REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011-04367

BETWEEN

MICHAEL HINDS
(FOR THE ESTATE OF JANET QUARLESS-HINDS)

Claimant

AND

DR STEVE BUDHOORAM
MEDICAL X-RAY AND DIAGNOSTIC CLINIC LTD
THE SOUTH-WEST REGIONAL HEALTH AUTHORITY

Defendants

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Before: Master Alexander

Appearances:
For the claimant: **Mr Kendell Alexander**
For the first defendant: **Mr Gregory Pantin instructed by Ms Debra Thompson**

REASONS

1. Before this court is an application to set aside default judgment entered against the first defendant for failure to file an appearance (hereinafter "the judgment"). The judgment was obtained on 15th December, 2011 for the payment of an amount of money to be decided by the court together with interest and costs. The application to set aside was made on 10th January 2012 by the first defendant (hereinafter "Dr Budhooram"). It was supported by the affidavit of Dr Budhooram (hereinafter "the principal affidavit") and a supplemental affidavit of 16th March, 2012 (hereinafter "the supplemental affidavit"). The claimant has filed no evidence in opposition to this application. The substantive action itself involves a claim for medical negligence and wrongful death against multiple defendants.

Background

2. The claimant's wife (hereinafter referred to as "the deceased") visited Dr Budhooram at the Surgi-Med Clinic, San Fernando on 29th June, 2007 with a routine screening mammogram that she had obtained on her own. The deceased had previously had a lump removed by Dr Budhooram. A review of the mammogram showed evidence of micro calcification and he diagnosed her with having impalpable lumps or "two foci of calcification" in her right breast. He recommended that they be excised and biopsied. He advised that as a precursor to this surgery, the deceased undergo a guide wire needle localization procedure, by Dr Dinesh Mor, at the medical institution operated by the second defendant in Port of Spain (hereinafter "the procedure"). He also scheduled the deceased for surgery at the Surgi-Med Clinic to have the lump removed by him after the procedure. Both the procedure and surgery were done on 22nd November 2007 and the deceased was discharged on the same day. Post-operatively, Dr Budhooram prescribed cataflam for the deceased and provided his contact information in the event of any problems.

3. On 24th November 2007 the deceased began experiencing difficulty breathing. The claimant took the deceased to the Princes Town District Health Facility ("the Clinic") where she was diagnosed as suffering from an allergic reaction to cataflam. The deceased was stabilized then transported to the San Fernando General Hospital ("SFGH"), where it was confirmed that she was suffering an allergic reaction to the cataflam. The deceased died on 27th November 2007. On 28th November 2007, Pathologist Professor Hubert Daisley performed an autopsy on the deceased and discovered that she had died as a result of "pneumothorax with surgical emphysema of neck and face, with collapse of the right lung, pulmonary embolism of left lung". The post mortem report also pointed to evidence of hypertensive changes with heart failure.

4. On 9th November 2011 the claimant filed the medical negligence claim against all defendants with respect to the death of his wife. The second and third defendants entered their appearances on 14th and 23rd November 2011 respectively. The claimant applied for and attained judgment in default against Dr Budhooram on 15th December 2011which is now sought to be set aside.

The Application

5. The application to set aside the judgment is pursuant to **Part 13.3 (1) Civil Proceedings Rules, 1998 as amended** (hereinafter "**the CPR**"). In order to succeed on such an application, Dr Budhooram must satisfy the two conditions prescribed in the rules, namely: (a) that he has a realistic prospect of success and (b) that he acted as soon as reasonably practicable when he found out that judgment had been obtained against him. See ***Nizamodeen Shah* v *Lennox Barrow*[1].** Kokaram J in ***Des Vignes* v *Manning and Gordon*[2]** explained:

> *Therefore, if the Defendant fails to satisfy the Court of any one of the conditions set out in 13.3(1) the CPR his application fails. Accordingly, a Defendant can have a realistic prospect of success in defending the claim but because he failed to act as soon as reasonably practicable after he found out that judgment had been entered against him the judgment cannot be set aside. Similarly the Defendant can act promptly, immediately after he found out that judgment had been entered, but if he has no realistic prospect of success in defending the claim the judgment remains. Both conditions are critical to the success of any application under Part 13.3 CPR.*

(a) Realistic Prospect of Success

6. Dr Budhooram's obligation at this stage is to establish that he has a realistic prospect of success in the claim. He does not have to prove his case or conduct a mini trial at this juncture. The case law seems to suggest that his defence must be better than merely arguable. In circumstances where he admitted to being served with the claim and then did not enter an appearance, it cannot be sufficient for a court to exercise its discretion without some material from Dr Budhooram as to the nature of the defence that he wishes to raise.[3] There was no draft defence exhibited to the application. However, Dr Budhooram's principal and supplemental affidavits give exhaustive details of his likely defence and he has exhibited documents in support of the case he has advanced. Does Dr Budhooram's defence have a real chance of success?

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1 *Nizamodeen Shah* v *Lennox Barrow Civ App No 209 of 2008 at page 3 para 11*
2 *Des Vignes* v *Manning and Gordon* HCA1867/2007
3 *John* v *Mahabir* HCA No 866 of 2005

7. Counsel for the claimant has submitted that Dr Budhooram "cannot successfully defendant (sic) the claim of liability for negligence". This is, however, not what he is required to do at this stage. What he has to show is that his defence is real and/or more than merely arguable and not something that is far-fetched. It is to be noted that the term "realistic prospect of success" was described as being, "*obviously a higher threshold requirement than merely a reasonable prospect of success*" in a claim. See ***Curt Semper* v *Mandy Sampson and The New India Insurance Company***[4] per Rajkumar J. To my mind, a realistic prospect of success refers to a prospect of succeeding that is tangible, and carries a real conviction.

8. Dr Budhooram, in his principal affidavit, states that he has a realistic prospect of success in defending the claim for medical professional negligence and the wrongful death of the deceased. He goes further and has exhibited to his principal and supplemental affidavits documentary evidence in support of this position. Then in the submissions, counsel for Dr Budhooram sets out the elements of the claim: the claimant must show that Dr Budhooram (a) had a duty of care to the deceased; (b) breached that duty of care and (c) caused the damage to the deceased as a result of the breach.

9. It is not in issue that the deceased was the patient of Dr Budhooram and is one to whom he owed a duty of care in his capacity of general surgeon. Counsel submitted, however, that no duty of care existed between the deceased and Dr Budhooram for him to advise the deceased with regard to the risks and complications of transportation after undergoing the procedure, which was done by another doctor. It was also submitted that there existed no duty of care on Dr Budhooram's part to put in place or implement a safe means and/or method of transporting the deceased to Surgi-Med, after the procedure in Port of Spain. Counsel contended further that there were intervening events between the surgery performed on the deceased by Dr Budhooram and her death and that the deceased's death was not caused by the attendance, advice and treatment of Dr Budhooram.

10. Dr Budhooram in his principal affidavit explains that upon admission, the deceased indicated that she had no allergies. He made a note of this on the Case Note Form which he

[4] *Curt Semper* v *Mandy Sampson and The New India Insurance Company Trinidad and Tobago Limited* CV 2010-4557 page

has exhibited and attached to this affidavit. This was signed by the deceased who also completed a surgical consent form consenting to the surgery prior to its performance. He also admits that he did prescribe cataflam for the deceased, which from her medical notes she was not allergic to. To be noted is the fact that the deceased did not die as a result of any allergic reaction to the cataflam, as there was none. It is Dr Budhooram's case that there were intervening events from 22nd November 2007 when he performed surgery on the deceased and the date of death including but not limited to:

- the misdiagnosis of allergic reaction to cataflam;
- the failure to recognize and treat her true ailment, that is "pneumothorax with surgical emphysema", which he argues does not normally result in death once treated expeditiously;
- the failure to keep the deceased ambulated, given her recent history of surgery; and
- the failure to administer the requisite drug (prophylactic anticoagulation) to prevent the clots that led to the pulmonary embolism.

He has exhibited a copy of the History and Physical Record of the Ministry of Health and asked the court to note that the staff at the SFGH would have been aware that the deceased had undergone recent surgery. Despite this, there was an absence of any record that prophylactic anticoagulation was administered to prevent blood clots, which is necessary in cases where following surgery a patient is to remain immobile for several hours.

11. Counsel for Dr Budhooram argues that the deceased being in the care of the Clinic and SFGH broke the chain of causation. Further, the court was asked to note that Dr Budhooram was never contacted by the deceased when she began to feel unwell, despite having given her his contact details and telling her to contact him in the event of any problems. Counsel submitted that save when Dr Budhooram provided advice, attended to and/or treated the deceased as a general surgeon, a doctor-patient relationship did not arise between the deceased and him in relation to the conduct and management of the procedure done by an independent medical professional, under whose care she was and who bore the responsibility for discussing any likely transportation complications following same. It was

also submitted that the forensic evidence as to the causes of the deceased's death (including the collapsed lung) pointed to the fact that it could not have been caused by the surgery on the right breast, which lay outside the thoracic cavity in which the lungs are encased. Further, the failure to keep the deceased ambulatory or administer anticoagulation post operatively, given the history of surgery, was not a consequence of the actions of Dr Budhooram.[5] Counsel submitted that there is sufficient evidence before this court to show that Dr Budhooram has acted in accordance with a practice accepted as proper by a responsible body of medically skilled men in the field of general surgery and so has a realistic prospect of success and invited the court to rule accordingly

12. In response by submissions filed 30th April 2012, counsel for the claimant sets out the law on the duty of care owed by Dr Budhooram and makes out his case that the duty was indeed breached. It was submitted that Dr Budhooram had a duty to advise the deceased and the claimant of any potential risk of travelling from Port of Spain to San Fernando after undergoing the procedure, to facilitate her making an informed decision. It was this breach of duty that was the catalyst for the claimant's loss. It was further submitted that the chain of causation was not broken as the failure to transport in a stable environment led to the punctured lung and is linked to Dr Budhooram's failure to advise of the risk or dangers. To be noted is that the claimant has put in no evidence on the application but sought to submit that the deceased did make inquiries of Dr Budhooram whether it was safe to be transported back to San Fernando by the claimant.

13. I am satisfied that Dr Budhooram has raised viable defences to the triable issues in this case. I am also satisfied that on the particular facts of this case, and bearing in mind the arguments of the parties as well as the fact that at this stage I am not required to test the full strength of the defence, Dr Budhooram has satisfied the test laid down in ***John* v *Mahabir*** (supra), which is a lower standard than on a balance of probabilities. In any event, the evidence that could reasonably be expected to be available to him at a trial is always a relevant

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5 In Medical Negligence: Michael Jones Fourth Edition at paragraph 5-110 the author states, "[*W]here the act of another person, without which the damage would not have occurred, intervenes between the defendant's negligence and the claimant's damage, the court must decide whether the defendant is responsible or whether the intervening act constituted a novus actus interveniens. If the latter, then the act is regarded as having broken the casual connection between the negligence and damage*."

consideration to be borne in mind in coming to a conclusion that a defendant has crossed this particular hurdle. Thus, I am satisfied that Dr Budhooram has a defence that is more than merely arguable, sufficient to cross the threshold condition of **Part 13**. Given that he has shown that he has a defence with a realistic prospect of success, I will now look at the second limb of **Part 13, CPR**.

(b) As Soon as is Reasonably Practicable

14. A defendant who wishes to apply to set aside a judgment under **Part 13, CPR** must act reasonably promptly, and where there is delay it must be explained in his affidavit of merit. See ***Thorn plc* v *MacDonald*[6].**

15. Dr Budhooram admits to being served personally with the claim form and statement of case on 14th November, 2011. He states in his principal affidavit that it is his usual practice to have his secretary file away documents as she sees fit. At the time, Dr Budhooram was unaware of the nature of the documents, placed it on his desk and it was filed away without being brought to his attention. He did not contact or instruct his attorneys to enter an appearance or file a defence in the matter. However, he became aware on 6th January 2012 that judgment had been entered against him. He asserted that he acted as soon as reasonably practicable when he found out that judgment had been entered against him as he filed the application to set aside within 4 days of realizing that it had been entered.

16. A defendant against whom a judgment has been entered because of the failure to comply with the timelines set in the rules must act with due dispatch to set aside that judgment. This must be done in as reasonably practicable a way as possible. Of pivotal importance is the timeframe between learning of the judgment and the application to set aside. I accept that the conduct of Dr Budhooram is material only after he became aware of the default judgment, as noted in ***Bertin Benny* v *Brian Benny*[7].** In the instant case, it was 4 days.

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6 *Thorn plc* v *MacDonald* (1999) The Times, October 15, 1999

7 *Bertin Benny* v *Brian Benny* CV2008-02475

17. I note that the claimant did not concede that the application was made promptly but sought to rely on the principle enunciated in the ***Curt Semper case*** (supra) to have the court dismiss the instant application. The ***Curt Semper*** principle holds that wilful delay on the part of a defendant is also a factor to consider in deciding whether to exercise its discretion. In that case Rajkumar J affirmed the learning set out in **Zukerman, Civil Procedure** that, "*[I]t may be argued that a defendant who deliberately decides not to defend the claim has irrevocably waived the right to defend.*" Counsel for the claimant pointed the court to Dr Budhooram's principal affidavit and submitted that Dr Budhooram himself admits that when he was served he was aware the documents were from the court but chose to pay little or no attention to and/or to place little or no importance on them but merely set them aside. He only addressed his mind to them and their importance when his attorneys drew it to his attention. His treatment of this claim showed that it was negligible to him, warranting little or no attention from him. Counsel submitted that in accordance with the Rajkumar dicta that Dr Budhooram, by his behaviour, has irrevocably waived his right to defend the claimant's case.

18. I do not accept the arguments of counsel for the claimant that on service of the court documents, Dr Budhooram treated the claim as trifling such as to irrevocably deny him the right to defend it. There is simply no sufficient material before me to so conclude. What I accept is that Dr Budhooram has sought by placing evidence before this court to recount what had happened, within the context of the administrative realities of his office. I also do not find on the evidence that there was wilful delay in seeking to defend this matter on the part of Dr Budhooram. The claimant has brought no evidence in proof of this position or to contradict Dr Budhooram's evidence of how the events unfolded. Thus, on the face of the evidence before me, I am satisfied that there is a proper explanation for the delay. I bear in mind that on the issue of whether he acted as soon as reasonably practicable, I am required to arrive at my conclusion on the basis of when it came to his knowledge that judgment was entered against him. At the end of the day, the evidence is (and this is not denied by the claimant) that Dr Budhooram acted to file the instant application within 4 days of the judgment being brought to his attention. Given the voluminous exhibits, could he have acted any swifter?

19. I further considered the recent decision of Master Mohammed in ***Brown* v *Dass***[8] where 9 days had elapsed between the defendant receiving notice of the default judgment and the application to have it set aside. It was held that the defendant acted with a significant degree of dispatch once notified of the default judgment and that he acted as soon as reasonably practicable. Given that the delay was a mere 4 days from the time when Dr Budhooram found out about the judgment and the application to set aside, the reasons advanced for it are not unreasonable or improbable. In these circumstances, I find that Dr Budhooram has also satisfied the requirements of the **Part 13.3(1) (b), CPR**. Thus, he has satisfied both limbs to have this judgment set aside.

The Order

20. It is, therefore, ordered that the application to set aside the default judgment is allowed with costs; the first defendant to file and serve his defence on or before the 8th November, 2012. I will hear attorneys on the issue of costs in default of agreement.

Dated 10th October, 2012

Martha Alexander
Master

Judicial Research Assistant: Ms Kimberly Romany

8 *Brown* v *Dass* HCA3614/2011, CV2011-03614