THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2019

CLAIM NO. AXAHCV 2018/0027

BETWEEN:

MICHELLE LEONIDAS CARTY

Claimant/Respondent

AND

CLM HEAVY EQUIPMENT LIMITED
MARVIN CARTY
CURTHLEY CARTY

Defendants/Applicants

Appearances:
Mr. Kerith Kentish, Joyce Kentish & Associates of Counsel for the Defendants/Applicants
Mr. D. Michael Bourne, SAGIS LP of Counsel for the Claimant/Respondent

_____
2019: January 28;
February 20.
Issued March 15.
_____

Default judgment – Whether default judgment irregular – Setting aside default judgment – Application of CPR 13.2 and 13.3 (1) – Exceptional circumstances – CPR 13.3 (2) – Variation of Default Judgment – CPR 13.3 (3)

DECISION

Chronology

[1] Innocent, J. (Ag.): This matter came on for hearing upon a Notice of Application filed by the Defendants to set aside a Default Judgment obtained by the Claimant and for leave to file their defence beyond the time prescribed by the CPR. The Chronological background to the current application before the court is critical to arriving at a resolution to the issues raised therein.

[2] The Claimant filed his Claim Form and Statement of Claim on May 23rd, 2018 for damages for trespass to certain goods on account of the alleged wrongful detention and interference with same. In his Claim the Claimant/Respondent sought the following relief, namely, delivery up of the goods or their value and damages consequent on the wrongful interference and detention of the same, damages for conversion of certain of the goods, damages for trespass in respect of the goods, the sum of US$66,076.20 being the retail price of aggregates excavated from the Claimant's land, the sum of US$138,076.78 being monies loaned to and/or advanced for the benefit of the First-named Defendant/Applicant and in the alternative specific performance of the "understanding" between the parties that the loan would be repaid from the earnings of the First-named Defendant/Applicant, an Order directing the Defendants to within seven days following the determination of this matter to obtain the release of the assets of the Claimant held as security for the debts and the First-named Defendant's obligations to the National Commercial Bank of Anguilla and an Order directing the rectification of the vehicle registration database to reflect the Claimant as owner of the goods in question.

[3] The Claim Form and Statement of Claim were served on all of the named Defendants on May 23rd, 2018.

[4] The Defendants filed an Acknowledgement of Service to the Claim on June 6th, 2018.

[5] On July 18th, 2018 the Claimant/Applicant filed a Request for Judgment in Default pursuant to CPR Part 12 Rule 12.10 (b) seeking all of the relief claimed in the Claim Form and Statement of Claim. The Request for Entry of Judgment in Default was accompanied by a supporting Affidavit. The Request for Judgment in Default was in CPR Form 7 (a Request for Judgment in Default for a Specified Sum).

[6] The Defendants filed their Defence on July 20th, 2018.

[7] On July 23rd, 2018 the Defendants filed a Notice of Application seeking an extension of time within which to file their Defence and that the Defence filed on July 20th, 2018 be 'deemed properly filed'. This Application was vehemently opposed by the Claimant who filed an Affidavit in Opposition to the Defendants' Application.

[8] The hearing of the Application for extension of time by the Defendants and the Claimant's Request for Judgment in Default came on for hearing before the Master on September 24th, 2018. The Master made the following order in relation to the applications before her: -

1. The Court of Appeal in St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited, intimated that applications before the court are to be dealt with in the sequence filed.

2. The Claimant's request for judgment in default in defence having been filed first in time had to be first considered and processed by the Registrar, once the requirements for CPR 2000 Part 12.5 were satisfied. Rule 12.5 does not confer a discretion; it makes it mandatory that the Court Office enter judgment. However, the nature of the request is pursuant to CPR 12.10 for which the court is to make a determination.

3. The Court of Appeal in Mark Brantley v Hensley Daniel and Clement Liburd NEVHCV 2013/0118 held that a defence filed out of time after a request for judgment has been filed is not properly before the court.

4. In the case at bar, the defendants filed the defence after the request for judgment in default was filed and thereafter, on July 23rd, 2018 filed a request for extension of time to file the defence and to deem the defence filed as being properly filed.

5. The defence filed after the request for judgment in default is a nullity and cannot be revived unless the claimant withdraws the request for judgment in default. Accordingly, the defendants' application fails and the defence filed is of no effect.

[9] The master granted the claimant's request for judgment in default of defence in terms of the Draft Default Judgment submitted and dismissed the defendants' application with costs. There was no interlocutory appeal filed by the defendants against the decision of the Master.

[10] On October 1st, 2018 the Defendants filed a Notice of Application seeking to set aside the Default Judgment granted by the Master on September 24th, 2018 and for the defence filed on July 20th, 2018 be deemed filed in time and that leave be granted to the defendants to file an Amended Defence. Alternatively, that leave be granted to the defendants to file the Draft Defence exhibited to the Application.

[11] The Default Judgment was entered and filed on October 3rd, 2018. The Default Judgment was not in the form required by CPR 12.10 (1) (a) being Judgment in Default for a specified sum; but also included other forms of relief that were not capable of being granted in that manner, but ought to have been made in compliance with CPR 12.10 (1) (b) and (c) being a Default Judgment for a sum to be determined by the Court and for the terms of the judgment to be settled by the court. Also the Default Judgment also contained judgment for a specified sum claimed by the claimant. The Default Judgment also purported to grant such reliefs as are specified in CPR 12.10 (1) (c) while there was no compliance by the claimant with CPR 12.10 (2) in relation to the type of relief sought.

[12] On December 13th, 2018 the claimant filed an Affidavit in Opposition to the defendants' Application to set aside the Judgment in Default.

[13] On December 17th, 2018 the claimant filed a Request for Entry of Judgment in Default pursuant to CPR Part 12 Rule 12.10 (1) (a) (b) and (c) for a specified sum and for an amount to be determined by the Court by way of damages and in the alternative orders for delivery up of the goods. It is not clear whether this application was before the Master at the time of hearing the application to set aside the Default Judgment.

[14] The Application to set aside the Default Judgment came on for hearing before the Master on December 17th, 2018 and Counsel appearing on behalf of the parties were directed to file submissions and authorities related to the Application. The hearing of the Application to Set Aside was adjourned to January 28th, 2019.

[15] The Application to Set Aside came on for hearing before me on January 28th, 2019. At this hearing the court noted the presence on the Court's file of the Request filed by the Claimant for Judgment to be entered for an amount to be decided by the Court. I enquired of both counsel whether the Master was aware of the subsequent Request for Entry of Default Judgment filed by the Claimant when the order of December 17th, 2018 was made. It was confirmed that the latter Request was filed subsequent to the hearing on December 17th, 2018 and after the Master had made the Order.

[16] Having established that the Request was filed subsequent to the hearing on December 17th, 2018 it was put to counsel for the Claimant whether he was conceding that the Judgment in Default granted by the Master on September 24th, 2018 and filed and entered on October 3rd, 2018 was irregular and ought therefore to be set aside. Therefore, when the matter came on for hearing there were two applications before the court. I propose to deal first with the application to set aside the default judgment filed by the Defendants.

[17] After hearing the oral submissions from both counsel I reserved my decision and undertook to deliver a written decision.

The Application to Set Aside

[18] The defendants' application to set aside the default judgment is made pursuant to the 'inherent jurisdiction' of the court and CPR 13.3 (1) and (2). The defendants contend that the default judgment should be set aside because it was wrongly entered on a bad request having been made pursuant to CPR 12.10 (b).

[19] The defendants contend that CPR 12.10 (1) (b) mandates that the request for default judgment on a claim for an unspecified sum of money must be for an amount to be decided by the court and must be made in Form 32. They say that the request having been made pursuant to CPR 12.10 (1) (b) and in Form 7 rather

than Form 32 makes the default judgment irregular and that it ought not to have been granted by the master.

[20] In addition, the defendants argue that the claim was not solely for an unspecified sum and therefore the claimant could not have properly made a request in either Form 7 or Form 32. The claimant they contend ought to have filed a Notice of Application in Form 6 in compliance with CPR 12.10 (4) and CPR 12.10 (5).

[21] The defendants also argued that the default judgment was entered without regard to CPR 12.8 (3) which requires a claimant requesting judgment for a specified sum to abandon the claim for an unspecified sum or other relief; therefore, the default judgment obtained was irregular because the claimant failed to abandon the claims for an unspecified sum and other relief sought in the statement of claim.

[22] They also contend that the claimant would have similarly fallen into error had he utilized Form 32 because a request in Form 32 relates specifically to entry of default judgment in a claim for an unspecified sum. Accordingly, they say, that given the nature of the relief sought in the claim, in particular that for the delivery of goods, the provisions of CPR 12.10 (4) and CPR 12.10 (5) were triggered.

[23] The defendants submit that a claimant seeking to obtain a default judgment in respect of the present claim that seeks other remedies and delivery of goods is not entitled to abandon any other claim for relief in the same manner as for a request for a specified sum and an unspecified sum pursuant to CPR 12.8 (3) using Form 7. By extension the appropriate rule being CPR 12.10 (5) required that the default judgment be obtained by application and not by request in either Form 7 or Form 32. The defendants broadened their argument by submitting that a request was administrative whereas an application was judicial in nature.

[24] Further, they argue that the request for default judgment did not comply with the provisions of CPR 16.2 (1).

[25] For all of the above reasons they say the default judgment should be set aside. In support of their argument they cite the case of Dr. Miranda Fellows v Carino Hamilton Development Company Inc. and Anor HCVAP 2011/0006 (Nevis Circuit) delivered June 6, 2012.

[26] On the contrary, the claimant argued that the defects in the default judgment was a matter of form rather than substance. In support of his contention counsel cited the dicta of George-Creque JA, as she then was, in the case of Intrust Trustees (Nevis) Limited and others v Naomi Darren [2009] ECSCJ 72 where she said at paragraph 10 of the judgment that: -

> "Further, as correctly stated by the Master, it would be quite a draconian approach to strike out the claim in such circumstances and were it properly to have been brought by way of Form 2, it would have been quite right in the exercise of her discretion under CPR 26.9 (3) to order that the matter proceed as if by Fixed Date claim and thereby put matters right. This would be wholly in keeping with the overriding objective of the CPR. To sacrifice substance by way of a slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of the CPR rather than giving effect to it."

[27] I wish to disagree with the claimant's argument. First, the procedural error in the case of Intrust is entirely distinguishable from the facts and circumstances of the case at bar. In the case of Intrust the court's jurisdiction had been triggered in any event but in a procedurally incorrect way. In the instant case the court simply had no jurisdiction to make the order in the manner in which it did. I do not agree with the claimant that this is an appropriate case for the court to exercise its discretion to vary the default judgment rather than set it aside.

[28] In my view, the procedural defect and the irregular nature of the Default Judgment were not merely formal but were substantive. It was not capable of being cured as the claimant suggested. Therefore, the default judgment was irregular and alternatively irregularly obtained.

[29] I adopt the reasoning of Mitchel JA in the case of Dr. Miranda Fellows and conclude that the provisions of CPR 13.2 (1) (b) and 13.2 (2) are triggered in this case and the court must therefore set aside the Default Judgment. This is so particularly given the provisions of CPR 12.5 (d).

[30] The Request for Default Judgment filed on July 18th, 2018 was headed "Request for Judgment in Default pursuant to CPR Rule 12.10 (b)". What was before the Master was a document purporting to be in accordance with CPR 12.10 (5). The document so headed was accompanied by an Affidavit. In fact, the document contained the recital "an affidavit is also submitted in support of this request/application for entry of judgment in default". Based on the form of the document, it can only be assumed that the master, having been aware of the defect in the heading of the document, treated the same as a matter of form rather than substance which could have been cured by treating what was filed as a request as being an application made pursuant to CPR 12.10 (5).

[31] However, the crux of the matter lies in the substance of the perfected default judgment which the defendants quite correctly say is irregular given the relief granted therein. It is not certain whether the points advanced by the defendants on the present application were canvassed before the Master when the application for default judgment was heard. I take notice of the fact that the defendants were not served with the Request for Judgment in Default.

[32] The defendants, by the tenor of their application, appear to have launched a two pronged attack against the default judgment. Not only have they relied on CPR 13.2 but they also rely in the alternative on CPR 13.3. I have already concluded that the court can quite competently set aside the default judgment pursuant to CPR 13.2. However, I think it necessary to explore the consequences of the arguments put forward by the defendants in relation to CPR 13.3 (1) and CPR 13.3 (2). Therefore, I now turn to consider whether the defendants' application can

pass muster in light of the provisions of CPR 13.3. (1) and CPR 13.3 (2) which would entitle them to have the judgment set aside.

[33] CPR 13.3 deals with situations where the court may set aside or vary a default judgment. CPR 13.3 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."

Application made as soon as practicable

[34] There is no doubt that the defendants have satisfied the requirements of CPR 13.3 (1) (a). In fact, the claimant has conceded this point. The default judgment was made on September 24, 2018 and the defendants' application was filed on October 1, 2018.

Good explanation for the failure

[35] However, a more troubling issue is whether the defendants have satisfied the requirements of CPR 13.3 (1) (b) by providing a good explanation for the failure. The defendants' explanation for the failure is set out at paragraphs 33 to 43 of their written submissions. In a nutshell, they say that the delay in filing the defence

was not intentional and that, in any event, they had complied with all other timelines under the CPR.

[36] It appears that the parties had considered the question of mediation and to that end had consented to an extension of time to July 13th, 2018 for the defendants to file their defence. Counsel for the defendant who fell ill between July 2nd and July 10th, 2018 requested a further extension of time to file the defence to July 23rd, 2018. It is evident that this request for an extension was acceded to by Counsel for the claimant, the claimant having filed a Request for Default Judgment on July 18th, 2018. The defendants' counsel left Anguilla for Europe on 'national duty' on July 11th, 2018 and returned to Anguilla on July 18th, 2018.

[37] According to what is contained in the defendants' affidavit in support of their application, counsel because of illness somehow exacerbated by the rigours of travel was not able to file the defence until July 20th, 2018. It appears that the period of 56 days pursuant to CPR 10.3 (7) had not expired when the defendants purported to file their defence.

[38] In any event, Counsel for the defendants filed an application for an extension of time to file a defence on July 23rd, 2018. However, it will be recalled that the claimant filed the request for default judgment on July 18th, 2018.

[39] On the other hand, the claimant contends that the defendants have failed to satisfy the criteria under CPR 13.3 (1) (b) and in support of his contention has cited the decisions of Michael Laudat and Anor v Danny Ambo; and Attorney General v Universal Projects Limited [2011] UKPC 37.

[40] It seems to me that given the explanation for the failure to file the defence and the events that occurred in the intervening period, particularly the parties having agreed to an extension of time to file a defence and such time for the grant of a further extension not having expired in accordance with the CPR, that it cannot be

said that the defendants' conduct in filing a defence can properly be regarded as so contumelious to the extent that it cannot be said that they have failed to satisfy the provisions of CPR 13.3 (1) (b). Therefore, I find that in all the circumstances of the case there is a reasonable explanation for the failure.

[41] In Inteco when assessing the concept of 'a good explanation for the failure' Bannister J. at paragraph [15] of his judgment said:

> "[15] The next test that Sylmord needs to pass is whether it has given a 'good explanation' for its failure to file an acknowledgement of service or defence. The expression 'good explanation' is not an easy one. In its ordinary sense an explanation is a statement or account which explains something. It may be a bad explanation if the person to whom it is made is unable to understand what it is that is sought to be explained and a good one if the recipient is fully enlightened, but in the context of CPR 13.3 I do not think that a 'good explanation' is to be understood in that way. In my judgment, the expression 'good explanation,' where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies 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, an 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."

Real prospect of successfully defending the claim

[42] I have taken sight of the Draft Defence exhibited to the Affidavit of Carla Tomlinson filed on October 1, 2018 and the Supplemental Affidavit filed thereafter in support of the application to set aside the default judgment. It seems to me from what is contained in the Draft Defence the defendants have a real prospect of defending the claim.

[43] I have arrived at this conclusion having considered the context of the pleadings and such evidence as there is before me on the defendants' affidavit in support and I have determined on this basis that the defence has a real (as opposed to a fanciful) prospect of success[1].

[44] In support of their contention that they have a realistic prospect of successfully defending the claim the defendants have raised several points. First, the defendants say that the claimant is not the beneficial or legal owner of the goods in question and have relied on salient grounds for so holding. The defendant submits that the claimant cannot bring the claim seeking the remedies claimed as the causes of action are statute barred.

[45] In addition, the defendants in their defence contend that the legal and beneficial ownership of the goods reside with the first-named defendant (the 'Company') of which the claimant was a director prior to his resignation from that office and the commencement of the present cause of action. They further contend that the claimant is not entitled to bring a claim against the second and third defendants for the delivery of the goods or the payment of their assessed value as they are not in possession of the goods in question. They say that the ownership of the goods was transferred to the Company, a fact which the claimant is well aware of as he was a director of the Company at the material time.

[46] In the circumstances, they argue that the second and third defendants are not properly joined in the proceedings as they are not personally liable for the acts of the Company and could therefore only be sued in their capacity as directors of the Company which is not the situation in the case at bar. Furthermore, in the present proceedings the claimant has not sought to pierce the corporate veil. In the circumstances, it is their contention, as appears from the draft defence, that the

[1] Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste Saint Lucia High Court Civil Appeal SLUHCVAP2009/0008 (delivered 11th January 2010, unreported)

claimant has no cause of action against the second and third defendants for conversion or any of the other remedies claimed.

[47] In addition, the defendants argue that whereas the default judgment orders damages for trespass, a review of the claim form and statement of claim shows that the claimant has not made out his claim for trespass. The facts in relation to the claim for trespass have not been pleaded at all. Therefore, they say, the claimant has not made out a case of trespass against the defendants and has failed to fulfill his obligation to set out his case in the manner contemplated by CPR 8.7 (1).

[48] The defendants argue, and quite rightly so, that the claimant's claim that the defendants release (discharge) the claimant's property used as security for a loan to the Company by the National Commercial Bank of Anguilla cannot succeed. The defendants' argue that the relief sought by the claimant places the obligation for the repayment of the loan on all three defendants rather than on the Company. In any event, they say that the claimant has not pleaded any fact that shows that there is any contractual or equitable basis for such a claim against the second and third defendant. They further argue that the claimant has not set out in the Statement of Claim the basis upon which either the Company or the other two named defendants are fixed with liability for the repayment of the debts.

[49] It is contended on behalf of the defendants that the situation becomes even more startling when one considers that the Company is a legal entity separate and distinct from its directors.

Exceptional Circumstances

[50] The defendants also rely on CPR 13.3 (2) on the basis that the court finds that there are 'exceptional circumstances' which empowers the court to set aside the default judgment. I am required, in the event that the defendants are unable to satisfy the requirements of CPR 13.3 (1) to consider the question of whether there

are exceptional circumstances warranting depriving the claimant of his default judgment.

[51] The defendants contend that the matters upon which they rely to support their argument that they have a realistic prospect of successfully defending the claim also supports their application pursuant to CPR 13.3 (2) in that there are exceptional circumstances warranting the setting aside of the default judgment.

What constitutes 'exceptional circumstances' under the CPR

[52] In the case of Meyers v Baynes [2019] UKPC 3 the Privy Council reiterated and confirmed the statement of principle of Her Ladyship, Pereira CJ in the court below. At paragraph [26] of the Court of Appeal Judgment Her Ladyship said:

> "----- that what amounts to exceptional circumstances must be decided on a case by case basis----- and expressed her full agreement with the view expressed by Bannister J. in Inteco Beterlingungs Trade Inc. v Sylmord Trade Inc.[2] at paragraph [31] of that judgment that there must be something amounting to a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment had been obtained. She cautioned that exceptional circumstances are not the same as a realistic prospect of success."

Their Lordships further stated, citing the learned Chief Justice that:

> "In her view exceptional circumstances would include those cases where it was shown that a claim was not maintainable or a defendant had a 'knock out' point, or where a remedy sought by a claimant was not available."[3]

The Privy Council stated further in their judgment that:

> "The Board is prepared to accept that it established that Mr Meyer had a defence to the claim for breach of statutory duty which had a realistic prospect of success, but it certainly did not amount to a knockout blow or constitute a compelling reason to set the default judgment aside. What is more, it was, at best, only peripherally relevant to the claim based upon vicarious liability and either claim was sufficient to provide a basis for the default judgment.[4]

[2] BVIHCM (COM) 120 of 2012
[3] Per Lord Kitchin at paragraphs 17-18
[4] Per Lord Kitchin at paragraph 19

[53] In Inteco, Bannister J. said at paragraph [31] of his judgment that:

> "[31] Mr. Moverley-Smith QC submits that the fact that the Loan Offer documents contain the arbitration clause to which I have referred, coupled with the fact that the commencement of these proceedings amounted to a breach of the clause, constitutes an exceptional circumstance, within the meaning of sub-rule 13.3(2). I do not think that that can be right. For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained. The fact that they were commenced in breach of an agreement to arbitrate cannot possibly amount to such a circumstance. So far from being exceptional, it is routine. Claimants regularly bring proceedings in breach of arbitration agreements where they prefer their chances in Court to the expense of arbitration and are prepared to take the risk of a successful stay application. Had Sylmord reacted timeously, it could have sought a stay in these proceedings. The fact that it did not is not a proper ground for setting aside the judgment."

Whether Default Judgment can be varied

[54] CPR 13. (3) provides that where this Rule gives the court power to set aside a judgment, the court may instead vary it.

[55] I am of the view that given the numerous procedural improprieties attendant on the grant of the default judgment it cannot be saved by the court varying the terms thereof. In my view, it is not just a matter of form over substance. Therefore, I am inclined to adopt the sentiments of Michel JA in the case of Fellows.

The Application for Default Judgment

[56] The claimant, having filed a "Request for Default Judgment" in accordance with CPR 12.10 (1) (a), (b) and (c), while the default judgment under scrutiny is extant is clearly an improper procedural practice and at best an orchestral maneuver in the dark. This recent filing suggest that the claimant may very well be aware of the difficulties with the existing default judgment. In any event, I am of the view that the claimant's actions in this regard amounts to an abuse of process. The

subsequent application by the claimant for default judgment cannot in my view render the existing default judgment nugatory. The present application for default judgment before the court does not and cannot change the landscape. Therefore, the application filed by the claimant on December 17th, 2018 is struck out. I also hasten to add that even this recent "Request for Default Judgment" is laden with its share of difficulties.

[57] In the circumstances, and for the reasons set out above I make the following orders:

1. The Default Judgment dated September 24th, 2018 and entered on October 3rd, 2018 is set aside.

2. The defendants are granted leave to file and serve a defence on or before seven (7) days of the making of this order.

3. The claimant is granted leave to file a reply to the defendants' defence within fourteen (14) days thereafter.

4. The application for Default Judgment filed by the claimant on December 17th, 2018 is hereby struck out.

5. The matter is adjourned for Case Management before the master on a date to be fixed by the Court.

6. Costs shall be in the cause.

7. The parties are encouraged to enter into negotiations and/or mediation with a view to settling this matter.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar