EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2016/0233

BETWEEN:

MERVIN GRANT

Applicant/Defendant

and

ST KITTS NEVIS CABLE COMMUNICATIONS LIMITED

Respondent/Claimant

Appearances:

Dr. Henry Browne, with him Mr. John Cato for the Applicant
Ms. Natasha Grey for the Respondent

...……
2017: May 25;
2018: January 22.
……

JUDGMENT

[1] **LANNS, J. [AG]:** This is an application by Mervin Grant filed on the 19th April 2017, pursuant to CPR13.2 (1) for an order setting aside the judgment in default entered up against him on the 1st November 2016.

[2] The grounds of the application are stated to be:

> "1. The Defendant relies on Rule 13.2 (1) which states that the court must set aside a judgment entered under Part 12 if the judgment was wrongly entered;
> 2. The default judgment was entered under Part 12;
> 3. The Defendant/Applicant had, before judgment was entered, filed a Defence to the Claim;

4. The said judgment was therefore wrongly entered;
5. In any event, the total amount claimed and or assessed is erroneous in that:-
    (a) A unilateral penalty was added to the original agreement between the parties;
    (b) Exorbitant interest was deliberately added to the arrears claimed;
6. The Judgment in default was irregularly entered on Form 32. It was therefore invalid and must be set aside as of right;
7. The Claimant/Respondent seeks to be unjustly enriched. ..."

[3] Mr Grant swore to his own affidavit in support of his application. The application is resisted.

[4] The application came before me for consideration on the 25th May 2017, in the presence of Dr. Henry Browne QC and with him, Mr John Cato for the applicant, and Ms. Natasha Grey for the respondent. Ms. Grey informed the court that she was only served with the application the day before, and requested an adjournment to afford her an opportunity to respond. Dr. Browne QC conceded; whereupon the court made an order in the following terms;

> "[1] The respondent do file and serve its response to the application within 14 days of today's date
>
> [2] The applicant may reply within 14 days of receiving the affidavit in response
>
> [3] The parties shall, by the 9th July 2017 file and exchange submissions and authorities in support of their respective positions.
>
> [4] The application will be considered on the written representations submitted by the parties".[1]

[5] On the 8th January 2017, Ms. Grey filed an affidavit in response sworn to by Judith Hewlett, manager of the respondent company. The record shows that on the 13th June 2017, the affidavit in response was served on the chambers of Chancery Associates[2]. Subsequently, submissions on behalf of the respondent company were filed on the 10th July 2017. To date, I have not received

[1] This decision was taken upon Dr. Browne's request.
[2] Mr. Cato's chambers

any reply[3] to the responding affidavit of Ms. Hewlette; nor have I received any submissions[4] on behalf of Mr Grant. I shall proceed to give my decision.

Brief Background Facts

[6] On the 22nd July 2016, St Kitts Nevis Cable Communications Ltd (SKNCCL) filed a claim form and statement of claim against Mr. Grant for rent, electricity supply, and parking fees. According to the affidavit of service of Samantha Huggins, the claim form and statement of claim were served on Mr Grant on the 8th August 2016[5]. An acknowledgment of service was filed on the 25th August wherein Mr Grant indicated that he did not admit any part of the claim and that he intended to defend the claim.

[7] Pursuant to CPR 10.3 (1); and CPR 3.5, the defence should have been filed 28 days after the 15th September 2016. Accordingly, it should have been filed by the 14th October 2016. It was filed on the 28th October 2016. By that time, SKNCCL had already on the 19th October 2016, filed a request for entry of judgment in default of defence. The judgment was signed by the Registrar of the High Court on the 1st November 2016. So while it is true that the defence was filed before judgment was entered, it was the date of the filing of the request that mattered – not the date of the signing of the default judgment.[6].

[8] It was open to counsel (at the relevant time) to seek a consensual extension of time as permitted by CPR 10. 3 and (6), or apply to the court for an order extending time to file a defence under CPR 10.3 (9) or CPR 26.1(2) (k). None of this was done, and thus, judgment in default was entered up against Mr. Grant for damages to be assessed. At a hearing before the master on the 7th December 2016, in the presence of Ms. Natasha Grey for SKNCCL, Mr. John Cato for Mr. Grant, Mr. Grant himself, and Ms. Vanessa Percival, (SKNCCL's representative), directions were given for the hearing of the assessment of damages, and an order was made fixing the date for such

[3] A reply was not mandatory
[4] Submissions were mandatory
[5] The acknowledgement of service indicates that the claim form and statement of claim were received on the 17th August 2016.
[6] See The Attorney General of Trinidad and Tobago v Keron Matthews, [2011] UKPC 38, where Lord Dyson stated 'if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. ... if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour.' See also Caribbean Civil Court Practice 2011, at Note 10.2, page 133, where the learned authors explain that if a defence is filed late, but before the Claimant has requested a default judgment, then default judgment will not enter. The default is having failed to file before the Request, not in having filed late, the authors explain

hearing as the 28th February 2017. SKNCCL complied with the master's directions. Mr Grant did not. There has been no appeal from the master's order.

[9] When on the 28th February 2017, the matter came before another master for the hearing of the assessment; Mr. Grant was absent and unrepresented by counsel. The order of the master reflected that SKNCCL had filed and served witness statement, submissions and authorities, out of time on 30th January 2017, with the permission of the court, and the defendant had not responded. The learned master took the view that Mr. Grant had been given sufficient time to respond to the directions given in relation to the hearing of the assessment, and on that basis, the master proceeded to assess the damages based on the material before him. There has been no appeal from the quantum of damages awarded to SKNCCL However; Mr. Grant has strategically applied to set aside the default judgment obtained on 1st November 2016. If the judgment were to be set aside as of right, then the assessment falls away automatically and Mr. Grant would be at liberty to file a defence. As it stands, the defence filed on the 28th October 2016, is not properly before the court.

Issue

[10] The main issue which falls to be determined on the application is whether the default judgment obtained on the 1st November 2016 against Mr. Grant should be set aside as of right, and Mr. Grant be permitted to file his defence within a specified time; or whether the default judgment should stand.

Submissions of SKNCCL

[11] In summary, the submissions of the respondent are as follows

1. The claimant has satisfied the conditions under CPR 12.5 and thus the judgment was not wrongly entered.

2. The filing of a defence subsequent to the filing of a request will not avail the defendant (**Glenford Rolle v Stephen Lander**, DOMHCV2013/0025 A relied on).

3. The applicant has not provided any evidence to support his contention that the judgment should be set aside on the ground that the total amount claimed and or assessed is erroneous in that: (a) a unilateral penalty was added to the original agreement between the parties; and (b) exorbitant interest was deliberately added to the arrears claimed;

4. The default judgment was regularly entered based on the definition of a claim for a specified sum of money for the purpose of default judgment. The amount claimed cannot be classified as a specified sum of money (CPR 2.4 relied on).

5. Neither the claim form nor the statement of claim was accompanied by receipted bills evidencing the specific sum; so judgment could not have been properly entered for the sum claimed. (**Anjo Dhar et al v. Glenford David et al** BVIHCV2009/0384; and **Stephine Emanuel** v **Clyde Jenson Lecointe** DOMHCV2009/0166 relied on).

6. At the time of the assessment, the claimant was in a position to prove the amount of damages, and based on the master's order, did in fact prove the amount of damages.

7. The application should be dismissed as the applicant has failed to show the court that the claimant did not satisfy the conditions set forth in CPR 12.5.

Discussion and Decision

(a) Bases upon Which an Application can be Made to Set Aside a Default Judgment

[12] There are two bases upon which a default judgment can be set aside. The first is where the Defendant can establish that the correct procedures have not been followed in obtaining judgment, in which case the defendant can have judgment set aside as of right without the requirement of establishing a defence to the claimant's claim. Here, the court may set aside judgment on or without an application.[7]

[7] Royal Trust Corporation of Canada V. Dunn, 60 OR 3rd 468; CPR 13.2 (2)

[13] On the other hand, if the judgment is regularly obtained and the defendant is asking the court to exercise its discretion under CPR 13.3 to set aside the default judgment and allow the defendant to defend the claimant's claim, a number of conditions must be satisfied.

[14] The first situation which is in the context of CPR 13.2 is applicable in these proceedings. The applicant did not make any application under 13.3.

Whether the Default Judgment was Wrongly Entered

[15] Having considered the application, the affidavits in support and in opposition, and the respondent's submissions and authorities, the court finds that the default judgment was correctly entered in that

(a) The claimant satisfied all the conditions for default judgment in accordance with CPR 12.5;

(b) At the time of filing the request for default judgment on the 19th October 2016, the default had already occurred, in that the defendant had not filed a defence;

(c) The default lies in a failure to file a defence before the request, and not in filing a late defence. (See **Glenford Rolle v Stephen Lander**, DOMHCV2013/0025, paragraphs 11 and 12); (See also **The Caribbean Civil Court Practice 2011**, Note 10.2, page 133);

(d) Mr Grant, not having filed a defence before the request for judgment was made, and not having sought a consensual extension of time, and not having filed an application for an extension of time within which to file a defence before the request was made, faced the risk of a request by the claimant that judgment in default be entered in his favour. (See **Attorney General v. Keron Matthews**, supra) 'That risk materialized when the claimant made the request. Upon receipt of such a request, the court office 'must' enter judgment for failure to defend, if the conditions set out in CPR12.5 are satisfied". (Per Baptiste, J.A. in **Glenford Rolle v Stephen Lander, supra.**

(e) In my judgment, the conditions under CPR 12.5 were satisfied and thus, I adopt the observation of Baptiste J.A. in **Glenfor Rolle** that filing of a defence after the filing of a request for judgment to be entered for failure to defend will not avail the defendant.

(f) In relation to the "specified sum" issue, this court in the case of **Stephine Emanuel** v **Clyde Jenson Lecointe**, at paragraph 3 opined as follows:

> " ... [T]he Registrar failed to appreciate the definition of "claim for specified sum of money" set out in Rule 2.4, and as such, erroneously entered judgment in the sum of $69,249.29 although neither the claim form nor statement of claim was accompanied by any receipted bills evidencing the $69,249.29."

(g) Had the Registrar of the High Court entered judgment in the sum claimed by SKNCCL without any receipted bills etc. evidencing the sum claimed, that, to my mind would have been an error serious enough to warrant setting aside the default judgment under CPR 13.2. But that is not the case here.

[16] I am mindful that if a judgment is entered for an incorrect amount, that judgment can be set aside for irregularity as was done in the case of Christopher **Wyllie v Hermus Cyprus** SVG Civil Appeal No 9 of 2009. However, unlike the Wyllie case, Mr. Grant has proffered no plausible evidence in proof of his contention that judgment was erroneously entered in an excessive amount, and in any event, he was given an opportunity to participate in the assessment.

[17] As regards the "Form 32" issue mentioned in ground 6 of the application, (CPR 12.10 (1) (b) requires a claimant to use Form 32 to make an application for default judgment on a claim for an unspecified sum of money. It does not preclude the Registrar or the court from entering judgment in the terms as she did. I entertain no doubt that the judgment entered by the Registrar of the High Court was valid, and thus, it should stand.

Conclusion

[18] For all the reasons stated above, I have come to the conclusion that the application to set aside the default judgment entered against Mr. Grant on the 1st November 2016 must be refused with costs to SKNCCL summarily assessed in the sum of $1000.00.

[19] It is ordered that

1. The application to set aside the judgment obtained against the applicant on the 1st November 2016 is refused..

2. Costs awarded to the respondent in the sum of $1000.00 to be paid within 30 days of today's date.

[20] I commend counsel for the respondent for her industry, and I am grateful for her assistance.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar

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