and must be held to be obtaining profits or gain from that asset.

Mr Nisbett also stated that the Company was in breach of Section 346 of the Companies Ordinance in that it had not filed with the Registrar of Companies a Power of Attorney authorising some person resident in Nevis to act as the Attorney for the Company for the purpose of receiving service of process in proceedings against the Company.

- [20] Learned Counsel contends that since there is no registered entity in Nevis by the name of Four Seasons Resort Nevis, that entity must suffer the consequences of its default for non-compliance with the Companies Ordinances.

Court's Analysis

- [21] The setting aside of a regularly obtained Judgment is a discretionary remedy granted by the Court where the justice of the case favours the grant of an opportunity to a defaulting Defendant to defend a Claim against him which had already reached a stage of Judgment.

The general principle is that a Party should not be deprived of the fruits of his Judgment except for a good reason. Although there should be finality to litigation, there is need to transfer this principle in exceptional circumstances see: Taylor et al vs Lawrence et al¹

- [22] In the case of Strachan vs Gleaner², the Privy Council held that the fact that Damages had been assessed and a final Judgment entered did not deprive the Court of jurisdiction to set aside a Default Judgment, but it was highly relevant to the question of discretion There could be no rigid rule either way; it depended on the facts of the particular case.

- [23] I have already set out the provisions of Part 13.3 (1) of the Civil Procedure Rules 2000 and the authorities are clear that the requirements of Part 13.3 (1) of the Civil Procedure Rules 2000 are in the

¹ [2002] 2 ALLER 353 per Lord Woolf C.J

² [2005] UKPC 33

conjunctive. A successful applicant is required to satisfy all three conditions as stated in that rule. Any failure on the part of the applicant to meet the requirement of any of the subsections could preclude this Court from setting aside the Default Judgment see: Kenrick Thomas vs RBTT Bank Caribbean Ltd³ per Barrow J.A

[24] Part 13.3 (1)

"applies to the Court as soon as reasonably practicable after finding out that Judgment had been entered."

In the case at Bar, the Default Judgment was entered on the 6th January 2016 and the Application to set aside the Judgment was filed on the 6th January 2016. I am satisfied that there was no delay in applying to the Court and the Defendant has met the threshold set by this subsection.

[25] Part 13.3 (1) (b)

"Gives a good explanation for the failure to file an Acknowledgment of Service or a Defence as the case may be."

[26] The Claim Form and Statement of Claim were served on the Applicant/Defendant and an Acknowledgment of Service was filed on the 18th December 2015.

[27] With regard to the reasons for the failure to file a Defence on time, the Court reviewed the third affidavit of Collis Elliott-Griffin filed on the 3rd February 2016; In her affidavit Mrs Elliott-Griffin, the Office Manager of the Defendant's Attorney at- Law's Chambers stated

"I am also advised by Ms Walwyn and verily believe that the Party instructing Counsel on behalf of the Defendants is out of the jurisdiction and in a different time zone."

[28] Further at paragraph 10 of her affidavit, she states

"I am further advised by Ms Walwyn and verily believe to be true that the Judgment in Default is irregular based on the following facts

³ Grenada Civil Appeal No 3 of 2005

- (i) that the Claim was not for a specified sum and
- (ii) the Claim was purportedly served on the Defendant company, which is a United States registered limited liability Company on a person in Nevis who is not authorised to accept service of same."

[29] In the instant case, the real issue is what the Applicant/Defendant did after the Acknowledgment of Service was filed and served on the 18th December 2015. On the 6th January 2016 at 10:17 am the Defendant filed a Notice of Application for an extension of time to file a Defence and relief from sanctions and on the 5th January 2016, the Claimant was granted Judgment in Default of Defence from the High Court Registry.

[30] Counsel for the Applicant in her written submissions contends that the Party instructing Counsel on behalf of the Defendant was out of the jurisdiction and in a different time zone.

[31] The Court will not act to set aside a Default Judgment without careful consideration and the Court must consider whether the reasons advanced by the Applicant show some good reason for the Applicants failure to file a Defence within the stipulated time under the rules.

[32] Having carefully considered the reasons advanced by the Applicant I am of the view that the Applicant's submissions do not find favor with this Court and the reasons advanced by the Applicant do not constitute good reason for failure to file a Defence.

Learned Counsel has not provided the court with the details of the exact time zone she referred to, and this Court is of the opinion that being in a different time zone cannot affect a person's ability to provide instructions to Counsel. We are in an age of instantaneous communication and social media and one can use various methods of communication to provide instructions for filing a Defence which was due in twenty eight days after filing an Acknowledgment of Service.

The Applicant has not met the threshold required by Part 1.3 (1) (b) and the Application must fall on this ground.

I have however gone on to consider another ground submitted by Counsel.

[33] Rule 13.3 (2) Exceptional Circumstances

The Applicant has also asked this Court to consider whether this is a case in which the Court should exercise its discretion under Part 13.3 (2) of the Rules, if the Court considers that there are exceptional circumstances why the Default Judgment should be set aside.

[34] This rule has been determined in a number of cases in particular in the case of Raelene Lazarus vs Advocate Publishers [2000] Inc⁴ where Cenac-Phulgence Master referenced the cases of Graham Thomas vs Wilson Christian Trading as Wilcon Construction⁵ and the South African case of Thulani Sifeso Mazibuko Ambrose Simphine Cebekhulu vs The State for guidance on the meaning of "Exceptional."

In the South African Case Rall A. J stated as follows

"I am in respectful agreement with the approach adopted in the Mohamed's case. In my opinion in order to give a meaning to the phrase "exceptional circumstances, it is essential to ascribe a meaning to "exceptional", and a good starting point is the dictionary meaning of the word.

It was held by Comrie J in Mohammed's case that exceptional has two shades or degrees of meaning. It can either mean unusual or different or markedly unusual or specifically different.

He said "so the true enquiry it seems to me is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release. And "sufficiently" will vary from case to case."

[35] The Court notes the oral submissions of Counsel for the Applicant on that issue where she states that the Claimant is unaware of the proper Party to sue and that both entities are alien to this jurisdiction.

⁴ GDAHCV 2010/0382

⁵ ANUHCV 2011/0629

Counsel for the Applicant submits further that a Judgment of this Court cannot be maintained against a foreign company and that the Defendant company was not the Claimant's employer. Further that the Claimant's letter of offer was issued by the Four Seasons (Nevis) Hotel.

Counsel argued further that Section 339 of the Companies Ordinance provided for a foreign company to be exempt from the provisions of Division B of the said Ordinance.

However Counsel was unable to provide any evidence that an exemption had been granted by the Nevis Island Administration to the Defendant company to be registered under the Companies Ordinance.

[36] Learned Counsel Mr Nisbett in rebuttal to Counsel for the Defendant's submission, stated that the Defendant company had not been exempted from the Companies Ordinance and had not produced the order by the Minister which had to be published in a newspaper in Nevis in accordance with Section 339 of the Companies Ordinance.

Counsel argued that as an External Company, the Defendant had to be registered under the Companies Ordinance and was in breach of the said Companies Ordinance, and referred the Court to the affidavit of Belva Nisbett dated the 11th February 2016..

[37] Learned Counsel also contended that the Defendant cannot now say they were improperly served after filing an Acknowledgment of Service never challenging the jurisdiction of the Court.

Counsel submitted further that the explanation for not filing a Defence was inadequate and improper, and that the Judgment was correctly entered for a specified sum of money.

[38] Learned Counsel Mr Nisbett exhibited the Claimant's payroll advice (Exhibit GR2) with the Defendant **company's** name printed on the advice as proof that the Defendant company was the employer of the Claimant.

Also a copy of the Social Security contribution detail was submitted in evidence (Exhibit GR3) by the Claimant as proof of the Defendant company's contribution to Social Security for the Claimant.

[39] Learned Counsel Ms Isaacs also referred the Court to (Exhibit SKNR1) which is a letter of offer from Four Seasons Resort to the Claimant confirming their offer of employment to him as a Junior Boat Captain. That letter was signed by Mr Andrew Humpries, Regional Vice President and General Manager of the Four Seasons Resort.

Conclusion

[40] I am of the view that, the Defendant company has not been forthcoming as to who is the real employer of the Claimant by issuing various documents to the Claimant under different headings and signatories. However I am of the firm opinion that the Defendant named in this matter is the proper Party against whom Judgment was properly obtained by the Claimant and that the Claim was properly served on an officer of the company who held a position of authority (i.e.) Assistant to the General Manager.

[41] This Court has reviewed the evidence and legislation on this issue and can find no exceptional circumstances to justify the Default Judgment being set aside in accordance with Rule 13,3 (2) of the Civil Procedure Rules 2000.

[42] Further under Section 357 of the Companies Ordinance, "An external company that is not registered under this Ordinance may not maintain any action suit or other proceeding in any court in Saint Christopher and Nevis in respect of any contract made in whole or in part within Nevis in the course of or any connection with the carrying on of any business by the company in Nevis."

[43] Accordingly the Defendant company is prohibited from and cannot apply to have a Judgment regularly obtained out of the High Court set aside, on the grounds advanced by the Defendant and further it is in breach of the Companies Ordinance chapter 7.06 and has no locus standi before the Court.

[44] The Application by the Defendant company to set aside the Default Judgment entered on the 5th January 2016 by the Claimant is hereby dismissed.

[45] Each party is to bear its own costs.

Lorraine Williams
High Court Judge.