THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2016/0259

BETWEEN:

[1] RUTH JAMES
[2] HENRY JAMES

Claimants/Respondents

And

[1] PHILLIP MC DOUGALL
[2] CAROL ATTIDORE

Defendants/Applicants

Appearances:

Mrs. Heather Felix Evans with her Mr. Jeffery Douglas Murdock for the Claimants/Respondents

Mr. Kondowani Williams for the Defendants/Applicants

2017: May 9, 22

June 21

RULING

[1] **Stephenson J.:** This is an application by Phillip Mc Dougall and Carol Attidore (The Defendants) to set aside a default judgment that the Claimants obtained against them. The decision was handed down on the 21st day of June 2017and this is the written ruling.

CHRONOLOGY

[2] On the 9th August 2016, the Claimants filed a claim against the Defendants, claiming the sum of $108,000 as arrears of rent in respect of the months September 2010 to July 2016. The claim form was accompanied by a statement of claim which set out the detail of the claim.

[3] The Claimants, who are elderly and live out of state, are represented by son Dr Adelbert James; his Power of Attorney was also filed on the 9th October 2016.

[4] The claim form and all the accompanying documents were served on Friday the 30th September 2016, at approximately 8:30 AM as averred by the process server in the Affidavit of Service filed on the 12th October 2016.

[5] An Acknowledgement of Service was filed by the Defendants on the 3rd October 2016. In the Acknowledgment of Service, the Defendants did not admit the claim and indicated that they would be defending it.

[6] The Notice of Acknowledgment of Service from the registry was duly prepared and lodged at the Registry and filed on the 17th October 2016.

[7] On the 2nd November 2016, a request for entry of default of defence was filed.

[8] Judgment in default of defence was entered on the 11th November 2016.

[9] Both the request for Judgment in default of defence and Judgment in default of defence were served on the Defendants on the 18th November 2016.

[10] An Affidavit of Service of the request for Judgment in default of defence and Judgment in default of defence were duly filed on the 24th November 2016.

[11] On the 5th December 2016, a Notice of Application to set aside the default judgment was filed with an affidavit in support sworn to by both Defendants. The Notice of Application was fixed for the 27th January 2017.

[12] On the 8th December 2016, the Defendants sought to file a defence and counterclaim in the matter.

[13] On the 23rd December 2016, the Claimants filed a Judgment Summons in the matter.

[14] The process server for the claimant averred in his affidavit of service[1] that on the 6th January 2017 he served the following documents on the defendants:

I. a letter dated the 5th January 2017;
II. the Judgment in default of defence lodged on the 2nd November 2016 as well as dated and filed on the 11th November 2016;
III. the Judgment Summons dated 22nd December 2016 and filed on the 23rd December 2016 and
IV. a Questionnaire as to means.

[15] On the 13th February 2017, a Notice of Hearing for the matter to be heard on the 6th April 2017 was sent out by the Court.

[16] On the 6th April 2017, the matter came up in chamber Court and the following order was made:

***"UPON** hearing **Mr Jeffery Douglas Murdock** for the Claimants and **Mr Kondowani Williams** for the* **Defendants**, *both parties being present and represented*
***AND UPON** the Defendants making an application to set aside the default judgment obtained by the Claimant and for leave to file defence and counterclaim filed on the 5th Defendant*
***AND UPON** the Claimants filing a Judgment Summons on the 23rd December 2016 returnable on today's date*
***AND UPON** there being no evidence that the said application has been served on the Claimant as is required by CPR 2000*
***IT IS ORDERED** that:-*

[1] Affidavit of service filed on the 16th January 2017

1. *The* Defendants *shall serve their application to set aside the default judgment and application to file and serve defence and counterclaim out of time on or before* ***3:00 PM on Friday 7th April 2017****.*
2. *The* Defendants*' application shall be heard on the* ***9th May 2017****.*
3. *There after the Judgment Summons will be heard if necessary.*
4. *Costs for the day to the Claimant in the sum of EC$350.00"*

[17] On the 9th May 2017, the matter came up for consideration of the application to set aside the judgment in default and the hearing of the judgment summons and the court made the following order:

UPON hearing **Mrs. Heather Felix Evans** with **Mr Jeffery Douglas Murdock** for the Claimants and **Mr Kondowani Williams** for the Defendants, the Defendants being present
AND UPON the Defendants making an application to set aside the default judgment obtained by the Claimant and for leave to file defence and counter claim filed on the 5th Defendant
AND UPON the Claimants filing a Judgment Summons on the **23rd December 2016** returnable on today's date
AND UPON the Defendant**s** being ordered to pay costs in the sum of $350.00 which costs have not been paid
AND UPON the Court being of the view that the application can be dealt with on written submissions
IT IS ORDERED that:-

1. The Defendants shall pay the outstanding costs ordered on or before 4:00PM of today's date and failing which their application stands dismissed.
2. The Defendants shall file and serve their fully written submissions on or before 3:00 PM on Friday 12th May 2017**.**
3. The Claimants shall file and serve their fully written submissions in response on or before 3:00 PM on Monday 22nd May 2017**.**
4. Thereafter the Court shall rule on the 30th May 2017**.**
5. The Parties are to submit their submissions electronically in addition to filing same.

[18] The costs as ordered by the Court were paid immediately by Counsel on behalf of the Defendants.

[19] On the 22nd May 2017, the Claimants filed their submissions in opposition to the application to set aside the default judgment and the soft copy was also emailed to the Court as ordered.

[20] As of the 12th June 2017 no written submissions have been received for and on behalf of the applicants.

[21] The Court will however go ahead and rule on the application.

THE LAW:

[22] In the Civil Procedure Rules 2000 (the CPR), 'default judgment' means judgment without a trial or any other judicial process, (other than the giving of any necessary permissions), where a defendant has failed to file an Acknowledgment of Service or a defence;

[23] A default judgment is obtained without a trial[1] and is therefore not a judgment on the merits. It is usually obtained by an administrative act;

[24] In the case at bar there is no contention that Part 13.2 of CPR applies and therefore the application falls to be considered under Part 13.3 of CPR 2000 which provides:

"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.

**Rule 26.1(3) enables the court to attach conditions to any order"*

[26] Learned Counsel Mrs. Heather Felix Evans on behalf of the Claimants submitted that all three of the requirements of Part 13.3(1) must be complied with and that the burden of proof is on the applicant seeking to set the default judgment. Learned Counsel acknowledged however that the Court does have some flexibility so that *"notwithstanding a defendant's failure to satisfy one or more of the three conditions, in the interest of justice, the court may set aside the default judgment if the defendant satisfies it that there are exceptional circumstances justifying the setting aside of the judgment."*[2]

[27] It was submitted on behalf of the Claimants that based on the contents of their affidavit in support, the Defendants have failed to establish that their application should be granted, that the application should fail, as the Defendants have failed to satisfy the Court of the first three conditions required by part 13.3(1) of CPR and it is required that all three conditions must be satisfied.

Promptness of the Application

[28] It is contended on behalf of the Claimants, that the Defendants have failed to file their application for setting aside of the judgment in default of defence as soon as was reasonably practicable after finding out that judgment was entered against them, that is, some 17 days after service of the default judgment on them. Learned Counsel Mrs Felix Evans urged the Court to look at the facts as stated in the Defendants' affidavit and submitted that they have failed to give any evidence or even make an effort to satisfy the Court that the application was made as soon as was practicable after they were served with the judgment in default.

[2] Claimants written submissions filed on the 22nd May 2017 at paragraph 4 Reference made to **Elvis Wyre et al –v- Alvin G Edwards** ANYHCVAP2014/0008 at Para 27

[29] Learned Counsel Mrs. Felix- Evans submitted that the Defendants had an obligation to tell the Court not only why they failed to meet the deadline for filing the defence, but also what happened from the date they were served with the default judgment to the date they filed their application to set aside[3]. That this was necessary in order to enable to the Court to make the judgment as to whether or not they applied to set aside the judgment as soon as was practicable. Learned Counsel Mrs Evans cited decision of the Court of Appeal d in **Alvin G Edwards & Cyril Maundy –v- Willoughby Bay Beach Resort Limited et al[4]** and **Louse Martin v Antigua Commercial Bank[5]** in support of her submission**.**

[30] This provision requires the applicant to apply as soon as reasonably practicable. The Court is therefore required to examine the circumstances of the case to determine whether the Defendant has satisfied the requirement of the rule. No specific time period is given in the rules as to what constitutes a reasonably practicable time frame. I am satisfied therefore that reasonableness, depends on the facts of the case.

[31] It can be stated that the overriding objective of CPR can have the effect of prevailing or negating the specific requirements of Part 13.3(1) of CPR. It is incumbent on me to pay heed to the overriding objective and the need to do justice between the parties; however it has been held by our courts that, this is not a solution/panacea for any failure to confirm to the stipulated provisions of CPR.

[32] The burden is on the applicant to persuade the court that this is a suitable application for the Court to grant the relief prayed for. It is clear that there is a condition for the Defendant to act with promptitude when applying to set aside the default judgment.

[33] The Court in applications such as the one currently before the court must seek to determine whether the Defendants moved as soon as was reasonably practicable after becoming aware of the Judgment in Default. Therefore the Court must examine the facts

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[3] Learned Counsel placed reliance on the dicta of Thomas J in the **Louise Martin –v- Antigua Commercial Bank** ANUHCVAP1997/0115 at paragraph 19

[4] ANUHCV2011/0427

[5] ANUHCV 0115/1997

as stated by the Defendants as to what was done between the time of being served with the Default Judgment and the filing of the application to set aside.

[34] The Defendants in their affidavit state that on the 15th November 2016, they made contact with their lawyer regarding their defence and they were informed that Counsel was ill. The affidavit filed by the Defendants is devoid of any explanation as to what transpired between the times of being served with the defence and making the application to set aside the judgment in default. Therefore it is clear based on the evidence presented by the Defendants they have failed to adduce any facts upon which the Court can properly decide whether or not their application was made as soon as was practicable. And therefore in the circumstances the Defendants have failed to meet the first obligations of CPR Part 13.3(1).

[35] The learned authors of Caribbean Civil Court Practice[6] state that the criteria guiding the Court's consideration as set out Part 13.3(1) are conjunctive, requiring that each must be satisfied before the court may set aside the default judgment. The Court agrees with the submissions of Learned Counsel for the Claimant in this regard. It is clear that in other words, the failure to meet the requirement of any of the subsections would be a bar to the Court setting aside a Default Judgment.

[36] The Court really need not necessarily go on to consider the second ground, however the Court will nevertheless proceed to briefly consider the second limb.

Good Explanation for not filing a defence

[37] Part 31.3 (1) (b) states that the defendant must give a good explanation for not filing a Defence. The duty is on the applicants to satisfy the Court that they have a good explanation for their failure to file a defence. In the case at bar there was good service of the claim on the Defendants who filed an Acknowledgment of Service through their solicitors on record. The defence was not filed within the time frame prescribed by CPR.

[6] 2011 edition at page 138 Note 11.5

[38] I am required to look at and I have examined the reasons proffered by the defendants to see if they have provided the court with a satisfactory explanation for their failure to file their defence on time and for applying to set aside the default. I ask the question have the defendants said to the court what happened and what were the reasons for not filing a defence, have they provided the court with any explanation as to what took place between the service of the default judgment and the filing of the application to set aside the default judgment.

[39] The defendants have averred that they were seeking receipts and accounts for the six years which were with their banks and their accountants and that they encountered some difficulty recovering the documents. Mrs Felix Evans submitted that these were bald statements presented by the applicants not supported by any evidence such as a letter from their accountants or bankers to evidence or support what they were saying. I agree. Learned Counsel on behalf of the claimants humbly submitted that the court should not have to make a determination in favour of the Defendants based on these bald assertions.

[40] Mrs Felix Evans also asserted that the excuses proffered by the defendants were not reasonable in that it is not reasonable for the defendants who were running a business not to have their bank accounts or receipts readily accessible for the past six years. Learned counsel submitted that the usual practice is when an accountant is finished preparing your accounts your documents are returned to you. That the excuse presented by them was not an acceptable one.

[41] Learned Counsel also submitted that the statement of defence is a pleading and all that is required is for the defendants to provide the parameters of their defence which would be fleshed out in the witness statements and in the exchange of documents further that the defendants also had the option of filing a bare bones defence which could also have been later amended without the permission of the court prior to case management and thereafter with the permission of the court. It was also submitted that it would have been reasonable in the circumstances of the case for a defence to be filed pending the receipt of the accounts and other documents. I agree.

[42] I find upon perusal of the affidavit filed by the defendants that if their account of what happened is to be accepted that there was a deliberate decision by the attorney not to file the defence until he saw the accounts and other documents from the defendants. That in the circumstances the defendants' lawyer failed to seek and extension of time from counsel for the claimants and or to seek an extension of time before the time for filing expired.

[43] I have reviewed the affidavit filed by the defendants and taking all the excuses presented by the defendants I do not find them to be acceptable I am not convinced that the Defendants provided a good explanation for their failure to file a defence as required by 13.3 (1)(b) and further having regard to the totality of circumstances, the Court is of the considered view that the explanation proffered by the applicants does not rise to the level to meet the stipulation of Part 13.3(1) .

[44] In the premises, and insofar as the court has concluded that The Defendants have failed to meet the threshold of both of the above mentioned provisions of Part 13.3(1), their application therefore fails. The court does not propose to go any further.

[45] This additional basis is also sufficient to not grant the defendants' application, bearing in mind that the failure to satisfy any one of the three prerequisites is fatal to the application. Reference is made to the ruling of the Court of Appeal in the case of **Kenrick Thomas –v- RBTT Bank Caribbean Ltd. (*Formerly Caribbean Banking Limited)***[7] where it was held that "*If the preconditions are not satisfied the court has no discretion to set aside*." In that case the applicant failed to satisfy two of the three conditions set forth in the CPR, in that the court found that he failed to apply promptly and he failed to give a good explanation for the failure to file a defence and therefore the Court of Appeal reversed the Master's decision to set aside the default judgment.

[46] In view of the premises, that is I have come to the view that the applicants in the case at bar have failed to satisfy two of the three conditions required by CPR Part 13.3 and therefore the application to set aside the Default Judgment is dismissed.

[7] (St Vincent and The Grenadines) (Civil Appeal No.3 of 2005) (13 October 2005)

[47] Also, I am not convinced that the Defendant has shown any exceptional circumstances that would warrant the setting aside of the default judgment as required by 13.3 (2) and would therefore dismiss the application to set aside the default judgment with costs to the respondent in the sum of $750.00.

M E Birnie Stephenson
High Court Judge

By the Court

Registrar