REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. C.V. 2017-00990

BETWEEN

KRISHENDATH GOPAULCHAN Claimant

AND

NATALIE GAYADEEN Defendant

BEFORE THE HONOURABLE MME. JUSTICE M. DEAN-ARMORER

APPEARANCES:
Nyron Heeralal, Attorney at law for the Claimant
Ricky Pandohee, Attorney-at-law for the Defendant

REASONS

Introduction

1. On March 28, 2019 I set aside the judgment, which had been obtained by the Claimant against the Defendant, in default of appearance. I gave directions for the filing and service of a defence and awarded costs against the Defendant. My reasons for so doing are set out below:

The Evidence

2. The Defendant's application to set aside judgment was supported by her affidavit of July 13, 2018. In opposition, the Claimant filed an affidavit on November 8, 2018 and the Defendant filed an affidavit in reply on January 21, 2019.

3. I also heard the cross-examination of process server Mr. Rakesh Ramoutar, who had sworn affidavit of service in support of the Claimant's application for default Judgment. The Court head the viva voce cross-examination of Mr. Ramoutar on February 21, 2019.

Facts

1. By claim form filed on the March 21, 2017, the Claimant sought an order for payment for the sum of seven million dollars ($7,000,000.00) being the unpaid balance on a promissory note which the Defendant had allegedly made in favour of the Claimant on 1st January, 2016.
2. The Defendant filed neither an appearance nor a defence and on 25th May, 2017, the Claimant applied for judgment in default of appearance.
3. The application for judgment is default of appearance was supported by the affidavit of process server, Rakesh Ramoutar who deposed that he served the Claimant with a copy of the Claim Form and Statement of Case on 24th March, 2017.
4. On June 6, 2017, the Claimant obtained judgment in the default of appearance against the Defendant. On June 25, 2018, a levy conducted at the premises of the Defendant, by the Marshal's Assistant, San Fernando, and several items were seized.
5. By Notice of Application filed July 13, 2018, the Defendant applied to set aside judgment in default of appearance. Her application was supported by her affidavit of even date. She applied for the following specific orders:

> *"a. That the judgment entered on the May 25, 2017 against the Defendant be set aside;*

b. That the Claimant return all third party times [sic] sized [sic] from the Defendants home and her business;

c. That the Claimant's claim be dismissed with costs;

d. Alternatively, the Defendant be granted leave to file and serve a Defence with 28 days of the order of the court; and

e. That the cost of this application to be assessed."

6. It was the evidence of the Defendant that she only became aware of the proceedings on June 25, 2018 when the levy was being conducted.

7. Ms. Gayadeen testified that she had never been served with the Claim Form or Statement of Case. She stated that had been acquainted with Mr. Ramoutar for about two (2) to three (3) years prior to the date of swearing her affidavit. She denied however that she ever saw Mr. Ramoutar on March 24, 2017 or that she showed him her identification card.[1]

8. Ms. Gayadeen also gave evidence of the levy which was effected at her business place and residence. At paragraph 13, of her affidavit, the Defendant testified that she only became aware of the matter, when persons came to her house on June 25, 2018. She deposed further that they destroyed parts of her home and took away motor vehicle PCR 346.

9. Ms. Gayadeen also denied signing the promissory note which is attached to the Claimant's Statement of Case. Ms. Gayadeen gave further evidence of her bank statements and went on to file a draft Defence.

[1] See paragraph 4 of the affidavit of Natalie Gayadeen filed July 13, 2018

10. Mr. Gopaulchan by his affidavit of the 8th November, 2018 on the other hand, attacked Ms. Gayadeen's evidence, by stating that he denied that the Defendant was not served. He further stated that the bank records are fraudulent and was told "off the record" by an employee (whom he did not wish to name) that the US address is fraudulent. It was my view that the "off-the record evidence" was of no value. It was inadmissible hearsay, scandalous and irrelevant.

11. The Defendant set out to disprove the allegation that she had been served with the Claim form and the Statement of Case. For this purpose the process server Mr. Rakesh Ramoutar was called for cross-examination. I heard the cross-examination of Mr. Ramoutar on February 21, 2019 and directed that Written Submissions be filed in support of and in opposition to the Defendants application to set aside the default judgment

Issues

12. The principal issue which arose from the Defendant's Notice of Application[2] was whether the Defendant had satisfied the criteria set out at Part 13.3(1) ***CPR*** for the setting aside of the default judgment.

13. An ancillary issue, which engaged my attention, was whether the Defendant had been served with the Claim Form and Statement of Case, as alleged by the Claimant on March 24, 2017. This was an issue of fact, upon which the Defendant hoped to set aside the default judgment. Significantly, the Defendant did not apply to set aside service and did not attempt to amend her Notice of Application to include an application for an order to set aside service.

[2] Notice of Application filed July 13, 2018

Setting aside service

14. Part 5.5 of the ***CPR*** prescribed the manner in which personal service should be proved. Part 5.5 provides:

> *"(1) Personal Service of any document is to be proved by an affidavit sworn by the server of the document stating:*
>
> a) *the date and time of service;*
>
> b) *the precise place or address of which it was served;*
>
> c) *precisely how the person served was identified; and*
>
> d) *precisely how service was affected.*

15. Part 5.5 (2) specifies the method by which there should be proof of service where the recipient of service had been identified by another person and Part 5.5(3) directs proof of service where the recipient of service identified by use of a photograph.

16. Learned Counsel for Claimant relied on the decision of Kangaloo JA in ***Republic Bank v Homad Maharaj Civ App No. 136 of 2006.*** At paragraph 7 of his judgment, Justice of Appeal Kangaloo had this to say:

> *"The appellant did all that was required of it in accordance with order 13 rule 7 (1) which provides that the affidavit of service constitutes sufficient proof of service upon which judgment in default of appearance can entered…."*

Justice of Appeal Kangaloo underscored the burden carried by the party who set out to disprove service:

"To the extent that the respondents have sought to challenge these judgments the onus fell on them to show that they had not been served. In practice the usual course is via cross-examination of the process servers."

17. Justice of Appeal Kangaloo referred to the decision of Nigerian Court of Appeal in ***Chief Leo Degreant Mgbenwelu v Augustine N. Ojumba*** Unreported Appeal No. CA/P/H/273/2002 where Omage, JCA reiterated the general principle that the affidavit of service creates a presumption of service that can be rebutted by the defendant. [3]

18. In these proceedings, the Process Server swore an affidavit of service on April 6, 2017. The affidavit was filed on May 25, 2017. By his affidavit, Mr. Rakesh Ramoutar testified that he personally served the Defendant Natalie Gayadeen at 8:15am on March 24, 2017 at No. 443 Naparima Mayaro Road, Princess Town.

19. Mr. Ramoutar stated that he was able to identify her because he knew personally. He stated further that she produced her identification card No. 19670226037. A presumption arose therefore, in favour of the Claimant that there was personal service on the Defendant.

20. Under cross-examination, Mr. Ramoutar was unable to satisfy the Court that the Defendant produced her identification card. He stated that he knew her and that he had obtained her identification card number during another transaction. In this way, Mr. Ramoutar contradicted his evidence at paragraph 2 of his affidavit, where he swore:

[3] See Kangaloo JA in Republic Bank V Homad Maharaj Civ App. 136 of 2006

"….when I served the Defendant the Claim Form, she produced her Trinidad and Tobago Identification card no.19690226037…. which I used to confirm the Defendant's identity…."

21. It was my view that Mr. Ramoutar had seriously compromised his credibility. It appeared to me, on a balance of probabilities that Mr. Ramoutar had failed to prove that the person who received service was correctly identified.

22. I proceeded to consider the effect of my assessment of Mr. Ramoutar's evidence and whether service should be set aside. The Defendant had failed however to seek an order that service be set aside.

23. I examined her Notice of Application filed on July 13, 2018 and found no request for service be set aside.

24. I observed further that the Defendant did not attempt to have the Notice of Application amended to include an order setting aside service even when the absence of such an application was highlighted in the submissions of Mr. Heeralal, Learned Counsel for the Claimant. Mr Heeralal, had relied on Part 11.12 of the ***CPR*** at page 6 of his written Submissions and argued that the Defendant should not be granted an order which she did not seek.

25. Under the heading "Consequences of not asking for an order in application", Part 11.12 of the CPR provides:

"An applicant may not ask for an order for which he has not asked in his application unless the Court permits him to do so. "

The Defendant never asked the Court to permit her to seek an order setting aside service. Rather, the Defendant applied for an order for an extension of time to file her defence and annexed a draft defence to prove that she had a realistic prospect of success. Accordingly, it was my view that the Defendant had waived service by implication.

Application to set aside Judgment

26. I proceeded therefore to consider whether the default judgment should be set aside. The law is well settled as to the factors which must be established when a defendant seeks to set aside a default judgment in default. ***Rule 13.3 Civil Proceedings Rules*** state:

> *"(1) The court may set aside a judgment entered under Part 12 if—*
>
> *(a) the defendant has a realistic prospect of success in the claim; and*
>
> *(b) the defendant acted as soon as reasonably practicable"*

27. The Defendant was required to satisfy the Court that she had a realistic prospect of success[4] and that she acted as soon reasonably practicable when she discovered the judgment was entered against her.

Realistic Prospect of Success

28. Counsel for the Defendant, failed to make submissions on the issue of setting aside judgment in default, and sought to focus on the issue of service, which was not a ground of the application.

29. Learned Counsel for the Claimant, however, made relevant submissions on setting aside judgment in default and relied on the case of ***Delora Buckradee v. Winston Buckridee***

[4] See also Nizamodeen Shah v. Lennox Barrow Civ App 209 of 2008, Mendonça JA

Naidoo CV 2011-962 which was a decision of Master Magaret Mohammed (as she then was). Master Mohammed referred to one of her earlier rulings where formulated the test in this way:

> *"The term reasonable prospect of success" has been interpreted to mean something more than "arguable", "a case which carries a real conviction, "a case which is better than merely arguable" and it is "a higher threshold requirement than merely a reasonable prospect of success."*

Master Mohammed then quoted Moosai J in *John v Mahabir*[5] :

> *"The Defendant is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable: White Book 2007, Vol 1, para 24.2.3. In determining whether the Defendant has a realistic prospect of success, the court is not required to conduct a microscopic assessment of the evidence nor a mini-trial. In Royal Brompton Hospital NHS Trust v Hammond, The Times, May 11, 2011, CA, it was held that, when deciding whether a defence has a real prospect of success, the court should not apply the same standard as would be applicable at trial, namely the balance of probabilities. Instead, the court should also consider the evidence that could reasonably be expected to be available at trial: See O'Hare and Brown, Civil Litigation 12th edn. (2005), para. 15.017"*[6]

30. The Defendant contended that she never signed a promissory note and produced a bank statement to show that she never received the sum of Seven Million Dollars from the

[5] John v. Mahabir CV2005-866
[6] At pages 6 and 7 of the judgment

Claimant. Should this matter proceed to trial, the burden of proof will not be carried by the Defendant. Rather, the Claimant will carry the burden of proving that the promissory note was signed.

31. The Defendant also indicated that she was willing and in my view she would be entitled to, rely on the opinion of a hand writing expert to contradict the suggestion that she signed the promissory note.

32. It was therefore my view that the defendant had a realistic prospect of succeeding on the defence which was put before this Court.

Acted as soon as reasonably practicable

33. In respect of whether or not the Defendant approached this Court as soon as reasonably practicable[7] it was my view that in these proceedings, there was no evidence produced by the Claimant, to contradict the contention of the Defendant that she first became aware of the Judgment on June 25, 2018. In fact, the evidence suggested that the Defendant had not been served.

34. It was on June 25, 2018 when, a levy was conducted at her premises that the Defendant first became aware of the default judgment. She provided evidence in her affidavit, that following the levy, she met with persons with from the Marshall's section and that in the days which followed her energies were focused on enquiring about the levy, and retrieving her goods.

[7] Nizamodeen Shah v. Lennox Barrow Civ App 209 of 2008, Mendonça JA

35. Ms. Gayadeen's testified that on the July 3, 2018 she caused her attorney-at-law to write asking the Marshall to hold his hand. She was successful in filing her application to set aside ten days thereafter.

36. It was my view that by filing this application the Defendant acted as soon as reasonably practicable having regard to the circumstances of the levy and the obvious distress that may have caused her.

37. In light of the foregoing, I set aside judgment in default of appearance. I also extended time and ordered that the Defendant bear the cost of and associated in the application.

Date of Delivery: May 21, 2019
Justice Mira Dean-Armorer