

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 491 of 2015

BETWEEN

KIM THOMPSON (Personal representative of the Estate of Clarence Festus Thompson, Deceased) CLAIMANT

AND

**DR. BRONWEN ALLYSON D. GLASFORD DEFENDANT
(Trading as WellCare Golden Jewels Senior Citizens' Home)**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: January 28

Ms. Joia W.S. Reece of Reece Associates for the Claimant

The Defendant in person

DECISION

[1] The Defendant has made an application pursuant to Part 13 of the Supreme Court (Civil Procedure) Rules, 2008 (CPR) to have a Default Judgment for failure to enter an acknowledgement of service set aside.

INTRODUCTION AND BACKGROUND

- [2] The Claimant Kim Thompson is the legal personal representative of the estate of Clarence Thompson, deceased, and the Defendant is Dr. Bronwen Allyson D. Glasford trading as WellCare Golden Jewels Senior Citizens Home situate at 15 Coles Road, Merricks in the parish of St. Philip (the property).
- [3] The Defendant was a tenant of the deceased. The tenancy agreement began during the deceased's lifetime where the Defendant agreed to rent the property under a monthly tenancy from the deceased. The monthly rent was \$5,000.00 payable in advance on the first day of each month.
- [4] The Claimant alleged that after the deceased died on the 1st August, 2011, the Claimant and the Defendant agreed verbally to continue the monthly tenancy that existed prior to the deceased's death whereas the Defendant would continue to rent the property at a monthly rate of \$5,000.00.
- [5] According to the Claimant, the Defendant has failed to pay the agreed monthly rent of \$5,000.00 as evident by two letters dated October 12, 2011 and November 7, 2012 which the Claimant wrote to the Defendant demanding payment of rent arrears.

- [6] Subsequent to this demand, the Defendant wrote the Claimant and notified her that she intended to quit the tenancy and vacate the property by the 31st October, 2014.
- [7] On the 13th April, 2015, the Claimant instituted a claim against the Defendant seeking the sum of \$156,086.00 for unpaid rent and/or damages for use and occupancy of the property, \$708.41 for electricity consumption, costs, interest and further or other relief as the Court deems fit. This was done by the filing of a claim form and statement of claim pursuant to Rule 8.1(4) and 70.4(2) of the Supreme Court of Judicature Act, Cap 117A Civil Procedure Rules 2008 (CPR).
- [8] On the 27th May, 2015 Ms. Petra Gooding, a process server, filed an affidavit of service representing that she personally served the Defendant on the 24th April, 2015 at No. 1 Wildey Main Road, Wildey, St. Michael with the filed claim form and statement of claim along with the prescribed documents under the Supreme Court of Judicature (Civil Procedure) Rules, 2008 being Notice to the Defendant, prescribed notes to the Defendant, Form 3 – Acknowledgment of Service of Claim Form, Form 4A – Application to pay by Instalments, and Form 5 – Defence and Counter Claim Form.

- [9] If the above is accepted then the deadline to file the Defendant's acknowledgment of service of claim form in accordance with the CPR would have been the 8th May, 2015 and the deadline to file the Defendant's defence would have been the 22nd May, 2015.
- [10] On the 28th May, 2015, the Claimant pursuant to Rule 12.7(1) of the CPR filed a request for default judgment against the Defendant in default of acknowledgement of service of the claim form and statement of claim.
- [11] On the 8th June, 2015 the Deputy Registrar of the High Court (ag.) granted in favour of the Claimant, default judgment against the Defendant in the sum of \$158,952.66 inclusive of interest and costs of \$5,149.00 with interest at 6% per annum from the 9th June, 2015 until payment. The final Order was signed by the said Deputy Registrar (ag.) on the 13th July, 2015.
- [12] On the 20th July, 2015 the Defendant filed an acknowledgment of service of claim form which indicated that she was only served on the 6th July, 2015. The Defendant also filed a defence and counterclaim on the 28th July, 2015.
- [13] On the 6th August, 2015 the Defendant was served with the default judgment and on the 18th August, 2015, the Defendant filed a notice of

application to set aside the default judgment and a supporting affidavit.

ISSUES

[14] The questions which have to be determined are:

- (i) whether or not the default judgment was wrongfully entered in default of acknowledgment of service; and
- (ii) whether or not the default judgment should be set aside

THE SUBMISSIONS

[15] The Defendant grounded her submissions on the following points:

- (i) The request for default judgement was made on the 8th June, 2015 and the claim form and statement of claim were not yet served on her;
- (ii) The claim form and statement of claim were only served on her on the 6th July, 2015 after the request for default judgment was made;
- (iii) On the 20th July, 2015, the Defendant served the Claimant a copy of the acknowledgment of service. On the 28th July, 2015, the Defendant then filed the defence and counterclaim and served the same on the 4th August, 2015;
- (iv) On the 17th August, 2015 the Claimant served a certified true copy of the default order. That default judgment of the 8th June, 2015, was entered on the 6th August 2015;
- (v) The Court must set aside the default judgment under Part 13.2, in that the defence was filed on the 28th July, 2015 after the claim form was served on the 6th July, 2015;
- (vi) The Court must set aside the default judgment under Rule 13.3 by reason of disability set out in the defence of the 28th July, 2015. The Defendant has a real prospect of successfully defending the claim.

[16] The Defendant therefore contends that she was not served on the 24th April, 2015 but rather on the 6th July, 2015, after which she filed her acknowledgment, defence and counterclaim in time and therefore the default judgment was wrongfully entered and ought to be set aside.

THE LAW

[17] Part 13 of the CPR provides two cases for a Defendant to have a default judgment set aside. These cases are found at Parts 13.2 and 13.3 of the CPR.

[18] Part 13.2 of the CPR deals with judgments which must be set aside.

There it states that:

- “(1) The court must set aside a judgment entered under Part 12 if judgment was wrongfully entered because in the case of
- (a) a failure to file an acknowledgment of service – any of the conditions in Rule 12.4 was not satisfied; or
 - (b) judgment for failure to defend – any of the conditions under Rule 12.5 was not satisfied
- (2) The court may set aside judgment under this rule on or without an application.”

[19] The Caribbean Civil Court Practice 2011 at Note 11.3 on page 137 addresses Part 13.2 of the CPR where it states that:

“In order to obtain a default judgment under CPR Part 12, the requirements are strict. The court must set aside a judgment entered under CPR Rule 12 if judgment was

wrongfully entered because one of the conditions in the rule relating to the entry of a default judgment was not satisfied.”

[20] In the instant case the judgment entered was for failure to file an acknowledgment of service. As such it is necessary therefore to consider Part 12.4 of the CPR. Part 12.4 of the CPR states that:

“The Registrar may, at the request of the Claimant enter judgment for failure to file an acknowledgment of service where

- (a) the Claimant proves service of the claim and statement of claim,
- (b) the period for filing an acknowledgment of service has expired,
- (c) the Defendant
 - (i) has not filed an acknowledgment of service;
 - (ii) has not filed a defence to the claim or any part of it;
 - (iii) where the only claim, apart from the costs and interest, is for a specified sum of money, has not 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; and
 - (iv) has not satisfied the claim on which the Claimant seeks judgment; and
- (d) necessary, the Claimant has the permission of the court to enter judgment.

[21] Part 5 of the CPR deals with the service of claim form within the jurisdiction. Rule 5.1 provides that the general rule is that a claim form may be served personally on each Defendant. Rule 5.3 states that a claim form is served personally on an individual by handing it to or leaving it with the person to be served. Proof of service is governed by Rule 5.5 which provides –

“personal service of a claim is to be proved by an affidavit sworn by the server stating

- (a) the date and time of service;
- (b) the precise place and address at which it was served;
- (c) precisely how the person was identified; and
- (d) precisely how the claim form was served.”

[22] Due to the conflicting positions with respect to when service on the Defendant was effected, the Court must determine whether or not the Claimant’s submission that the Defendant was served on the 24th April, 2015 and therefore failed to file an acknowledgment of service within the prescribed time is correct and therefore the judgment was rightfully obtained or whether the Defendant’s submission that she was not served with the claim form or statement of claim until the 6th July, 2015 and therefore the default judgment was wrongfully entered and must be set aside.

[23] To support their respective positions, the Claimant relied on the affidavit of service filed by the process server Petra Gooding who deposed that she personally served the Defendant on the 24th April, 2015 at No. 1 Wildey Main Road, Wildey, St. Michael in conformity with the CPR. The Defendant relied on the affidavits of Brenda Peltaire and June Squires, who both indicated that they were present at WellCare Golden Jewels Senior Citizens Home on the 6th July, 2015 when they observed a woman come to the home and delivered an envelope addressed to Dr. Glasford.

[24] What is conspicuously absent from the affidavits of Brenda Peltaire and June Squires is what was actually contained in the envelope which Dr. Glasford received on the 6th July, 2015, therefore the Court is unsure as to what the Defendant received on the 6th July, 2015, whereas Petra Gooding deposed that she personally served the Defendant with a sealed and certified copy of a claim form and statement of claim and that the Defendant identified herself to the deponent and accepted service of same.

[25] The Court finds that the requirements of Rule 13.2 of the CPR were clearly satisfied and in the absence of any reliable evidence to refute Ms. Gooding's affidavit of service, the Court is satisfied that service was effected on the Defendant on the 24th April, 2015 and therefore

the acknowledgment of service of claim form should have been filed by the 8th May, 2015.

[26] Failure by the Defendant to file her acknowledgement of service of claim form within the prescribed time means that the Claimant was well within her rights to file a request for default judgment in the circumstances and the Registrar also acted correctly in granting the default judgment on the 8th June, 2015.

[27] Having found that the default judgment was rightfully obtained, the next issue to be decided is whether or not the default judgment should be set aside. This discretionary powers of the Court is found at Rule 13.3 of the CPR which provides that the Court may only set aside a default judgment if the Defendant:

- (i) applies to the Court as soon as reasonably practicable after finding out that judgment has been entered;
- (ii) gives a good explanation for the failure to file an acknowledgment of service or a defence as the case may be; and
- (iii) has a real prospect of successfully defending the claim.

[28] These three conditions are conjunctive – each must be satisfied before the Court may set aside. If the pre-conditions are not satisfied the Court has no discretion to set aside.

[29] The discretionary powers of the Court have been explained simply in the 1995 White book 13/9/14 –

“The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the Court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the Defendant has merits to which the Court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the Defendant has no defence, and because, if the Defendant can show merits, the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the Court will take into account the explanation of the Defendant as to how the default occurred. The foregoing general indications of the way the Court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co. Inc., The Saudi Eagle [1986] 2 Lloyd’s Rep. 221, C.A. at p. 223 cases are summarized. From that case the following propositions may be derived. It is not sufficient to show a merely “arguable” defence that would justify leave to defend under Order 14; it must both have “a real prospect of success” and carry some degree of conviction. “Thus the Court must form a provisional view of the probable outcome of the action.”

- [30] Therefore the accepted considerations of the Court of Law in determining whether a regularly obtained judgment ought to be set aside, is that the application must be supported by an affidavit explaining (a) the circumstances in which the Defendant allowed a judgment to be entered against him, (b) the reason(s) for the delay in applying to have the same set aside and (c) disclosing a substantial and meritorious ground of defence.

- [31] Since the Court has already indicated that it is satisfied that the Defendant was served on the 24th April, 2015 and not on the 6th July, 2015 as alleged by the Defendant, the delay in filing the acknowledgment of service would have been about two months. Such period in some cases may be considered as not acting promptly but in the instant case the Court is not minded to conclude that the Defendant did not act with all reasonable celerity. However the Court does find that the Defendant has not provided a good explanation for failing to file the acknowledgment of service with the prescribed time, she has given an explanation but based on the evidence before the Court, the explanation provided cannot be considered a “good” one.
- [32] It now becomes necessary to consider whether there is a defence with a “real prospect” of success as oppose to a “fanciful prospect of success” – see **Lord Woolf MR** in Swain v. Hillman [2001] 1 All E.R. 91, CA.
- [33] The case of Federal Republic of Nigeria v. Santolina Investment Corp [2007] EWHC 437 (Ch) shows the approach the Courts use in determining whether a Defendant has a real prospect of successfully defeating a claim. It summarized the guiding principles to be used in determining if a case has a real prospect of success. At paragraph 4 of the judgment it states:

- “(i) The Court must consider whether the Defendant has a “realistic” as opposed to a “fanciful” prospect of success...
- (ii) A “realistic” defence is one that carries some degree of conviction. This means a defence that is more than merely arguable...
- (iii) In reaching its conclusion the Court must not conduct a “mini-trial”.
- (iv) This does not mean that the Court must take at face value and without analyzing everything that a Defendant says in his statements before the Court. In some cases it may be clear that there is not real substance in factual assertions made, particularly if contradicted by contemporaneous documents...
- (v) However, in reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial...”

[34] A review of the *information* before the Court shows that the Defendant was at all material times the deceased’s tenant. The Defendant is in arrears for unpaid rent and/or damages for use and occupation of the property. The Defendant submits that she never rented from the deceased but in fact rented from the deceased’s wife, however the fact remains that she was on the property and used it for the purpose of conducting a business. The Defendant is counterclaiming for an equitable interest in the property since she allegedly effected repairs. However in the absence of any evidence to support this claim, it is submitted that these are merely bald

allegations, which are entirely without substance. The Defendant's defence and counterclaim does not demonstrate an arguable defence going to the heart of the matters pleaded by the Claimant and in my opinion lacks conviction that it has a real prospect of success.

[35] The Defendant having fail to satisfy the conditions that Part 13.3 of the CPR specifies must be satisfied, then it is not open to the Court to set aside a judgment that the Rule says may be set aside only if the three conditions are satisfied.

CONCLUSUION

[36] It is hereby ordered that the application to set aside the default judgment is denied.

[37] Costs to the Claimant to be agreed on assessed.

PAMELA A. BECKLES
Judge of the High Court