REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011-00962

BETWEEN

DELORA BUCKRADEE
(as Administrator Pendente Lite of the
Estate of Selwyn Buckradee)

Claimant

AND

WINSTON BUCKRIDEE NAIDOO
WINSTON BUCKRIDEE NAIDO
(As Executor of the Estate of Moonsie Naidoo)

Defendants

Before: Master Margaret Y Mohammed

Appearances:

Mr Y Ahmed for the Claimant
Mr S Sharma for the Defendants.

DECISION

Introduction

1. The defendant is sued in his personal capacity and in his capacity as executor of the estate of his mother Moonsie Naidoo. (For the purpose of this decision I will refer to both defendants as "the defendant"). In both capacities he has applied to set aside a judgment in default of appearance ("the default judgment") obtained by the claimant under the

Civil Proceedings Rules, 1998 ("the CPR") on August 25, 2011 for "payment of a sum of money to be decided by the Court together with interest and costs". The action was instituted by the defendant's brother Selwyn Suresh Buckradee ("Selwyn") for damages for breach of trust by the defendant in both his capacities for failing to pay a $1/13^{th}$ share of the proceeds of the sale of property situate of No 2 Boundary Road, San Juan to Selwyn. During the course of these proceedings Selwyn passed on and his wife Delora Buckradee has been substituted as the claimant to pursue this action.

2. The defendant has challenged the regularity of the judgment on the basis of non service. Alternatively, he has also sought the court's permission to set aside the default judgment on the basis that he has a realistic prospect of success in defending the claim and he acted as soon as reasonably practicable when he found out that the default judgment was entered against him.

3. The 2 issues for determination by the court are (a) whether the defendant has rebutted the presumption of service of the claim form and statement of case and (b) whether the defendant has satisfied the test to set aside the default judgment. I was not convinced that the defendant rebutted the said presumption for the reasons set out hereafter but I have been persuaded that he acted as soon as reasonably practicable by filing the instant application within 3 months after being notified of the default judgment and that he has a realistic prospect of success in defending this action.

Has the defendant rebutted the presumption of service of the claim form and statement of case?

4. I have not been convinced that the defendant has rebutted the presumption of service of the claim form and statement of case. Part 13.2(1) CPR states that the Court must set aside a judgment entered under Part 12 if the judgment was wrongly entered, if, in the case of a failure to enter an appearance, any of the conditions in rule 12.3 was not satisfied. The conditions to be satisfied for a judgment to be entered are :

" (a) The court office is satisfied that the claim form and statement of case have been served,

(b) The period for entering an appearance has expired,

(c) The defendant –

(i) has not entered an appearance;

(ii) has not filed a defence to the claim or any part of it;

(iii) where the only claim is for a specified sum of money, apart from costs and interest, has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it ; or

(iv) has not satisfied the claim on which the claimant seeks judgment; and

(d) (where necessary) the claimant has permission to enter judgment."

5. Proof of service is addressed in Part 5.5 which states :

"(1) Personal service of any document is to be proven by an affidavit sworn by the server of the document stating:-

(a) The date and time of the service;

(b) The precise place or address at which it was served;

(c) Precisely how the person served was identified; and

(d) Precisely how service was effected.

(2) Where the person served was identified by another person there must also be filed where practicable an affidavit by that person proving the identification of the person served and stating how that person was able to identify the person served."

6. Whether or not personal service has been affected is a question of fact for the court to decide. The affidavit of service creates a presumption of service which can be rebutted through the cross-examination of the process server[1]. In this case the court did not have the benefit of the cross –examination of the process server, Selwyn, the original claimant since he passed away before the application was heard.

[1] Civ Appeal 136 of 2006 Republic Bank Ltd v Homad Maharaj

7. In this application I am satisfied that the claim form, statement of case, appearance form, defence form and notes to the defendant were served by the process server, Selwyn on Thursday April 7, 2011 at 8:25 am on the defendant at his place of employment at No 41 Pasea Main Road, Tunapuna and that the defendant has failed to rebut the presumption of service for the following reasons:

(a) The defendant alleged that he was not at work at the time of service. However, he failed to present to the court any evidence of his whereabouts at that time of service to support his assertion that he was not at work. Further, there was no evidence from any of the other persons working at his place of business to corroborate his story and to establish the time he was or was not there.

(b) I do not agree with counsel for the defendant that the court should not attach any weight to the affidavit of service of Selwyn filed on August 25, 2011. The weight I to attach to this affidavit takes into account that the evidence remains untested. However even with this untested evidence the defendant failed to convince me that he was not at work at the time the documents were served.

(c) I accept that it is not desirable for a litigant to serve his claim form, statement of case and related documents, in particular where the parties are related since his evidence of service may appear to be self serving. In this case it is clear that the relationship between both parties had deteriorated and it would have been more prudent for an independent third party to serve the said documents. However, the rules of court do not prevent the claimant/litigant from serving the documents. While I accept that the server of the documents was not cross-examined, the defendant did not convince me that I should draw a negative inference by Selwyn's service of the documents.

(d) The evidence of Delora Buckradee is primarily hearsay and I attach little value to it.

(e) Earl Maxwell admitted that he did not see the documents served on the defendant. However, he places Selwyn at 41 Pasea Main Road on April 7, 2011 at approximately

8:25 am, and in my view corroborates the place and time of service as set out in the affidavit of service.

Has the defendant satisfied the conditions for setting aside the default judgment?

8. Part 13.3 (1) sets out 2 conditions which must be satisfied before a regular judgment obtained in default is set aside. The defendant must satisfy the court that he has a realistic prospect of success in the claim and he acted as soon as reasonably practicable when he found out that judgment had been entered against him. Both conditions in 13.3 (1) are conjunctive and "The obligation is on the Defendant to put some material before the court to satisfy both of these pre conditions before the court can set aside its judgment to set aside a default judgment[2]."

Did the defendant act as soon as reasonably practicable when he found out that the judgment has been entered against him?

9. The defendant's affidavit filed on May 25, 2012 indicates that he was notified of the default judgment on February 6, 2012 when he started to go through his correspondence which had accumulated during his absence from work during the period November 2011 to January 2012. On the same day he obtained an appointment with his attorney for February 8, 2012. However due to health concerns the defendant left the jurisdiction during the period February 13, 2012 to March 5, 2012. On the same day of his return the defendant again contacted his attorney. His attorney was not able to meet with him to prepare the instant application since the latter was involved in a Law Association matter in the High Court. The defendant attended court on March 22, 2012 at the hearing of the Assessment of Damages and indicated that he had instructed his attorney to make the appropriate application to set aside the default judgment. On April 3, 2012 the defendant was able to obtain an audience with his attorney and to obtain information from Mr Lloyd Elcock another attorney on May 17, 2012 in support of his application. The assessment of

[2] Kokaram J in CV 2007-01867 at para 9 Wilfred Des Vignes v Joycelyn Manning and Ken Gordon

damages was again called in court on May 21, 2012 when the instant application was still not filed. It was filed 4 days thereafter.

10. In all 3 months elapsed between the defendant receiving notice of the default judgment and the instant application. While on the face of it this may appear to be inordinate, I draw a distinction between the defendant and his attorney taking steps to file the instant application. The defendant sought legal advice on the same day of becoming aware of the judgment. Due to medical reasons shortly thereafter he could not take any steps since he had to leave the jurisdiction, he continued to show his interest since he made contact with his attorney on the same day of his return. He attended court on his own without any legal representation on May 22, 2012 and indicated his intention and instructions to his attorney to apply to set aside the default judgment. In my view this defendant cannot be faulted for not taking steps to set aside the default judgment after being notified. In my opinion it was not his fault but his attorney's to account for the delay in filing the instant application.

11. In the circumstances, I am satisfied that this defendant demonstrated to me that he had an interest in and actively took steps to set aside the default judgment after being notified. As such I find that he acted as soon as reasonably practicable after being notified of the instant default judgment.

Does the defendant have a realistic prospect of success in the claim?

12. In **Dexter Brown v Lomas Dass**[3] I set out my understanding of the term "realistic prospect of success" as it has been judicially interpreted and these comments I repeat here.

"The term "realistic prospect of success" has been interpreted to mean something more than "arguable"[4], "a case which carries a real conviction[5], "a case which is better than

[3] CV 2011-03614
[4] Dean Armorer J in CV 2006-04052 General Earthmovers Ltd v Estate Management and Business Development Company at page 9

merely arguable[6]" and it is "a higher threshold requirement than merely a reasonable prospect of success[7]". The exercise which the court is required to conduct in determining whether the defendant has satisfied the test of "realistic prospect of success" was set out by Moosai J in **John v Mahabir** [8] as:

"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."

13. The claimant's case is the defendant sold the property situate at No 2 Boundary Road, San Juan for the sum of $950,000 and the claimant has not received his 1/13th share of the proceeds of the sale. Alternatively the claimant contends that if the said property was held in joint tenancy then he is entitled to a 1/10th.

14. The defendant's proposed defence is in 1987 he and Selwyn entered into a written agreement whereby the parties agreed that in exchange for Selwyn's share in Moonsie Naidoo's estate the defendant gave to Selwyn a motor vehicle worth $16,000 and he paid $3,450 to the National Housing Authority ("the NHA") for a piece of land at Edinburgh, Chaguanas for him. The defendant did not exhibit a copy of the agreement which was prepared by attorney at law Mr Lloyd Elcock but exhibited a statement from the said attorney.

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[5] ED and F Man Liquid Products Limited v Patel [2003] EWCA 472
[6] Moosai J in CV 2005-00866 John v Mahabir at page 5
[7] Rajkumar J in CV 2010-04557 Curt Semper v Candy Sampson at para 13
[8] CV 2005-00866 at page 5

15. The issues which arise from the proposed defence are (a) whether there was an agreement where Selwyn agreed to give up his share in the estate to the defendant (b) whether the consideration for the said share was the transfer of the motor vehicle, valued at $16,000 and the payment of the sum of $3,450 to the NHA and (c) whether the said agreement was valid and enforceable.

16. At this stage with the limited evidence before me the defendant has persuaded me that he has a realistic prospect of success in defending the claim for the following reasons:

    (a) While there is no written agreement to support the defendant's position I have been persuaded that Lloyd Elcock, the attorney who prepared it can speak about its contents and the instructions he received surrounding its preparation. Mr Elcock is an independent party with no interest to serve in this matter and without the benefit of any cross-examination to test his information I accept his word as prima facie evidence of the said agreement.

    (b) There is no direct evidence to rebut the presumption of the agreement at this stage of the proceedings due to Selwyn's untimely demise. Delora Buckradee has presented an alternative version of what transpired but admitted that there were no receipts to support her version. There is no evidence before me to address the consideration of the said agreement. At a trial of this issue Delora Buckradee can be cross-examined to test the validity of her evidence.

    (c) The validity and enforceability of the said agreement would turn on the evidence. There was no evidence before me to allow me to make a finding on this issue.

Order

17. The judgment obtained in default of appearance against the defendant dated and entered on August 25, 2011 was regular.
18. The said judgment is set aside on the basis that the defendant acted as soon as reasonably practicable in being notified of it and has a realistic prospect of success.
19. The defendant to file and serve his defence on or before November 2, 2012.
20. The case management conference is fixed for November 26, 2012 at 9:45 in Courtroom POS 02.
21. Each party to bear his own costs.

Dated this 27th day of September, 2012

Margaret Y Mohammed
Master (Ag)