THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017 - 000941

Between

DIRK ARRINDELL FITZROY SMART

Claimant

And

STEPHEN JONES

First Defendant

CAROL GRIFFITH

Second Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Ms. Marilyn Solomon for the Claimant

Ms. Sasha Singh instructed by Ms. Lauren Ramtahal for the Defendants

Date Delivered: 2 November 2017

RULING

1. This is an application to set aside a default judgment.

2. The claimant is the lessee of the property located at #316 Rosalind Street, Couva South Housing Estate, Couva ("the property"), pursuant to a Deed of Lease dated December 22nd 2010, made between the Trinidad and Tobago Housing Development Corporation ("HDC") and the claimant; and registered as DE201100966904D001.

3. The defendants are siblings and reside at the property. Before the assignment of the premises to the claimant, the first defendant was the lessee of the property along with his parents. After the death of both his parents, the first defendant became the sole lessee of the property. The first defendant then failed to meet the payments required by the agreement between himself and the HDC. This caused the HDC to issue a Certificate of Indebtedness to the first defendant requesting him to pay the amount of $59,416.24.

4. The claimant settled this debt with the HDC. The claimant asserts that in exchange for him settling the debt, the first name defendant transferred his interest in the property to the claimant. This was done by a statutory declaration dated July 12th 2010, wherein the first defendant also requested the HDC to grant the lease to the claimant.

5. The claimant now seeks possession of the property. He has served notice on the defendants to vacate the property and they have refused to so. The claimant then filed this action by way of a fixed date claim form dated March 16th 2017.

6. The first defendant is serving a term of imprisonment. He did not file a defence; he was unable to attend the first hearing of the matter. The second defendant says that she was late on the day of the first hearing and missed when the matter was called.

7. An Order was granted in favour of the claimant on April 26th 2017. This is the Order the defendants now seek to have set aside by way of application dated June 02nd 2017.

Part 13.3 of the Civil Proceedings Rules ("CPR")

8. Part 13.3 of the CPR provides the law on cases such as these and states as follows:

"*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 when he found out that the judgment had been entered against him."

Realistic Prospect of Success

9. The first issue to be determined is whether the defendants have a realistic prospect of success. According to the case of **Anthony Ramkissoon v Mohanlal Civil Appeal No. 163 of 2013**, a realistic prospect of success is to be distinguished from prospects that are fanciful, as stated by Mendonca JA:

"*9. Rule 13.3 (1) (a) requires a defendant to show that he has a realistic prospect of success. The rule directs the Court to determine whether there is a realistic as opposed to a fanciful prospect of success (see Swain v Hillman and Anor. [2001] 1 ALL ER 91). A 'realistic prospect of success' is therefore to be distinguished from prospects that are fanciful.*

10. Rule 13.4 (5) provides that an application (other than an application by the claimant) must be supported by evidence. Under the Rules of the Supreme Court, 1975 (RSC, 1975), it was an almost inflexible rule that an affidavit of merit was required. This, in my view, is no less true under the CPR as it was under the RSC 1975. The defendant must, by evidence, establish he has a defence that has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate the defendant has a realistic prospect of success."

10. Further, in the case of **CV 2012-02508 Building Concepts & Construction Ltd. v The Trinidad and Tobago Housing Development Corporation**, Des Vignes J (as he then was) made the following comments:

"*The first limb of the rule that the Defendant must satisfy on this application is that it has a realistic prospect of success in the claim. This has been interpreted to mean that the defendant has to have a case that is better than arguable. However, the defendant is not required to show that it will probably succeed at trial. Further, the court is not required to conduct a microscopic assessment of the evidence or a mini-trial. The court should consider the evidence that could reasonably be expected to be available at trial*"

11. The second defendant states by way of affidavit filed on June 02nd 2017, that first defendant would never have transferred his interest to the claimant because the property had belonged to their parents. This at its highest is her speculating for an emotive reason that the second defendant would not have made a transfer. Faced with a debt he could not pay this is a perfectly reasonable way to get out of his obligation. In response to the statutory declaration, she further asserts that the first defendant was under the impression that the document merely established the terms and conditions of repayment, since the money the claimant paid to HDC on behalf of the first defendant was merely a loan. The second defendant also states that the first defendant only received limited formal education and as a result he was unable to read for himself and understand the contents of the statutory declaration.

12. The challenge with the contentions made by the second defendant is that a statutory declaration is a formal statement made in a prescribed way affirming that something is true to the best knowledge of the Declarant, being the person making the declaration. It is a legal document. It cannot simply be discarded on the second defendant's assertions that the first defendant cannot read or write well. He did sign the document. There are very narrow circumstances in which a realistic challenge can be mounted on a signed document of this nature.

13. Further, there exists the Deed of Lease which involved a third party, the HDC. This Deed has been in existence since 2010 and there has been no challenge to it as such. Nothing has been advanced by the defendants about how this Deed of Lease in favour of the claimant came into existence. It can be expected that some process or investigation would have occurred in relation to this matter before the HDC effected the transfer.

14. Additionally, the second defendant says this sum of money was a loan. She has given no information relative to the repayment of said loan. There is nothing set out in her affidavit of circumstances which showed that any payments or steps were taken to give effect to a loan arrangement. It would be passing strange that this loan would have been granted by the claimant in 2010 and the terms of this agreement would allow for non-payment to this day.

15. The entitlement of the defendants to the property seems to be hinged on the fact of their parents and their occupation of it for a long time. But the claimant's case is that they were in arrears of their account. In consideration of his paying off this debt to the HDC the agreement was made to transfer the property to him which led to the change of arrangement with the HDC. The claimant then took on the obligation for the payments in relation to the property to the HDC. There really is no answer to this claim set out by the defendants in any affidavit with a realistic prospect of success. Further, the claimant has not had the opportunity to occupy the property since the defendants have been in possession of it.

16. In the circumstances, I find that the defendants have failed to show that this claim has a realistic prospect of success.

Promptness

17. The second issue to be decided is whether the defendants made the application for default judgment to be set aside as soon as reasonably practicable.

18. In the case of **Nizamodeen Shah v. Lennox Barrow C.A. Civ. 209 of 2008**, Mendonça JA identified two categories of cases when dealing with this question of promptness:

> "In the first category, one finds cases where the Court can simply look at the facts and conclude that the Defendant acted as soon as reasonably practicable. In other cases, the Defendant has an obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable."

19. At paragraph 12 of his judgment, the learned Mendonça JA further stated:

> "There are no doubt cases where the application to set aside the judgment is made a very short time after the judgment is entered so that, on the face of it, the Court can say that the defendant acted as soon as reasonably practicable. In this case however the application was made at least two months after the date when the Appellant found out that judgment was taken up against him. This delay does not fall into that category of case where you can simply look at it and say that the Appellant acted as soon as reasonably practicable after finding out that the judgment was entered. In those circumstances what then is the obligation of the Appellant. The obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable."

20. In the case of **Rohini Khan v Neville Johnston Trading as Johnston Construction Civil Appeal No. 56 of 2011**, the Court of Appeal examined the use of the phrase 'reasonably practicable' in Rule 13.3 (1)(b) and considered that the words used suggested a less onerous type of standard than that articulated by Rule 13.3 (1)(a); and encompasses a range of behaviour.

21. In the instant case, this matter was filed on March 16th 2017. The defendant entered appearances on March 29th 2017. The matter came up for hearing on April 26th 2017, after which this court made the Order. The defendants were not present and were also unrepresented on this date. The first defendant is currently serving a term of imprisonment and was not able to attend the hearing, neither did he file a defence. His attorney is still attempting to obtain instructions from him and is also making attempts to have him sign the necessary documents to grant power of attorney to the second defendant to conduct this matter on his behalf.

22. The second defendant states that she was late on the day of the hearing and was not there when the matter was called. She still had not retained an attorney. After that day she says she made several enquiries about the status of the matter. She retained an attorney on May 15th 2017. On May 25th 2017, the attorney-at-law for the claimant received a copy of the Order made from the Court and the second defendant asserts that it was only then she fully

understood the nature of the Order. The application to set aside the Order was filed on June 02nd 2017. On receiving the court order it can be said there was no delay on their acting to set aside the judgment.

23. Applying the statement of the law by Mendonca JA in the case of **Nizamodeen Shah v. Lennox Barrow** mentioned above, although several weeks elapsed between the date the order was made and the application to have said judgment set aside, I find that this application was made as soon as was reasonably practicable.

24. Accordingly, it is my assessment that the defendants have not presented a case which is better than arguable and has a realistic prospect of success. Even though I have found that the application was made as soon as reasonably practicable, both limbs of rule 13.3 of the CPR must be satisfied.

Order

25. The defendants' application to set aside the Judgment in Default of Defence filed on June 02nd is dismissed.

26. The defendants must pay the costs of this application to the claimant assessed in the sum of $3,000.00.

Ronnie Boodoosingh

Judge