THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: SVGHCV2018/0127

BETWEEN:

DONALD FINDLAY

CLAIMANT/RESPONDENT

AND

KENROY ROBERTSON

DEFENDANT/APPLICANT

Appearances:
Mrs. Ronnia Durham Balcombe for the Claimant
Mrs. Maferne Mayers-Oliver for the Defendant

2019: January 15
February 20

JUDGMENT

Burnett, M (Ag):

[1] This is an application by the defendant to set aside the Judgment in Default of defence ("the default judgment") obtained by the claimant on the 29th day of October, 2018. The application is made pursuant to part 13.4(1) of the Civil Procedure Rules 2000 (the CPR).

[2] The defendant/applicant identifies two (2) grounds, namely:

a) The acknowledgement of service was filed, Counsel for the defendant was out of state, and did not properly manage her time.

b) The defendant had a real arguable defence.

Background

[3] On the 7th day of September, 2018, the Claimant commenced proceedings against the defendant claiming the sum of $11,590.50 as Special Damages, General Damages, Costs, Interest and other reliefs.

[4] The Claim Form and Statement of Claim were personally served on the defendant along with application to pay by installment, acknowledgment of service and papers for the defence and counter claim on the 10th day of September, 2018.

[5] The Defendant filed his acknowledgment of service on the 21st day of September, 2018 which indicated his intention to defend the claim. The time limit for filing the defence was by the 8th day of October, 2018.

[6] The Defendant failed to file a defence within the time for doing so and on the 26th day of October, 2018 the Claimant filed a request for judgment in default of defence which was granted on the 29th day of October, 2018.

[7] On the 1st day of November, 2018, the defendant filed an application for extension of time for relief from sanction and to file a defence and counter claim. An affidavit sworn by Counsel for the defendant supported that application.

[8] On the 12th day of November, 2018 and 23rd day of November, 2018 the defendant filed a notice of application and an amended notice of application to set aside the default judgment.

[9] On the 20th day of November, 2018, Master Ermin Moise ordered that the application filed on 1st day of November, 2018 be dismissed. (Notice of application for extension of time)

The Law and its Application

[10] The criteria for setting aside a default judgment as contained in Part 13.3(1) of the C.P.R. 2000 are that the court may set aside a judgment in default under part 12 only if the Defendant:

[11] Applies to the court as soon as reasonably practicable after finding out that judgment had been entered.

[12] Gives a good explanation for the failure to file a defence or acknowledgement of service.

[13] Has a real prospect of successfully defending the claim.

[14] In any event the court may set aside judgment entered under part 12 if the Defendant satisfies the court that there are exceptional circumstances.

[15] Part 13.4 sets out the procedure to apply to set aside a default judgment. Part 13.4 states:

- An application may be made by any person who is directly affected by the entry of the judgment.

- The application must be supported by evidence on affidavit.

- The affidavit must exhibit a draft of the proposed defence.

[16] It is well settled law that the three (3) conditions under Rule 13.3 are conjunctive. The Defendant must satisfy all of the three (3) conditions set out in the rules for the court to exercise its discretion to set aside the default judgment.

[17] Learned Counsel for the claimant submitted the case of Kenrick Thomas v RBTT Bank Caribbean Limited, Civil Appeal No. 3 of 2005. In that judgment Justice of Appeal Barrow SC stated: *"The discretion in C.P.R. 2000 is severely limited; it specifies three conditions that the Defendant must satisfy before the court is permitted to set aside a default judgment".*

[18] At paragraph 10 of the said judgment Barrow J.A. further stated: *"The overriding objective contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. The court has clarified that the overriding objective does not allow the court to ignore clear rules. [1]The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified [2]abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing preconditions for setting aside a default judgment.*

If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that."

So, in order for the defendant to succeed with this application he must satisfy these pre-conditions.

Has the Defendant applied to the court as soon as reasonably practicable after finding out that judgment had been entered,

[19] This is the first criteria in Rule 13.3 of CPR that the Defendant/Applicant has to satisfy.

[20] The Defendant/Applicant deposed in his affidavit that he was served with the judgment in default on the 6th day of November, 2018. His application to set aside the default judgment was filed on the 12th day of November, 2018, a mere six (6) days after.

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[1]Kenneth Harris v Sarah Gerald (unreported) Civil Appeal No. 3 of 2003.

[2] See Supreme Court Practice 1999 Volume 1, "...the major consideration is whether the Defendant has disclosed a defence on the merits, and this transcends any reason given by him for the delay in making the application even if the explanation given by him is false, citing Vann v Awford (1986) 83 L.S. Gaz 1725; (1986) Te Times, April 12 CA.

[21] There is no set period of time within the rules as to what satisfies this requirement.

[22] However, in the case of Earl Hodge v Alban Hodge BVIHCV2007, Hariprashad Charles.J, found that a period of thirteen (13) days between being served with the judgment and the filing of the application to set aside the judgment was reasonable.

[23] In Doreen Leslie v Bradley Davis, Lex Clayton Davis SVGHCV1998/0047 Thom, J. found that a period of about four (4) days between being served with the judgment and the filing of the application to set aside the judgment satisfied Part 13.3(1)(a). She held that the application was made as soon as reasonably practicable after they received the notice that judgment has been entered.

[24] Having considered the authorities cited above this court is of the view that a period of six (6) days is not an unreasonable amount of time to respond to the service of judgment in default.

[25] In the circumstances, I find that the applicant has filed his application as soon as reasonably practicable after finding out that judgment in default was entered.

Has the Applicant provided a good explanation for failure to file a defence within the stipulated time?

[26] The Defendant must satisfy the court that he has a good explanation for failure to file a defence during the stipulated time.

[27] In his application of the 12th day November, 2018 to set aside the judgment in default the applicant provided no ground to support the application but made reference to the affidavit in support of the application. However, in his amended notice of application filed on the 23rd day of November, 2018 the grounds cited were:

- The acknowledgment of service was filed, but that the lawyer was out of state and the time was not managed properly.

- The Defendant has a real arguable case.

[28] The Privy Council's decision in the case of The Attorney General v Universal Project Limited P.C. Appeal No. 2010/0067 (2011) UK PC 37 is instructive on this issue and was adopted by the Eastern Caribbean Court of Appeal in Sylmond Trade Inc v Inteco Beteiliegungs AG BVI HC MAP 2013/0002 by Michel J.A.

[29] In quoting from Lord Dyson in The Attorney General v Universal Project Ltd. Michel J.A. cited the following *"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."*

[30] Rule 13.3(1) provides for a good explanation. In the case of Sylmord Trade Inc., a definition of *"good explanation"* was provided: *"An account of what has happened since the proceedings were*

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 a good one for the purpose 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 may be entered".

[31] In the most recent case of Mitchell v News Group Newspapers Ltd. (2014) 2 A.E.R: 430 Court of Appeal Civil Division U.K: Lord Dyson stated inter alia that: *"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. 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 otherwise fully compliant with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contest 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".*

[32] In the instant case, the Defendant filed a notice for extension of time to be relieved from sanctions and for an extension of time to file a defence and counter claim dated 31st day of October, 2018 and filed on the 1st day of November, 2018.

[33] The judgment in default was granted on the 29th day of October, 2018. In her affidavit Counsel deposed she was in and out of state dealing with her daughter's papers for college, whereas the Defendant was on vacation. Counsel stated that upon resumption of work she managed to file acknowledgement of service which was filed on 21st day of September, 2018, but due to backlog of work and deadline she was unable to complete the defence and counter claim. C.P.R. 10.3 (5) (6) (7) (8) (9) provides for extension of time. The Defendant failed to utilize these provisions available in the C.P.R. although it was known to the Applicant/Defendant at the time of filing the acknowledgement of service that her defence was likely to be late.

[34] Counsel for the Claimant/Respondent submitted that the reason of Defence Counsel being out of state for an extended period and the Defendant on vacation provides no good reason and are insufficient to meet the threshold of C.P.R. 13.3 (1) (b). Counsel relied on the case of Verbina Adams v Othniel Browne HCV 2005/0124. In that case Joseph J held that a defendant who traveled for medical attention, and on his return forgot about the claim form until he was served with the judgment in default was not a good reason to set aside a default judgment. I tend to agree.

[35] I am persuaded by the position of the Court in the case of Michael Laudat v The Attorney General of the Commonwealth of Dominica and Danny Ambo[3] where the court stated: *"Finally we wish to remind legal practitioners, particularly junior counsel, of the number of decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order or practice direction where the explanation given for the delay is misapprehension of law[4], mistake of the law by counsel[5] , lack of diligence, volume of work,*

[3] DOMHCVAP2010/0016

[4] See Richard Frederick and Owen Joseph and others St. Lucia Appeal No. 32 of 2005 (unreported)

[5] See Donald F. Conway and Queensway – Trustees, St. Christopher Nevis Civil Appeal No. 11 of 1999 (Unreported) 3/4/2000

difficulty in communicating with clients[6]*, pressure of work on a solicitor, impecuniocity of the client, secretarial incompetence*[7]*, or inadvertence*[8]*.*

[36] Having agreed with the submission of Learned Counsel for the Claimant in this regard, the court need not necessarily go on to consider the third ground, suffice it to say that if the Court were to consider the defence the applicant intended to mount, I would have found that the defence raised triable issues and that it does have some merit.

[37] However having held that the defendant provided no good explanation for failing to file the defence on time, he has failed to satisfy all the requirements to allow the Court to exercise its discretion.

Exceptional Circumstances

[38] The Applicant has not alleged any exceptional circumstances which the court may consider under Part 13 (3).

Conclusion

It is hereby ordered that:

1. The application to set aside the Default Judgment entered on 29th October, 2018 is hereby dismissed.

2. Costs to the Claimant to be assessed if not agreed.

Rickie Burnett
MASTER (Ag.)

By the Court

REGISTRY OFFICE
ST. VINCENT AND THE GRENADINES

Registrar

[6] See John Cecil Rose and Anne Marie Rose. St. Lucia Civil Appeal 19 of 2003 (Unreported) 22/9/03.
[7] See Mills v John, OECS Law report Volume 3 page 597 per Liverpool JA, Vena McDougal and Reno Romain, Commonwealth of Dominica HCVAP 2008/0003 (Unreported) 7/4/08
[8] Anthony Clyne v The Guyana and Trinidad Mutual Insurance Co Ltd., Grenada Civil Appeal No. 11 of 2010 (Unreported) 5/5/10