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

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SUIT NO: NEVHCV2016/0066

BETWEEN:

C.A.R.E Nevis Inc Claimant/Respondent

and

The Nevis Housing and Land Development Corporation Respondent/Applicant

Appearances: Mr. Adrian Scantlebury for the Claimant/Respondent
Mr. Terence Byron for the Respondent/Applicant

2016: October 26
2017: February 6

DECISION

[1] **WILLIAMS, J.:** The Claimant C.A.R.E Nevis Inc. is a non-profit company duly incorporated under the laws of Nevis and registered as a Non-Governmental Organization pursuant to the provisions of the Non-Government Organization Act Chapter 20.59 with its registered office at Shore Estate, Hermitage, Nevis.

[2] The Respondent is a statutory corporation incorporated under the Laws of St. Kitts and Nevis with its registered office at Bellevue, Charlestown, Nevis.

Background facts

[3] By a Claim Form filed on the 30th May 2016 the Claimant claims against the Defendant as follows:

a) Damages for Negligent misrepresentation.

b) Damages for Breach of Contract.

c) Restitution.

d) Interest.

e) Cost.

f) Any further order this Honourable Court deems just.

[4] On the 7th June 2016, the Solicitor for the Respondent Mr. Terence Byron filed an Acknowledgment of Service and on the 4th day of July 2016, the Solicitor for the Claimant Mr. Adrian Scantlebury filed a request for Entry of Judgment in default of Defence. On the 5th day of July 2016, the Solicitor for the Claimant filed an Amended request for Entry of Judgment in Default of Defence.

[5] On the 8th July 2016, Judgment was entered for the Claimant there being no Defence filed by the Respondents for an amount to be assessed by the Court. The Judgment in Default was served on the Respondent on the 12th July 2016.

[6] On the 22nd July 2016, the Respondents filed a Notice of Application to set aside the Judgment in default of Defence on the grounds listed at paragraphs 8-13 of the Application. An Affidavit in support of the Application to set aside the Judgment in Default of Defence was also filed by the Respondent on the 22nd July 2016.

[7] On the 14th October 2016, the Claimant filed an Affidavit in response to the Application and an Affidavit to set aside the Judgment in default of Defence obtained by the Claimant.

[8] **Issues**

The Issues that arise for the Court's determination are;

1) Whether the Court should exercise its discretion under Rule 13.3 (1) of the CPR 2000 to set aside the Judgment in default of Defence obtained by the Claimant on the 8th July 2016.
2) What are the conditions to be satisfied in order that a Default Judgment be set aside.

The Law

[9] Part 13.3 of the CPR 2000 sets out the conditions to be satisfied if a Court is to set aside a Judgment entered under Part 12;

The Rule states as follows;

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 Acknowledgment of service or Defence as the 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 the Judgment, the Court may instead vary it.

[10] It is well settled law that the three conditions under Rule 13.3 (1) are conjunctive and that the Defendant must satisfy all of the three criteria for the Court to exercise its discretion to set aside the Default Judgment.

See: Kenrick Thomas vs RBTT Bank Caribbean Ltd[1]

[11] The first criteria to trigger Rule 13.3 of the CPR is that the Defendant applies to the Court as soon as reasonably practicable after finding out that Judgment had been entered.

[12] Learned Counsel for the Respondent/Applicant submits that the Judgment in Default of Defence was obtained by the Claimant on the 12th July 2016 and served on the Respondent on the same day.

The Respondent then filed an application to set aside the Judgment on the 22nd July 2016 although it was served on the Claimant on the 30th September 2016 as a result of the intervening Court holidays.

The Respondent therefore filed its application to set aside the Judgment in Default of Defence about 10 days after finding out that Judgment had been entered.

[13] The following cases provide guidance to the Court on the issue of "as soon as reasonably practicable"

a) In the case of **Louise Martin vs Antigua Commercial Bank** [2] the Court held that a period of fifteen (15) days between being served with the Judgment and the filing of the application to set it aside was "as soon as reasonably practicable"

b) In **Earl Hodge vs Albion Hodge**[3] Hariprashad-Charles J held that a period of thirteen days between being served with the Judgment and the filing of the

[1] CA No.3 of 2005
[2] ANUHCV1997/0115
[3] BVIHCV2007

Application to set aside the Default Judgment was "as soon as reasonably practicable."

c) In **Curthwin Webster vs Preston Bryan**[4] , the Court found that sixteen (16) days was a reasonable time between being served with the Judgment in Default and the filing of the application to set aside the Judgment.

[14] In relying on the cited authorities, the Court considers that the period of ten (10) days having elapsed before the filing of the application to set aside the Judgment was a period of promptitude and finds that the Respondent has met the threshold required by Rule 13.3 (1) (a) of the CPR 2000.

[15] Rule 13.3 (1) (b) **gives a good explanation for the failure to file a Defence.**

[16] The Claimant submits that the Respondent demonstrated an indifference to the risk of having Judgment entered against it and the Respondent was aware that it was having difficulty preparing its Defence and could have sought an extension of time by agreement or application after the time for filing the Defence had expired.

[17] In an affidavit in support of the application to set aside the Judgment in default of Defence filed by Dexter Boncamper General Manager of the Respondent company on the 22nd July 2016, Mr. Boncamper states inter alia at paragraphs 5-16 that he and the Assistant General Manager of the Respondent Corporation were unable to gather all of the recorded documents and exhibits to convey to their solicitor to file the necessary defence by the deadline date for the Defence.

[18] The Law is well settled that the Defendant must give a good explanation for its failure to file an acknowledgment of service or Defence.

[4] AXAHCV2008/0020

The Privy Council decision in the case of **Attorney-General vs Universal Projects Limited** [5] is instructive on this issue, and was adopted by the Court of Appeal of the Eastern Caribbean Supreme Court in the case of **Sylmord Trade Inc. vs Inteco Beteiligungs AG**[6] where the Court quoted Lord Dyson in the case of the **Attorney-General vs Universal Projects** as follows;

"If the explanation for the breach connotes real or substantial fault on the part of the Defendant, then it does not have a good explanation for the breach."

However the Court in the **Sylmord Trade Inc.** case provided a definition of "a good explanation" in the context of Rule 13.3 (1) when it stated the following;

"An account of what has happened since the proceedings were served which satisfied the Court that the reason for the failure to acknowledge service or serve a Defence is something other than mere indifference to the question whether or not the Claimant obtains Judgment.

The explanation may be banal, and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness and administrative mix up are all capable of being good explanations because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that Judgment might be entered."

[19] In **Mitchell vs News Group Newspaper Ltd.**[7] Lord Dyson stated inter alia;

"The Court will start by considering the nature of the non-compliance with the relevant rule, practice direction or Court order. If this can properly be regarded as trivial the Court will usually grant relief provided that an application is made properly.

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[5] P.C Appeal No. 0067/2010 [2011] UKPC 37
[6] BVIHCMAP2013/003
[7] [2014] 2 A11ER 430 CA Civil Division U.K

Thus the Court will usually grant relief if there has been no more than an insignificant failure of form rather than substance **or** where the party has missed the deadline imposed by an order or rule but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure however minor is permitted."

[20] The Applicant in his Affidavit in support of his application to set aside the Judgment in Default of Defence has advanced reasons to show that it has a good explanation for its failure to file a Defence by the 12th July 2016. The Respondent submits that its failure to meet the deadline was not as a result of indifference but due to the voluminous compilation of relevant documents and exhibits which were needed to mount a proper defence to the case brought against the Respondent Corporation.

[21] The Claimant submits that the Respondent's alleged excuse about documents being in different files speaks to a lack of adequate internal administrative structures within the Respondent's institution and that the Respondent has not given a good explanation for its default in filing a Defence on time.

[22] The Respondent has provided an explanation to the Court for the failure to file the Defence within the stipulated time.

While I agree with the Claimant's learned Counsel Mr. Scantlebury that the Respondent's failure to file a Defence was due to a lack of adequate administrative structures, I am also of the opinion that the Respondent has provided an explanation that is plausible and reasonable. His explanation shows that he was involved in the litigation process and

endeavoured to submit a number of documents which were not compiled together in one place and file and generated numerous searches for their retrieval.

[23] In the case of **Alvin Edwards, Cyril Maundy vs Willougby Bay Beach Resort Ltd et al**[8] Cottle J stated inter alia that challenges in obtaining documents is not a good reason for failing to file a Defence.

"The reason advanced is that there were challenges experienced in obtaining documents necessary to avoid embarrassment in his Defence. If the Defendants have no information as to any of the facts which they rely on to defend the Claim. I cannot see how a search of facts which may or may not support a possible defence affords a good reason for failing to defend."

[24] However in distinguishing the **Alvin Edwards case** learned counsel for the Respondent Mr. Byron submits that the Defence was filed on the 11th July 2016 before the Judgment in default was entered. He also submits that there was nothing incredible about the explanation given by Mr. Boncamper and that he could not have filed a detailed defence before the Claim was filed.

[25] In my considered opinion, the Respondent has proffered a reasonable explanation for it's failure to file a Defence within the stipulated time and I accept that explanation and the submissions of learned counsel Mr. Byron and find that the Respondent has met the threshold required for Rule 13.3 (1) (b).

[26] Having found that the Respondent has satisfied the Court of the two threshold requirements prescribed in CPR 13.3 (1) (a) (b). The Respondent must now convince the Court that it has a real prospect of defending the Claim in order to set aside a regularly obtained default judgment.

[8] Claim No. ANUHCV2011/0427

[27] **CPR 13.3 (1) (c)** requires the Defendant to show that he has a real prospect of successfully defending the Claim. There is a plethora of legal authorities in relation to the manner in which the Courts have interpreted the Rule that there is a "real prospect of successfully defending the claim". The case of **Alpine Bulk Transport Co.Inc. vs Saudi Eagle Shipping Co. Inc.**[9] reflects the standard for establishing a real prospect of successfully defending the Claim. Sir Roger Ormrod in delivering the judgment said;

"The real question is whether it is a prima facie Defence, a serious defence or has merits to which "the Court should pay heed."

[28] In the case of **International Finance Corporation Utexafrica S.P.R.I** – Moore-Bick J opined as follows:

"The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying it is hopeless. Whereas to say that the case has a realistic prospect of success suggests something better than that it is merely arguable; That is clearly the sense in which the expression was used in the **Saudi Eagle** case, and in my view, it is also the sense in which it was used in Rule 13.3 (1) (a). There are good reasons for that… Something more than a merely arguable case is needed to tip the balance of Justice to set the Judgment aside, "a real prospect of success" in this context means a case which carries a real conviction."

[29] These principles have been adopted by our own Courts in;

Ferguson vs Volney[10]

Luke vs Alexander[11]

Addari vs Addari[12]

[9] [1968] 2 Lloyds Rep 221
[10] [2001] ECSC J 190
[11] [2002] ECSC J 88

[30] **The proposed Defence**

The Claimant claims against the Respondent by way of Loss and Special Damage the sum of $250,826.35 for the Respondent's misrepresentation and/or breach of contract. The Claimant also claims;

a) Damages for negligent misrepresentation

b) Damages for breach of contract

c) Restitution

d) Interest

e) Costs

[31] The Respondent, the Nevis Housing and Land Development Corporation disputes the claim brought by the Claimant and says that the Claimant failed to exercise the option open to it to apply to the Director of Physical Planning as the person charged with the responsibility for Physical Planning for approval in principle of the proposed development before preparing detailed plans and embarking on the same.

[32] According to the Respondent the Claimant is falsely imputing the reference by the Respondent to the description of the said lots in question to be an inducement to the Claimant to enter into the said leases. Further the Respondent states that the Claimant is also falsely confusing whether or not the said lots are not designated for commercial use with the approvability by the Director of Physical Planning of the Claimant's application for development permission.

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[12] 2002/0

[33] The Respondent also states in its Defence that it was the Claimant who exerted persistent efforts to persuade the Respondent to lease the Claimant the lots in question and in the process of doing so overcame the Respondent's reservations about reneging on a prior understanding to assign the said lots to the IT Department of the N.I.A.

[34] The Respondent states and denies that it represented to the Claimant that the lots it requested were designated for commercial use and also denies that it granted approval of the Claimant's written application dated 13th January 2014.

[35] The Respondent states that the Claimant is to blame for the untimeliness of its application for Development permission for the lack of approval in principle before preparing detailed plans and embarking on the same. The Respondent denies that it had any contractual duty or was competent to ensure that the Claimant's application for development permission was successful.

[36] The Claimant submits that the significant element of the Respondent's Defence actually involves a misplaced emphasis on matters that might arise at assessment, but not on the question of liability. The Claimant avers that it entered into leases with the Respondent Corporation in which the purpose was clearly stated and was commercial in nature; the lands could not be used for commercial purposes and the Respondent knew that the lands were designated as residential.

[37] In my respectful opinion the Respondent has raised live issues it its Defence which can only be determined at the Trial of the matter after cross-examination of all the witnesses. It appears that the Respondent by its assertions has a real as opposed to a fanciful prospect of successfully defending the claim.

[38] This Court is of the opinion that having examined the Defence it has merits to which the Court "should pay heed", and the Defence cannot at this stage be described as hopeless, fanciful or unwinnable.

[39] In the circumstances, I am of the respectful opinion that the Respondent has cleared the mandatory hurdles under Rule 13.3 (1) to allow the Court to exercise its discretion;

1) It has applied to the Court as soon as reasonably practicable after finding out that Judgment has been entered.
2) It has given a good explanation for failure to file a Defence.
3) It has a real as opposed to a fanciful prospect of successfully defending the claim.

[40] Neither party has made any submissions in relation to the existence of any exceptional circumstances pursuant to Rule 13.3 (2) and this Court is of the view that there are no exceptional circumstances to satisfy the Court under Part 12 to set aside the Default Judgment.

Conclusion

[41] After reviewing the pleadings, evidence and authorities I hereby make the following orders;

1. The Application by the Respondent filed on the 22nd July 2016 to set aside the Default Judgment entered on the 12th July 2016 is granted.
2. The Respondent is hereby granted leave to file a Defence within seven days of the date hereof.
3. The matter will be assigned to the Master for a Case Management Conference on a date to be fixed by the Registrar.
4. That there be no order as to costs.

[42] I thank Learned Counsel on both sides for their helpful submissions and authorities.

Lorraine Williams

High Court Judge.