THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2013-01618

Between

RASHEED ALI OF ALI'S POULTRY AND MEAT SUPPLIES

Claimant

And

NEIL RABINDRANATH SEEPERSAD

First Defendant

And

DRAKS INVESTMENTS LIMITED

Second Defendant

****

Before Master P. Sobion Awai

Appearances

Mr. Jairam SC instructed by Ms. Alana Toney for the Claimant

Mr. Camacho instructed by Mr. Freeman for the Defendants

The Application

1. This application filed pursuant to Parts 13 and 26 of the Civil Proceedings Rules 1998 is seeking to set aside the judgment dated and entered on September 10, 2013 in default of defence against the defendants or either of them.

2. In actual fact, no judgment was obtained against the second defendant as the claimant discontinued the claim against it by notice filed on September 10, 2013.

3. The application is supported by the affidavit of Neil Seepersad filed on November 28, 2013.

4. The claimant filed the following affidavits in opposition to the application:
   (i) Rasheed Ali filed on February 2, 2014
   (ii) Michael Acevero filed on February 2, 2014
   (iii) Joseph Toney filed on February 2, 2014
   (iv) Ryan Mohammed filed on February 2, 2014
   (v) Joseph Toney (supplemental) filed on March 7, 2014.

Background

1. The claimant and the first defendant are both businessmen. The second defendant is a company duly incorporated under the laws of Trinidad and Tobago. The first defendant is also a director of the second defendant.

2. On November 29, 2010 the first defendant signed a promissory note whereby he promised to pay the claimant the sum of $1.500,000.00 with final payment and liquidation on or before February 28, 2011. The interest

to be paid on the lump sum was $150,000.00 to be paid on or before February 28, 2011.

3. On or about February 8, 2011, the parties entered into a deed of mortgage whereby the first and second defendants, as Borrower and Owner respectively, conveyed property situate at 8 Bengal Street, St. James, Port of Spain to the claimant as Lender in consideration of advances made to the Borrower to be held as security for the loan. The mortgage deed was stamped to cover the sum of $1,900,000.00.

4. The first defendant did not pay the sums owed by the February 28, 2011, the due date.

5. Subsequently, the parties and their attorneys communicated via letters and meetings in an effort to settle the matter. This lasted over two years during which time interest continued to accrue on the loan at a high rate. The claimant did not receive any payments from the first defendant.

6. Finally on April 16, 2013 the claimant instituted proceedings against the defendants claiming the sum of $3,633,333.00 representing the principal sum of $1,900,000.00 and accrued interest.

7. The first defendant entered an appearance but failed to file a defence within the allotted time frame. On the September 10, 2013 judgment in default of defence was entered against the first defendant.

The Law

8. Rule 13.3 of the Civil Proceedings Rules 1998 (CPR) reads as follows:

(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 has acted as soon as reasonably practicable when he found out that judgment has been entered against him.

(2) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

9. The Defendant has to overcome two hurdles: first, he must show he has a defence with a realistic prospect of success and second, he must explain any delay in bringing the application to set aside i.e. he must show he acted as soon as reasonably practicable.

10. Section 12 of the Moneylenders Act Chap. 84:04 states:

12. (1) The interest which may be charged on loans by any person other than a moneylender licensed under this Act shall not exceed the rate of twenty-four per cent simple interest per annum, whether the interest is payable monthly or at any greater fixed period, and nothing herein contained shall authorise the charging of compound interest on such loans which would, in effect, amount to simple interest in excess of such rate per annum.

11. Section 24 of the Moneylenders Act reads:

24. (1) Where proceedings are taken in any Court by any person for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent exceeds the rates authorised by this Act, the Court may re-open the transaction, and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be due in respect of such principal and interest, and for such costs and charges as the Court may adjudge to be reasonable, and, if any such excess has been paid or allowed in account by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

12. The above sections of the Moneylenders Act are relevant insofar as any proposed defence of illegality or excessive interest is concerned.

Realistic Prospect of Success

13. Lord Woolf MR in Swain v Hillman [2001] 1AER 91 noted that the court must consider whether a defendant has a realistic as opposed to a fanciful prospect of success.

14. In ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 Lord Potter noted that the defence advanced must "carry some degree of conviction."

15. In Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550 Aldous LJ stated:

> *"To decide whether there was a real prospect of success, the court had to go further and conclude that the evidence in the witness statements, perhaps supplemented at trial to amplify ambiguities, was bound to fail even though not challenged by any evidence of the defendants."*

16. In R (on application of AK Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 447 Lord Justice Laws defined the test as follows:

> *"A case which is clearly unfounded is one with* no *prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with* no more than a *fanciful prospect of success. "Realistic prospect of success" means only more than a fanciful such prospect."*

17. In Day v Royal Automobile Club Monitoring Services Ltd [1991] 1 WLR 2150 at page 2157, Ward LJ warned against trying issues of fact in applications of this nature. He stated:

> *[J]udges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between*

them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it."

18. Taking into account dicta in the cases referred to above, this court has to determine matters such as whether the defence being advanced is merely fanciful, whether the evidence in the affidavits even if supplemented at trial was bound to fail, whether there is some inherent improbability in what is being advanced by either party and whether some extraneous evidence, for example, a document that is undisputed, contradicts or supports the evidence of either party.

19. The first Defendant's main assertions as contained in his affidavit filed on February 19, 2014 may be summarised as follows:

- He did not agree to borrow the sum of $1,9000,000.00, he did not receive the benefit of that loan and he did not agree to pay the interest claimed - paragraph 18.

- The sole beneficiary of the loan was Primis Corporation Ltd. a limited liability company (Primis) who was the real borrower. The first defendant was a director of Primis - paragraph 19.

- Ryan Mohammed who was employed part-time with Primis informed the first defendant that he knew the claimant who might be willing and able to lend the money that Primis needed - paragraph 22

- The first defendant informed the claimant that the money was required by Primis and the claimant indicated that his main reason for lending the money was the attractive interest rate. He also sought security for the loan - paragraph 23.

- The first defendant obtained the approval from the board of directors of Primis to borrow the sum of $1,5000,000.00 with interest at the rate of 10% quarterly - paragraph 26.

- The first defendant also obtained approval from the board of directors of Tsidkenu Corporation, the parent company of the second defendant, to mortgage the Bengal Street premises - paragraph 27.

- The promissory note was signed by the defendant in his capacity as director of Tsidkenu, not in his personal capacity - paragraphs 28 and 29.

- The true capital sum is $1,500,000.00 and not $1,900,000.00 - paragraph 33.

- The additional sum of $400,000.00 was compound interest added on to the principal sum of $1,500,00.00 - paragraphs 38 and 40.

20. Based on the above evidence, attorney for the first defendant advanced the following defences to the claim:

(a) The first defendant was not the borrower

(b) The interest on the original loan of $1,500,000.00 exceeded the limit of 24% per annum set by section 12 of the Moneylenders Act and the court has power

to reopen the transactions and relieve the borrower pursuant to section 24 of the Act.

(c) the additional sum of $400,000.00 added to the principal loan constituted compound interest which was illegal by virtue of section 14 of the Moneylenders Act.

(d) Primis did not agree to the variation of interest in the sum of $190,000 quarterly.

(e) The claimant was carrying on the business of moneylending and as such the original loan agreement and any variation is illegal and unenforceable by virtue of section 4 of the Moneylenders Act.

21. The evidence on behalf of the claimant was as follows:

- In July 2010, the claimant's neighbour and friend Ryan Mohammed told him that the first defendant was in financial difficulty and required a loan. After meeting with the first defendant, the claimant agreed to lend him $1,500,000.00 at interest rates suggested by the first defendant, who drew up the promissory note – paragraph 6 of the claimant's affidavit.

- Some weeks later he was again approached for a further sum of $500,000 but he agreed to loan the first defendant a further sum of $400,000 and the first defendant agreed to a mortgage agreement for the entire sum loaned i.e. $1,900,000 with security being the property at No. 8 Bengal Street, St James– paragraph 7 of the claimant's affidavit and paragraph 14 of the affidavit of Ryan Mohammed.

- The money was paid out on behalf of the first defendant and in accordance with his specific instructions. The first defendant never said that the loan was for Primis – paragraphs 8 and 9 of the claimant's affidavit and paragraph 8 of the affidavit of Ryan Mohammed.

- The claimant is not a moneylender, licensed or otherwise– paragraph 11 of the claimant's affidavit and paragraph 11 of the affidavit of Ryan Mohammed.

22. The claimant's evidence also included correspondence between the first defendant and the claimant's lawyer. Of particular note was the first defendant's response to a pre-action protocol letter in which the debt (then $2,715,000.00) was admitted and the first defendant indicated that he was awaiting settlement from Colonial Life EFPA Plan as well as project realisation. He anticipated settlement by the end of March 2012 (RA13 refers).

23. The claimant's attorney submitted that:

(a) All contemporary documents point conclusively to the claimant being the recipient of the loan and not Primis. Furthermore, nowhere in the promissory note is there any indication that the first defendant signed the promissory note as director of Tsidkenu Investment.

(b) The claimant was not carrying on the business of a moneylender and does not fall within the definition of a moneylender under the Moneylenders Act.

(c) The exhibits to the affidavits as well as the exhibits to the Statement of case demonstrate that

the first defendant's story is untrue and he has no prospect of success.

24. Having considered the evidence and the arguments outlined above, I conclude that the first defendant has no realistic prospect of success for the reasons set out below.

25. Firstly, there can be no doubt that the claimant lent the first defendant $1,500,000.00. This is evidenced by the promissory note within which the first defendant promised to pay back this sum and interest within a certain time frame. Nowhere in that promissory note does the first defendant state that he borrowed the money for and on behalf of the Primis Corporation. The language of the note is clear and unambiguous. It reads: "*For value received I, Neil Rabindranath Seepersad of...promise to pay Mr. Rasheed Ali of... the sum of one million five hundred thousand Trinidad and Tobago dollars".* The agreement was clearly between the first defendant and the claimant and not between the claimant and Primis.

26. Secondly with respect to the variation of the principal and interest, the mortgage agreement appears to support the claimant's version of events as the document was stamped for the sum of $1,900,000.00.

27. Thirdly I find that there is no evidence whatsoever to support the allegation that the claimant was engaged in the business of moneylending. It is not sufficient to say as did the first defendant at paragraph 25 of his affidavit that the claimant "showed a keen interest in lending such a large sum of money and knew a lot about interest rates and collateral as a result of which I

believe that he does in fact carry on the business of a moneylender."

28. Fourthly, while there can be no doubt that the interest charged is above 24% per annum limit and therefore in breach of section 12 (1) of the Moneylenders Act, that of itself does not render the loan agreement unenforceable. Section 24 (1) of the Moneylenders Act states that if a court is satisfied that the interest charged on a sum lent exceeds the rates authorised by this act the Court may re-open the transaction and take an account between the lender and the person sued and may relieve the person sued for the sum in excess of the sum adjudged by the Court to be due. Therefore, even if the interest charged was excessive this does not render the agreement unenforceable: South Western Atlantic Investment Trust Co Ltd v Millette (No 2) (1991) 46 WIR 351.

Whether the Defendant acted as soon as was Reasonably Practicable

29. The first defendant states that he first obtained knowledge of the default judgment on November 19, 2013 at a meeting with the claimant's attorney, Mr. Toney and applied to set aside the judgment some 9 days after. As such he argues that he acted as soon as was reasonable practicable after finding out about the default judgment.

30. The claimant's evidence was that first defendant had knowledge of the default judgment some two months before the application was filed. In the first affidavit of Joseph Toney filed on February 19, 2014, he said at paragraph 7, that about one month before November 19 (on or about October 19) he informed the first defendant by telephone that judgment had been obtained and he asked

for a response which was not forthcoming. However in his supplemental affidavit filed on March 7, 2014, Mr Toney sought to correct the information as to when he informed the first defendant of the judgment. He said that he in fact informed the first defendant in September 2013. At that time he asked the first defendant for his response and when that response did not come, he received instructions from the claimant to register the judgment which he did in October 2013. Thereafter he again called the first defendant and set up a meeting with the claimant for November 19, 2013. On that day a copy of the judgment was handed to the first defendant.

31. The law places the obligation of proving that an application to set aside a default judgment was filed as soon as was reasonably practicable on the party seeking to set aside the judgement. The party is also under an obligation to provide a reasonable explanation for any delay in filing the application.

32. In this case the court is presented with two conflicting stories. The claimant has given affidavit evidence that the first defendant received notice of the judgment some two months before the application to set aside was filed, whereas the first defendant states in his affidavit that he only found out about the judgment on November 19, 2013 and applied to set aside the judgment about 9 days after. There was no cross examination on this issue.

33. It is my opinion that the claimant's version of the story seems more plausible. To my mind it is unlikely that arrangements would have been made between the claimant and the first defendant for a meeting on November 19, 2013 without mention being made of the judgment having been obtained against the first defendant. It is my

opinion that the first defendant's version is improbable. I find that the defendant was notified in September 2013 and he has failed to provide any no explanation to the court which would justify a two month delay in making this application.

34. Bearing in mind that the onus lies on the defendant, I conclude that the first defendant has failed to prove that he acted as soon as was reasonably practicable after finding out about the default judgment.

Should the Court Vary the Judgment?

35. Section 24 of the Moneylender's Act authorises the court to re-open a transaction, take an account between the lender and the person sued and relieve the person sued for the sum in excess of the sum adjudged by the Court to be due. However neither party requested a variation of the judgment debt.

36. I agree with the parties that section 24 appears to be applicable where a matter is currently before a court for trial and not where an order has already being obtained requiring the borrower to pay a specified sum. In circumstances I declined to vary the judgment sum.

37. Additionally the two preconditions for the exercise of the court's powers under Rule 13.3 (2) of the CPR not having been satisfied, it is not open to the court to vary the judgment sum.

Ruling

38. The first defendant’s application filed on November 19, 2014 to set aside the judgment in default of defence is refused.

39. The first defendant shall pay the claimant's costs to be assessed in default of agreement.

Dated this **8th** day of **December**, 20**14**.

P. Sobion Awai
Master