EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2017/0226

BETWEEN:-

[1] FELIX WILSON

Claimant

and

[1] DURAVISION INC
[2] PERSONS UNKNOWN being the author of an article entitled "Felix Wilson kicked out of meeting in Florida" and subsequent amended to "Felix Wilson thrown out of meeting in Florida"

Defendant

On written submissions:
Miss Cara C Shillingford for the Claimant
Mrs. Dawn Yearwood-Stewart for the first named Defendant

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2019: March 1
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[1] STEPHENSON, J.: This is an application by Duravision Inc to set aside a default judgment that Mr Felix Wilson obtained against them. The application is strenuously opposed by Mr Wilson. Duravision also applied for an extension of time to file and serve their defence.

[2] This action was commenced on the 27th day of July 2017 seeking damages including aggravated and exemplary damages for defamation, an injunction, interest, other relief and costs.

[3] No defence was filed in the matter and on the 6th March 2018 the claimant applied for entry of judgment in default of defence.

[4] The claimant obtained judgment in default of defence against the defendant on the 1st May 2018 which judgment was served on the first named defendant on the 8th May 2018.

[5] The application to set aside the default judgment was filed on the 24th May 2018 accompanied by an affidavit in support which exhibited a draft defence.

[6] Learned Counsel Mrs Yearwood Stewart on behalf of the first named defendant contends that the judgment in default of defence obtained by the claimant did not comply with the rules of Court. Learned counsel submitted that:

a. there is no evidence that an acknowledgment of service was filed by the defendant. Reference was made to Part 12.5 of CPR 2000 which states that

"*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 (d) (if necessary) the claimant has the permission of the court to enter judgment."*

[7] It was submitted that since no acknowledgment of service was filed then the judgment in default should refer to failure to file an acknowledgment of service and not the defence.

[8] Learned Counsel Miss Cara Shillingford submitted that an acknowledgment of service was in fact served by the first named defendant. A review of the Court's file does in fact disclosed that an acknowledgement of service was filed on the 25th day of August 2017. Therefore taking into consideration that time did not begin to run until the 18th day of

September 2017[1]the defence was due to be filed on or before the 16th October 2017. A perusal of the file discloses that there was no defence filed by the defendants on the 16th October 2017. Therefore the claimant was at liberty to file for judgment in default after that date.

[9] Secondly, Counsel for the first named defendant contended that the claimant's request for entry of judgment in default was irregular. Counsel made reference to form 7 page 401 of CPR 2000 and to the procedure set out in part 12. 7 of CPR. Part 12.7 states "*A claimant applies for default judgment by filing a request in Form 7".* I have reviewed the claimant's application for judgment in default of defence and find that there has been compliance with the procedure as set out in Part 7.

[10] The defendant also submitted that the claimant entered judgment only for an unspecified sum and not for the entirety of the claimant's claim that is for damages including aggravated and exemplary damages for defamation, injunction or specific order or other relief interest and costs. Learned Counsel Mrs Yearwood Stewart submitted that the judgment should have been entered in accordance with part 12.10 (4) and (5) of CPR 2000.

> Part 12:10 (4) and (5) states:
>
> (4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply.

[11] Therefore, I find that there were no irregularities in the claimant's application for default judgment and the defendant's application would fail in this regard. The default judgment was regularly obtained.

[12] This application therefore now falls to be considered under part 13.3 of CPR 2000. Part 13.3 states:

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[1] Re: Rule 3.5 (1) & Re: Keith Mitchell –v- Lloyd Noel et al HCVAP2007/023 (Grenada) Barrow JA at paragraph 10 Per "… during the long vacation time runs only for serving a statement of claim. Therefore time for serving a defence does not run."

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.

[13] It is well established law that the court has the discretion to set aside a default judgment which was regularly entered. The word "may" has been construed to connote that the Court has this discretion the rational being that until a there is a judgment pronounced on the merits of the case or by the consent of the parties. In the Privy Council Case of Strachan –v- Gleanor Co Ltdand Another[2]the court made the following comment:

> "A default judgment is one which has not been decided on the merits. The courts have jealously guarded their power to set aside judgments where there has been no determination on the merits, even to the extent of refusing to lay down any rigid rules to govern the exercise of their discretion"[3]

[14] The decision Evans –v- Bartlam[4] was applied in the Strachan Case and Lord Millett in delivering the advice of the board quoted Lord Atkin in the Evans case when he said:

> 'The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.'

[15] There is therefore no doubt in my mind that the default judgment obtained in this case can be set aside. The first named defendant would however have to satisfy the requirements of part 13.3 which are conjunctive.

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[2] [2005] UKPC 33, (2005) 66 WIR 268
[3] (2005) 66 WIR 268 at pages 275 to 276
[4][1937] AC 473

Part 13.3 of CPR 2000

[16] Part 13.3 of CPR 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 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.

Did the first named defendant act as soon as was reasonably practical?

[17] It is a requirement that a defendant who seeks to have a judgment entered against him set aside should do so as soon as is reasonably practicable after he became aware of the default judgment. This is in keeping with the Overriding Objective of CPR to have cases dealt with expeditiously and justly. It is an accepted principle that reasonableness is to be considered on a case by case basis and is dependent on the facts of the said case. Learned Counsel relied on the Hodge –v- Hodge[5] case in support of her submission that the application in the case at bar was timely.

[18] Learned Counsel Miss Shillingford took no issue as to the timeliness of the application. The authorities in our jurisdiction clearly point to the fact that the time between being served with the default judgment and the application to set aside was within reason and in my judgment the delay of 16 days was reasonable.

[19] In seeking to satisfy the first requirements of Part 13.3[6] Learned Counsel Mrs Yearwood Stewart on behalf of the first named defendant submitted that the defendant applied to set aside the default judgment as soon as was reasonably practical after the default judgment was served on him. The first named defendant was served with the request for judgment in

[5] BVIHCV2007/0098
[6] Part 13.3

default and judgment in default on the 8th May 2018 his application to set aside and application for extension of time to file a defence was filed on the 24th May 2018.

Does the First named defendant have good explanation for his failure to file his defence?

[20] The defendant averred that he sought the advice of Counsel when he was served with the claim and that he delivered all the documents to his then attorney at law who advised him that the court would have been closing shortly. The first named defendant subsequently in November 2017 made further contact with his attorney and was advised that the said attorney was addressing his matter.

[21] The excuse proffered by the first defendant essentially lays the blame at the feet of his attorney at law for the failure to file his defence in a timely manner.

[22] Learned Counsel for the Claimant Miss Shillingford contended that this reason does not constitute a good explanation for the defendant's failure to file a defence.

[23] I am cognisant of the judgment of the Court of Appeal in Michael Laudat et anor –v- Danny Ambo[7] when Justice of Appeal Ola Mae Edwards spoke of the

> *"numerous decisions of the court which clearly establish that counsel does 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 the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence."*[8]

[24] It is therefore quite established that it is no excuse that Counsel or the Solicitor failed to act. This in the usual circumstances would not excuse non compliance. I am obliged however to take a look at the surrounding circumstances of the time when the defence should have

[7] HCVAP 2010/016 (Dominica)
[8] Ibid paragraph 14

been filed and note that life came to a stand still so to speak in Dominica following the passage of Hurricane Maria in September of 2017. This to my mind amounts to an exceptional circumstance which must be taken into consideration by the court. With this catastrophic occurrence the registry of the High Court even though it was open for business was not performing regularly. In fact I take judicial notice of the fact that even in January 2019, files are still missing and unaccounted for after the passage of the Hurricane. I do not agree with Learned Counsel Miss Shillingford that there was normalcy after November 2017.

[25] I take judicial notice of the fact that in November 2017 even though the High Court Registry was open it was for the most part still not functional and filings, court documents and files were still in a great mess. It is to be noted that the Civil Court as currently constituted attempted to start sitting in January of 2018 and the struggle was at that time still very evident to have things up and running. Therefore, in the circumstances it is reasonable to find that due to the upheaval following the passage of Hurricane Maria and the total disorganization of the Court Registry and in fact in Dominica as a whole it would be reasonable to find that the first defendant's ability to instruct counsel and to file a defence would have been impeded and should be excused. I hasten to say I do not agree with Learned Counsel Mrs Yearwood Stewart that time cease to run due to the Act of God. It is as a consequence of the catastrophic occurrence in Dominica that I form the view that there was good reason for the first defendant not to file a defence.

Does the defendant have a real prospect of successfully defending the case?

[26] Part 13.3 (c) requires the defendant to show that he has a real prospect of successfully defending the claim.The first named defendant exhibited his draft defence as is required by the rules.

[27] The first named defendant contends that his defence is that "so far as the words complained of consist of statements of fact, they are true in substance and in fact." The defendant

further contends in his draft defence that the contents of the publication are true and that the statements made in the article caused no damage to the claimant's reputation as alleged.

[28] Learned Counsel for the first named defendant submits that a hearing should be convened to determine whether the words contained in the publication are defamatory of the claimant. Counsel also submits that the claimant has failed to show how he has been defamed and he has contended only that the statement made was untrue.

[29] Learned Counsel Mrs Yearwood Stewart further submitted that the claimant in the case at bar failed to comply with Part 69 [9]of CPR 2000 in that he has proven the fact of publication but has failed to give particulars of the innuendo or malice to say that the publication was made maliciously.

[30] It was also submitted on behalf of the first defendant that the draft defence presented directly addresses the claimant's statement of claim and that it presents not merely an arguable case but one that carries real conviction.

[31] Learned Counsel Miss Shillingford contends that the draft defence exhibited by the first defendant argues that the words published were not defamatory however, she contends that the defendants have not pleaded any facts which could support their defence of justification. That the defendant have failed to do so since their allegation that the claimant was kicked out of a meeting in Florida is false.

[32] Learned counsel maintains that this statement reflects on the claimant's reputation in that he is a very high ranking and previously well respected member of the society and that he now faces continuous public ridicule.

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[9] CPR 2000 - Part 69.2 The statement of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 – (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; (b) if the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning – give particulars of the facts and matters relied on in support of such sense; and (c) if the claimant alleges that the defendant maliciously published the words or matters – give particulars in support of the allegation.

[33] I have considered the submissions of both parties in support of their respective positions. I have also considered the contents of the draft defence in relation to the claim and the defence.

[34] I also consider that pursuant to part 69.4 of CPR 2000 either party can apply to the judge in chambers for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case. In deciding whether or not a statement is defamatory, the court must first consider the notional single meaning that the words would convey to the ordinary person[10]. This is fact sensitive and one can consider that evidence may emerge which will enable the defendant in this case to establish his case in what is a fact sensitive area.

[35] In considering whether the defendant's draft defence discloses a case that has 'a real prospect' of successfully defending the claim the authorities are clear that the word real is to be distinguished from a fanciful prospect of success and the court must distinguish between the two. The defendant's case must be more than arguable. The defendant has to satisfy the court that there is good reason why a judgment regularly obtained should be set aside.

[36] I must at the same time consider the Overriding Objective to deal with cases timely and justly.

[37] I accept the submissions of the defendant in relation to the claim and defence the question of whether the word printed were defamatory is a question to be resolved by evidence. I consider that the defendant has a good defence.

[38] I am thoroughly satisfied that all three conditions set out in Part 13 .3(1) have been satisfied by the first named defendant and my discretion should be exercised in favour of setting aside the default judgment.

[39] I further direct that the first name defendant file its defence within 7 days of today's date and there after these proceedings are referred to case management before the master on a date to be fixed by the Registry.

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[10] *Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 258

[40] Costs are awarded to the Claimant in the sum of $1500 to be paid within 14 days here of.

[41] I wish to apologise to the parties and their counsel for the delay in rendering this ruling. The file was misplaced and I sought to render my decision as soon as it was located.

M E Birnie Stephenson
High Court Judge

[SEAL] By the Court

Registrar