THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2016-03476

BETWEEN

RESHMA LAKHAN

Claimant

AND

NAIPAUL SUKDEO SUPERMARKETS LIMITED

Defendant

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Before: Master Alexander

Date of delivery: **April 15, 2019**

Appearances:

For the Claimant: **Ms Saira Lakhan**

For the Defendant: **Mr Prakash Deonarine instructed by Ms Karuna Ramsaran**

REASONS

APPLICATION

1. By application filed on January 26, 2018 ("the application") the defendant sought to set aside a judgment in default of appearance entered against it on January 31, 2017. The defendant also sought permission to file and serve a defence to the claim against it. In the alternative, permission was sought for an enlargement of the time to file and serve a Notice of Intention to be heard on quantum. The defendant also sought a stay of the proceedings pending the hearing and determination of the application. The application was supported by the affidavit of Ms Jo-Ann Legall,

managing director of the defendant, filed on February 22, 2018. Subsequently, Ms Valini Marimootoo, office clerk in the defendant's employ, filed and served an affidavit on December 26, 2018. By her substantive claim, the claimant sought damages for personal injury sustained on October 15, 2012 when she slipped whilst ascending a spiral staircase at work.

REQUIREMENTS FOR A DEFAULT JUDGMENT TO BE SET ASIDE

2. The conditions to be satisfied to have a judgment set aside are set out in Part 13.3 (1) and (2) of the Civil Proceedings Rules 1998, as amended. The defendant is required to show that it has a realistic prospect of success in the claim[1] and that it acted as soon as reasonably practicable when it found out that the judgment was obtained against it. The crux of the latter condition being when it found out about the judgment, and not the date it was entered. Conditions are conjunctive so a failure to cross the bar of one will automatically disqualify a defendant from succeeding in setting the judgment aside.

(i) <u>REALISTIC PROSPECT OF SUCCESS</u>

3. Integral to determining whether the defendant has crossed this bar is the understanding as to what constitutes realistic prospect of success. This concept refers to a case that has a real conviction of success, not one that is merely arguable[2]. In ***Swain* v *Hillman & another***[3], Lord Woolf MR states, "*The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects*

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1 *Nizamodeen Shah* v *Lenno Barrow* Civil Appeal No 209 of 2008

2 *International Finance Corporation* v *Utexafrica Sprl* [2001] AER (D) 101

3 *Swain* v *Hillman & another Swain* v *Hillman & another* [2001] 1 AER 91

of success or, they direct the court to the need to see whether there is a 'realistic' as opposed to a fanciful prospect of success."

4. The test to be applied is clear; a defendant is not required to show that its case will probably succeed at trial. A case may be deemed to have a realistic prospect of success even if it is improbable[4] **White Book 2007, vol 1, para 24.2.3**. It is accepted that when determining if a defendant has a realistic prospect of success, the court is not required to conduct a mini trial or a forensic assessment of the evidence[5]. Conversely, the defendant is not required to prove its case. This does not mean that a court is mandated to take at face value, and without analysis, everything that a defendant says. Generally, a court will analyse the facts to see if the materials before it (whether by way of draft defence or by affidavit) are sufficient and convincing that they lead to a conclusion that the defendant has a realistic prospect of success in its defence[6]. So where there is no real substance in the defendant's assertions and/or where its claims are contradicted by contemporaneous documents, this will work against the defendant. In considering this issue, the court is also obliged not to apply the same bar as would be applicable at trial, namely the balance of probabilities[7]. What a court must consider is the evidence that could reasonably be expected to be available at trial[8].

RESPONSE TO CLAIMANT'S CASE

5. The claimant's pleaded case is that she was ascending a spiral staircase, when she slipped on a single step at the top, causing her to fall forward

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4 White Book 2007, Vol 1, para 24.2.3

5 *Ingrid Isaac* v *The Caribbean New Media Group* CV2012-04357 page 5 [12]

6 Supra note 3

7 *Royal Brompton Hospital NHS Trust* v *Hammond* The Times, May 11, 2011, CA

8 O'Hare and Brown Civil Litigation 12th edition (2005) para 15.017.

and sustain injuries. She pleaded that her fall was caused because the staircase was narrow, tiled, slippery and had no railing. She stated in her particulars of negligence that there was a liquid substance, which caused it to become a slipping hazard. The defendant, in response, denied negligence on its part, but instead alleged negligence on the part of the claimant. During oral submissions, the defendant stated that it has a witness in support of its case, and wanted an opportunity to put in its defence.

6. In support of its case, the defendant relied on the affidavit evidence of Ms Legall, who attested that she had used those stairs for over twenty years and continued to do so to this day, without any incident. She deposed also to the staircase being used exclusively by the defendant's employees daily, particularly cashiers (of whom there are twenty) who used these stairs around three times a day. Ms Legall's affidavit also contained evidence identifying the alleged negligence of the claimant on which the defendant relied as its defence. Part of this evidence involved eyewitness evidence of an employee that was available in support of its defence.

7. Subsequently, in an affidavit of Ms Valanie Marimootoo, office clerk, it was averred that she was at her desk doing paperwork, when she heard footsteps coming up the wooden spiral stairs. At the top or platform of the staircase, there was a step down and it led into a room. It was her job to open the gate at the top of the stairs for employees to enter; so her desk was positioned at a vantage point where she had clear sight of the top or platform of the staircase. She avowed that she instinctively looked up and saw the claimant walking with a cash-till in her hands. She averred further that she kept her eyes on the claimant, as she had to press the switch to open the gate. When the claimant reached the top platform, Ms

Marimootoo observed that she was not watching her next step, but instead was looking through the glass window on the left showing an office. As a result, Ms Marimootoo averred that the claimant missed the step down from the platform and fell. She averred further that she went to assist the claimant when she fell and that she observed then that the said steps were neither wet nor slippery.

8. Counsel for the claimant, Ms Lakhan, sought to discredit the affidavit evidence of Ms Marimootoo, advancing that it can only go towards contributory negligence and was based on an alleged ability to see the footsteps of the claimant from 7-9 feet away in an office. Ms Lakhan also critiqued Ms Marimootoo's evidence of the staircase being neither wet nor slippery, on the bases that it was speculative and without the laying of a proper foundation as to how she was aware of same. In particular, counsel pointed out that Ms Marimootoo gave no evidence that she had inspected the steps prior to the claimant slipping on them.

9. This court considered that at this stage it was not its responsibility to conduct a trial of the evidence, whether a mock or mini one. Ms Lakhan's submissions as to an absence of foundation for the conclusions in the affidavit evidence of Ms Marimootoo or her attempts to test the veracity and reliability of this evidence at this stage were misplaced. It was this court's responsibility to see if a real case was made out or a realistic defence was advanced as well as to consider the evidence likely to be available at trial. Clearly, there were competing versions of the facts raised, and the defence was not a bare, unsustainable one. Further, it was clear that the defendant, on the evidence before this court, had raised negligence and, at least, had a case for contributory negligence. Ms Lakhan's attempt to minimize the defence of contribution, as being the

only window open to the defendant and to suggest that somehow this was inadequate, was not accepted. So also were her submissions that the defendant had not provided this court with photographs of the staircase in October, 2012 or other corroborating statements to support its version of the events. At this stage, full or complete evidence was not a fundamental requirement for a disposal of this application. Further, Ms Lakhan posited that Ms Marimootoo was unable to verify or testify to the state of the staircase at the material time, if she was not using the step or inspecting them within the proximity of time to the claimant's fall. In reflecting on her submissions, this court was mindful that it was not required to pre-judge or make preliminary conclusions about the evidence. Thus, her arguments were weak in the context of this application, where the court must consider evidence likely to be available at the trial.

10. Ms Lakhan also decried the defendant's failure to answer other substantive aspects of the claimant's case namely its breach of statutory duty to provide a safe place of work. Given the competing versions of the incidents raised, this court was of the view that fuller investigations into the facts might alter or add to the evidence and so affect its outcome at trial. It was also of the belief that the defence was not a bare denial, so as to cause this court to conclude that it was bound to fail. The defendant has an eyewitness, whose account would be available at trial, and this court was required to consider the other evidence likely to be available at trial. It concluded that the affidavits raised triable issues that should properly be ventilated at trial. On these bases, this court concluded that the defendant has crossed the threshold for a realistic prospect of success in this matter.

(ii) AS SOON AS IS REASONABLY PRACTICABLE

11. The defendant conceded that it was served with the claim on October 24, 2016. Thereupon, it forwarded the claim to its brokers, Sterling Insurance Services Limited, which gave the assurance to make the necessary arrangements with its insurers. The defendant further averred that it first got knowledge of the default judgment on January 05, 2018. Between January 05 – 26, 2018 it was liaising with its attorneys, giving instructions, obtaining advice, and collating documents for the preparation and filing of the application to set aside.

12. A defendant who seeks to have a judgment set aside must apply as soon as reasonably practicable after becoming aware that default judgment was entered. If there is delay, it must be explained in an affidavit of merit[9]. The rules do not provide any specific time for filing the application, as each case will depend on its own facts[10]. While the length of the delay is taken into account, pre-action delay is irrelevant. Reasonableness depends on the facts of each case[11]. In fact, this limb is a lower, less trying standard that allows a court to take into account glitches and other administrative challenges in an attorney's office. In ***Rohini Khan* v *Neville Johnston***[12] Rajkumar J opined on reasonable delay to wit that, "*the delay is explained as resulting from attorney's office administration difficulties. …I consider that occasional glitches in the running of an attorney's practice may occur, falling short of negligence or even inadvertence, which may impact on time frames set by the rules. The delay from June 18th to July 5th has been candidly and adequately explained. I consider that the defendant acted as*

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9 *Thorn plc* v *MacDonald* (1999) The Times, October 15, 199

10 *Des Vignes* v *Manning and Gordon* CV2007-01867 (unreported) at page 10

11 *Louise Martin (as widow and executrix of the estate of Alexis Martin, deceased)* v *Antigua Commercial Bank* ANUHCV 1997/0115

12 *Rohini Khan* v *Neville Johnston* CV2009-02311 (unreported) at pages 2-3

soon as reasonably practicable in the circumstances set out above." At appeal, Mendonca JA, dismissing the appeal, reaffirmed this position stating that reasonably practicable, "*acknowledges that there will be, as the judge put it, glitches in attorney's office…. It's a less trying standard than, say, if you have to have an exceptional reason or a very good reason… 'reasonably practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work."*[13]

13. In the affidavit of Ms Legall, the defendant admitted that when it had learnt of the default judgment against it on January 05, 2018, it immediately notified its brokers. On January 11, 2018, an attorney appeared for the defendant before this court and indicated that it had only recently found out about the judgment and was attempting to obtain and view copies of the filed documents through the court office as the defendant intended to take conduct of its matter. The matter was adjourned to March 01, 2018 for the attorney to come on record and obtain documents to take the necessary steps. Ms Legall further deposed that between January 05, 2018 when it had learnt of the judgment and the filing of the application on January 26, 2018, the defendant was engaged in giving instructions, receiving advice, collating documents, preparing and filing the application. She averred that it took a while to collate the information required by the attorneys, as the incident had occurred five years ago. Further, the affidavit of February 22, 2018 was filed after the application as the then attorney with conduct of the matter had suffered the loss of a parent that required the re-assignment of the matter to another attorney, and this caused delay in its preparation.

[13] *Rohini Khan* v *Neville Johnston trading as Johnston Construction* Civ App No 56 of 2011

14. On the other hand, Ms Lakhan submitted that the defendant had failed to act in a timely manner and/or to provide a satisfactory explanation as to what transpired since it was served with the pre-action letter. She stated that the delay was 15 months and not 21 days as claimed by the defendant. She pointed to the date of service of the notice of the assessment of damages on the defendant as the relevant indicator for calculating time. This court rejected the arguments of Ms Lakhan as it was contrary to the clear principle that it was the date when knowledge of the default judgment came to the defendant that was relevant. The events that transpired upon the service of the pre-action letter and filing of the claim were not to be taken into account in deciding this application.

15. In the view of this court, a 21-day delay was not inordinate in the present circumstances. It accepted that the defendant would have had to conduct enquiries or liaise with its staff members to identify eye-witnesses, give instructions, receive advice from its attorneys, gather documents and make the necessary executive decisions on how best to deal with this matter. It also took into account that there would have been administrative delay in getting office copies of the filed documents and time spent on preparation of the application, including affidavits. It was felt that the defendant demonstrated an interest upon learning of the judgment and thereafter took active steps to get representation and to file this application.

16. In the circumstances, this court was of the view that the defendant has provided reasons for the delay in making the application, and the evidence sufficed to enable a disposition under this limb. These reasons included the need to provide proper instructions to its attorney, to obtain full

documentation and to conduct enquiries in preparation of its defence and to facilitate the current application.

ORDER

17. On March 20, 2019 it was ordered that:

a) the application filed on January 26, 2018 to set aside the default judgment was allowed;

b) the defendant do file and serve its defence on/or before April 12, 2019.

c) Costs of the application be paid to the claimant in the sum of $2,500.00.

Martha Alexander

Master