THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. 351 OF 2010

BETWEEN:

ROSEMARIE WALKER

Claimant

V

ROHAN MILLER

Defendant

Appearances:
Mr. Sylvester Raymond-Cadette for the Claimant.
Ms. Patricia Marks for the Defendant.

2012: July 20th

DECISION

[1] **JOSEPH, MONICA J. (Ag.)**: This is an application by the defendant to set aside the judgment in default granted to the claimant on 5th April 2011 under Part 13.2 or in the alternative Part 13.3 of CPR2000.

[2] The defendant also applies that the claimant be ordered to properly serve the defendant with the claim form and statement through a High Court Bailiff in the alternative that the defendant be granted leave to file and serve a defence within seven days.

[3] The grounds of the application are:
At no time was the defendant properly served with the claim form, statement of claim, judgment in default and judgment summons. Irregular service was carried out by the

claimant on a third party at all material times. He has a good defence and has applied to the court in a timely manner in the circumstances.

[4] Under CPR 13.3 the court may set aside a default judgment only if the defendant satisfies all these conditions -

a) applies to the Court as soon as reasonably practicable after finding out that judgment has been entered;
b) gives a good explanation for failure to file his defence and
c) has a real prospect of successfully defending the claim.

[5] In Kenrick Thomas v RBTT Bank Caribbean Limited Civil Appeal No. 3 of 2005 Barrow JA held that all three conditions must be satisfied. I consider whether all three conditions are satisfied. Default Judgment was entered on 5th April 2011. The notice of application to set aside the default judgment was filed on 25th January 2012, some nine months later. The claimant has not satisfied me as to the precise date the judgment in default was served. Time starts to run from the date the defendant became aware that judgment was entered.

[6] The explanation given by the defendant in his affidavit filed on 25th January 2012, for not filing a defence, is that in early 2011 he received from the claimant a document on which was written Judgment in default of defence. He placed it in the envelope and forgot about it. Further, he deposed that he did not know what a judgment in default meant. He did not understand that the claimant had been awarded judgment against him.

[7] Those are not good reasons. He could have enquired as to what default judgment means. To say that he received an envelope that bore the words judgment in default of defence and forgot about it is certainly not a good explanation. Mr. Cadette submits that, by that action, the defendant was rude to the court. I find that the explanation given by the defendant does not satisfy the second condition.

[8] With respect to the third condition which is that he has a real prospect of successfully defending the claim, it is not sufficient to state that he believes that he has a good defence. Something more is required. The rules provide that a draft defence should be exhibited to his affidavit. This would show his bona fides and assist the court in determining whether his defence has a real prospect of success. No draft defence accompanied his affidavit.

[9] The defendant has not satisfied the condition that he has a real prospect of successfully defending the claim. The procedure he failed to observe appears in CPR 13.4:

(a) an application must be supported by evidence on affidavit.

(b) the affidavit must exhibit a draft of the proposed defence.

IRREGULARITY

[10] Was one of the documents judgment in default of defence? The defendant says that he received a document that bore the words "JUDGEMENT IN DEFAULT OF DEFENCE". It is not clear what date he received that document. To ascertain that I look at the affidavit of Anthony Quow who deposed in paragraph 2 that he delivered the document to the "defendant Fitz-Stephen Andrews at Chauncey." That is not the defendant's name. This is an irregularity.

[11] Ms. Marks submits that a legal practitioner ought not to swear to an affidavit for his client. I agree with that submission. The request for entry of judgment in default of defence was signed by solicitor for the claimant. So too was the affidavit in support of the request by the solicitor filed on 22nd March 2011. The solicitor ought not to have sworn an affidavit in support of an application made by his client. I regard this as irregular.

[12] **Stephine Emanuel v Clyde Jenson Le Cointe** DOMHCV2009/0166 at p. 4 comments of **Borins J. Royal Trust Corp pf Canada v Dunn** at pages 478-479:

> "if the defendant can establish that the correct procedures have not been followed either in obtaining judgment or in relation to some step taken by the plaintiff in the commencement of the proceedings, such as in failing to serve the statement of claim in a proper manner, then normally the defendant can have the judgment set aside as of right without the requirement of establishing a defence to the plaintiff's claim".

[13] The judgment in default judgment entered on 5th April 2011 is set aside. The defendant is to file a defence on or before 8th August 2012. If he fails to do so the default judgment stands.

[14] $750.00 costs to be paid by the Claimant.

MONICA JOSEPH
HIGH COURT JUDGE (Acting)
18th July 2012.