

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-03451**

**BETWEEN**

**NEIL NORRIS EMSLEY PAYNE**

**Also called NEIL PAYNE**

**Claimant**

**AND**

**DENISE MC CLATCHIE**

**Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Appearances:**

**Date of Delivery: Friday 22 January 2021**

Mr Shervon Noriega instructed by Ms Delicia Bethelmy for the Claimant

Mr Jehan-Che Perreira for the Defendant

---

**DECISION ON THE DEFENDANT’S NOTICE OF APPLICATION TO SET ASIDE  
JUDGMENT ENTERED IN DEFAULT**

---

**I. Background:**

[1] Neil Payne, the Claimant herein and Rennison Augustus are the sons of Eric and Eileen Payne who are both now deceased. In 2011, prior to their passing, Eric and Eileen executed two Deeds to convey their two properties— the Balthazar Street Property and the College Road Property— to Rennison and Neil respectively. Rennison duly received

the Balthazar Street Property by registered Deed dated the 11<sup>th</sup> February, 2011. However, the Deed for the conveyance of the College Road Property to Neil, though executed, was never registered due to some difficulties at the Stamp Duty Office. This College Road Property consisted of rented premises and was valued initially at \$650,000.00 in 2011.

[2] Neil then discovers, after his parents' death, that Denise Mc Clatchie, the Defendant herein, was allegedly "*going across the community claiming that she owned the College Road Property.*" As a result, Neil commissioned a title search which revealed that his father, Eric, had indeed conveyed the College Road Property to Denise by Deed dated the 2<sup>nd</sup> May, 2012.

[3] Neil's case is that he always had a tumultuous history with Denise which culminated in several Magistrate's Court matters. He claims that he and his brother, Rennison, continuously warned Denise to stay away from Eric.

[4] He proceeded to describe in his pleading, the brief history of his parents' purchase and construction of both properties and noted that while the College Road Property was initially owned by their mother, Eileen, she had conveyed a ½ interest to Eric for \$5,000.00 by a 1977 Deed.

[5] Neil, who had migrated and lived in the U.S.A, states that he returned to Trinidad in 2007 and occupied the College Road Property with Eric, his father. However, he moved in with his mother Eileen at her house in October, 2010 and avers that he remained there until her death in February, 2011. While not specifically pleaded, it seems clear that the relationship between Eric and Eileen had become strained considering that they lived separately at that time.

[6] Neil pleads that in 2007, Eric introduced Denise Mc Clatchie as a "*friend*" but that Denise would never visit Eric when he, Neil, was in Trinidad. Around that time, being 2007-2008, Neil pleads that his father was receiving an average monthly income of \$7,000.00 with an additional pension of \$3,000.00. Further, he was privy to an income of \$2,000.00 from the two rental apartments at the College Road Property.

[7] It was upon his mother's funeral in 2011, when Neil requested from Eric a contribution to the funeral expenses, that Neil discovered that his father's savings accounts were empty

and instead, that Eric now possessed two joint accounts with Denise. He also pleads that Denise was in possession of Eric's bank card although it is not stated how he gained such knowledge.

[8] Moreover, Neil avers that he examined his father's bank statements and was alerted that \$2,000.00 was being withdrawn from Eric's bank account "*almost every two days or so*" for a period of approximately four years between 2008 and 2012 totalling "*well over \$75,000.00*". What confirmed his suspicions against Denise was when Neil questioned his father about these withdrawals and Eric's response was that he simply did not know about them.

[9] Thus, Neil's claim against Denise is that Denise "*befriended*" his father and acquired over a period of years dominion over his mind to the extent that, at the time of executing the Deed in 2012 conveying the College Road Property to Denise, Eric was under the undue influence of Denise.

[10] Neil states that in April, 2012, he was able to remove Denise as a joint holder on Eric's bank account. However, by the time of his return to Trinidad a few months later in August of the same year, he claims that all his changes had been reversed. Further, he pleads that Denise was now collecting rents from the College Road Property for herself.

[11] In the circumstances, this action was brought seeking several reliefs which include, *inter alia* (i) that the 2012 Deed conveying the College Road Property to Denise be set aside; (ii) a declaration granting Neil an equitable right in the College Road Property; (iii) in the alternative, a declaration that Denise holds the College Road Property on trust for Neil; (iv) an Order that Denise account for all profits and/or rent collected by her.

Further, several injunctions to restrain Denise from entering or remaining on the College Road Property were also sought.

[12] Although the Claim was filed since the 13<sup>th</sup> October, 2016, the Defendant entered neither an Appearance nor a Defence and thus, the Claimant applied for **Judgment in Default on the 24<sup>th</sup> March, 2017**. Such Judgment was granted by Court Order of the **10<sup>th</sup> May, 2017**.

[13] Less than a month later, the Defendant files a **Notice of Application on the 1<sup>st</sup> June, 2017 seeking to set aside the Judgment (the Application)**. The grounds for the Application were (i) that the Claimant failed to duly serve the Defendant with the Claim; (ii) that the Defendant has a realistic prospect of success; and (iii) that the Claim should be barred under the principles of *Res Judicata* given that a similar action was brought and determined between the parties in **Claim No CV2015-01374** before Kokaram J.

[14] At the next hearing of the 25<sup>th</sup> July, 2017, I granted permission to the Claimant to file an affidavit in response to the Defendant's affidavit of the 1<sup>st</sup> June, 2017. The Claimant proceeded to file two affidavits on the 5<sup>th</sup> September, 2017: one from the Claimant's instructing attorney, Delicia Bethelmy, and the other from legal secretary, Roxanna Phillips. These affidavits were effectively affidavits detailing and proving the due service of the Claim on Denise.

[15] I then gave directions at the hearing of the 22<sup>nd</sup> March, 2018 for the filing and exchange of written submissions.

## II. **Law & Analysis:**

[16] **Part 13 of the CPR 1998** sets out the provisions for setting aside default judgment. **Part 13.2** sets out the circumstances in which it is mandatory for the Court to set aside default judgment whereas **Part 13.3** provides for instances where the Court has a discretion as to whether to so set aside.

**Part 13.2** states:

- 1) *“the court must set aside a judgment entered under Part 12 if judgment was wrongly entered because—*
  - a) *in the case of a failure to enter an appearance, any of the conditions in rule 12.3 was not satisfied; or*
  - b) *in the case of judgment for failure to defend, any of the conditions in rule 12.4 was not satisfied.*
- 2) *The court may set aside judgment under this rule on or without an application.”*

**Part 13.3** states:

- 3) *“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 judgment had been entered against him.*”*
- 4) *Where this rule gives the court power to set aside a judgment, the court may instead vary it.”*

[17] The Defendant’s case to have the default judgment set aside is based on the premise that the Claim was not properly served on her. Thus, she essentially contends that the mandatory power of the Court to set aside the judgment is activated under **Part 13.2** because the provisions at **Part 12.3 (a) and 12.4 (a)**, which state that default judgment for failure to file an Appearance or a Defence must be entered if— *“the court office is satisfied that the claim form and statement of case have been served”*, were not met.

Further and in the alternative, the Defendant contends that if the Court were to find that the Claim was indeed properly served, the Court can still exercise its discretion to set aside the default judgment under **Part 13.3** on the basis that (i) the Defendant has a realistic prospect of success in the claim; and (ii) the Defendant acted as soon as reasonably practicable when she found out that judgment had been entered against her.

[18] Thus, two issues arise for determination as follows:

- 1) **Whether the Claim was properly served on the Claimant?; and, if not,**
- 2) **Whether the conditions in Part 13.3 (1) (a) & (b) of the CPR 1998 are satisfied?**

If the answer to any of these issues is in the negative, then I can/must set aside the default judgment.

**Personal Service of the Claim:**

[19] In the Claimant's application for default judgment, an affidavit of service deposited by Roxanna Phillips, legal secretary, was filed. In that affidavit, Roxanna deposed that she personally served the Defendant a copy of the Claim on the 4<sup>th</sup> November, 2016. She gave specifics of the address, time and place of service and stated that the "*Defendant answered to her name and accepted service.*"

[20] In her response affidavit, Denise deposed that she was never served with the Claim and that from the **1<sup>st</sup> to the 3<sup>rd</sup> November, 2016**, she resided with her terminally ill father-in-law and therefore, during this period, she was not at the address stated in Roxanna's affidavit.

[21] Roxanna and the Claimant's attorney, Delicia Bethelmy, then filed two affidavits in reply pursuant to Court Order. In her second affidavit, Roxanna gave more details about the service of the Claim. She deposed that Delicia had accompanied her on the drive to the Defendant's residence at **LP 51 Achong Trace via Balthazar Street, Tunapuna**. Her description of the process thereafter is material and is set out in full:

*"On arriving at the residence of the Defendant...a male who appeared to be in his twenties was standing outside in the paved yard area of the residence...Delicia Bethelmy who inquired from the male whether a Denise Mc Clatchie resided at the residence and the male responded "YES". The male then turned to the dwelling house and shouted 'Mom some people outside here to you.'*

*Shortly thereafter a woman exited the house and walked toward the edge of the paved yard dressed in a greyish/pinkish housedress. When asked whether she was Denise Mc Clatchie she responded in the affirmative.*

*I recall that Delicia...indicated to the Defendant that there were documents to be served on her. The Defendant became noticeably agitated by that statement and asked what the documents were concerning and the said Delicia...indicated they were court documents...*

*When the Defendant was told...that the documents were from Neil Payne the Defendant's disposition became hostile and she said she wanted nothing from Neil Payne...*

*I recall that her son responded that the matter with Payne had “done now”.*

*The Defendant did not want to take the envelope containing the Claim. I recall that it was her son who stood next to her and said ‘mummy just see what it is about’ and reached out and took the documents in hand. I recall that the documents were then immediately handed to the Defendant by her son and she began flipping through the pages. On seeing the contents the Defendant grew even more hostile. The said Delicia and I began retreating to the car which had its engine still running. I recall the Defendant stated ‘yuh see, yuh wasn’t to take no documents from them’. The said Delicia...then drove off.’*

Delicia, who was also present with Roxanna on the day of service, deposed an affidavit corroborating Roxanna’s version of events on the 4<sup>th</sup> November, 2016.

[22] At the outset, the Court notes that in the Defendant’s affidavit, Denise stated that she resided at her ill father-in-law’s house from the **1<sup>st</sup> to the 3<sup>rd</sup> November, 2016**. Thus, no alibi and/or statements of her whereabouts were given for the **4<sup>th</sup> November, 2016** when the documents were allegedly served.

In any event, considering that there existed a factual issue of whether service was indeed effected on the Defendant on the 4<sup>th</sup> November, 2016, a brief cross-examination, as ordered by the Court, was carried out on the 22<sup>nd</sup> March, 2018.

[23] At this hearing, the Defendant, under cross-examination, now stated that from the 1<sup>st</sup> to the 3<sup>rd</sup> November, 2016 she was actually at her mother-in-law’s husband’s residence. She however, admitted that she brought no medical records to prove that the mother-in-law’s husband was indeed terminally ill.

She stated that all three of her sons were still alive but because she did not know which son Roxanna claimed was present at the residence on the alleged day of service (because as she stated earlier, she was not present and never was served), she did not let any of them depose an affidavit in support.

More importantly, it was the Defendant's evidence that it was her mother and not herself, who resided at LP 51 where service was purportedly effected. Further, her evidence was that her mother resided there with her son.

Denise, then gave some curious evidence. She stated that she never saw Delicia prior to the hearing and that she only saw Roxanna once before at the warden's office.

Mr Noriega, the Claimant's counsel, no doubt surprised by this evidence, suggested to the Defendant that such evidence could not be accurate because she, Denise, would have met Delicia before in the previous matter between the parties before Kokaram J, which Denise raised in her affidavit. Denise's response seemed nervous as she stammered:

*"I met Mrs...I remember Mrs Roxanna..."*

Mr Noriega then interrupted her and reminded her that he was not asking about Roxanna but about Delicia. Denise finally responded that she could not remember meeting Delicia but remembered meeting Roxanna.

[24] In summary, the Defendant seemed to be a somewhat nervous witness at times and her evidence was not always believable. I agree with counsel that she could have brought some additional evidence to prove her version of events i.e. that she was not at LP 51 on the day of service. There was nothing preventing her from putting all three sons on affidavit to give corroborative evidence.

Further, as stated above, although not raised in cross-examination, Denise gave no evidence in her affidavit about her whereabouts on the **4<sup>th</sup> November, 2016**. Even at the hearing, she merely stated that she was not at LP 51 and she did not reside there. While it is noted that on her affidavit of 1<sup>st</sup> June, 2017 she stated that her address is LP 14 C Warner Trace (South) St Augustine, the address at which Denise resides is not as important to the proof of personal service as to the question of whether Denise was indeed present at LP 51 at the date and time of service as the Claimant claims.

This is confirmed by the provision in **Part 5.3 of the CPR**, which describes the method of personal service on an individual as follows:



***“A document is served personally on an individual by handing it to or leaving it with the person to be served.”***

There is no requirement that the document be served personally on the intended recipient’s last known address or residence.

[25] On the other hand, I find that both Delicia’s and Roxanna’s evidence to be largely in support of their affidavit evidence. Counsel, Mr Perreira, tried to ask Roxanna, the process server, why the Defendant did not sign a copy proving service but Roxanna correctly informed him that that is not a necessary component to prove service. Indeed, on a perusal of **Part 5.5 of the CPR 1998**, there is no requirement for the recipient to sign any document as proof of service.

Roxanna then, as stated in her affidavit, confirmed that she gave the Claim documents to the male person who claimed to be the Defendant’s son. When asked how she knew it was the Defendant’s son, Roxanna responded that he, the male individual, called out to the Defendant and said ‘mom’. When the Court asked for clarity on the events that took place, Roxanna’s answer was as follows:

***“Well I had the document in my hand and the son reached out and he took it from me, and he hand it to her, in my presence, and she in turn start looking through the document with an agitated, she was quite angry and annoyed by it.”<sup>1</sup>***

[26] On re-examination, Mr Noriega asked Roxanna why she didn’t have Denise endorse the other copy, Roxanna’s response was:

*“It didn’t happen because when we went to the residence and the defendant came outside she did not want to take the document so the son urged her by telling her to see what it is about, what it says. So when she saw that she got upset and we, knowing that she had it in her hand, we left immediately and went in our, in the vehicle because we knew she had the documents.”*

Roxanna then stated that she attempted to serve it on her personally at first but because she didn’t want anything to do with Neil Payne she didn’t endorse the document. Further,

---

<sup>1</sup> Page 15 of the Notes of Evidence, lines 40-44

Roxanna told the Court that the Defendant was identified by Ms Bethelmy who asked if she was indeed Denise Mc Clatchie and that the Defendant answered yes. She confirmed that she was in their presence when the son took the documents and handed them to the Defendant. She stated that they were about an arm's length away from her at the time.

[27] Ms Bethelmy's evidence, in similar fashion to Roxanna's was a replica of her affidavit. She stated that contrary to the Defendant's evidence, she had met the Defendant before at the previous court matter before Kokaram J. She admitted that she never asked for the son's birth certificate to prove that he was indeed her son. She also admitted, as stated in her affidavit, that she did not hand the Claim documents directly to the Defendant. However, she maintained that she properly served the documents on the Defendant.

[28] In my assessment, both Roxanna and Delicia seemed credible witnesses. Further their evidence under cross-examination did not depart in any way from their evidence in their affidavits or from each other. They both admitted that they did not hand the documents directly to the Defendant and that they did not have the Defendant endorse a copy and thus, I found them to be sincere in their answers. There is nothing to persuade me to think that they fabricated their evidence about service or that the persons whom they left the documents with were not the Defendant and/or her son.

On the other hand, Denise seemed the more nervous witness. Further, as indicated above, she gave no specifics of her whereabouts on the day of service. Moreover, her evidence that she never saw or met Delicia before did not seem plausible given their previous High Court matter in which Justice Kokaram's Court order was handed down on the 21<sup>st</sup> of March 2016, a mere two years prior to the date of the hearing. I do not expect that the Defendant would have forgotten her previous meeting with Delicia so quickly.

[29] I therefore accept the evidence of Roxanna Phillips and Delicia Bethelmy as to how they attempted to serve the documents on the Defendant and/or her son on the 4<sup>th</sup> November, 2016.

[30] What must now be determined is therefore an issue of law: **whether the procedure adopted by Delicia and Roxanna in seeking to effect service on the Defendant constitutes proper personal service as contemplated by Part 5.3 of the CPR 1998?**

While the case law submitted by the parties was helpful, this very same issue has been more recently dealt with in the English Courts in the 2015 case of **Alexandre Yaklovlevich Tseitline v Leonid Victorovich Mikhelson & Ors [2015] EWHC 3065.**

[31] In **Alexandre Tseitline** *supra*, the claimant through its process servers, attempted to effect personal service on the defendant as he attended a gallery. The documents were placed inside envelopes marked with the name of the claimant's solicitors. The process servers made a number of attempts to serve the papers but the defendant refused to accept service and eventually, the process servers took the documents away with them when they left. The defendant claimed that he was not properly served.

Mr Justice Philips, in giving his judgment referred to the House of Lords case of **Kenneth Allison Ltd v A.E. Limehouse & Co [1992] 2 AC 105** where the panel considered what is meant by "*leaving a document with the person to be served*", which is the requirement for personal service both in England and in this jurisdiction. He referred specifically to Lord Bridge of Harwich's words at para 113E of **Allison** *supra*:

***"There is abundant authority for the proposition that personal service requires that the document be handed to the person to be served or, if he will not accept it, that he be told what the document contains and the document be left with or near him."***

The ratio of Lord Goff of Cheiveley was also mentioned at page 124C:

***"Prima facie, the process server must hand the document to the person upon whom it has to be served. The only concession to that practicality is that, if that person will not accept the document, the process server may tell him what the document contains and leave it with him or near him."***

In **Thomson v Phenev [1832]** it was also held that if the defendant refuses to take a copy of the originating document, it is not necessary to leave it in his actual corporeal possession, **but it is sufficient to inform him of its nature** and throw it down in his presence; yet this must be done under such circumstances as to bring the case within the ambit of the above rule: per Patterson J.

In the case at bar, having accepted the affidavit evidence of the Claimant, it is clear that the Defendant refused to accept service. In those circumstances, based on the learning, the Claimant has to prove that **(i) they told the Defendant what the documents contained and (ii) they left the documents with Denise or near her.**

[32] Roxanna's affidavit evidence in proof of these issues was as follows:

*“When the Defendant was **told by the said Delicia Bethelmy that the documents were from Nail Payne** the Defendant's disposition became hostile and she said she wanted nothing from Neil Payne. **She was told that the documents were for her and that we were simply here to serve her.**”*

*“The Defendant did not want to take the envelope continuing the Claim. I recall that it was her son who stood next to her and who said ‘mummy just see what it is about’ **and reached out and took the documents in hand. I recall that the documents were then immediately handed to the Defendant by her son and she began flipping through the pages.**”*

[33] Delicia corroborated Roxanna and confirmed that (i) **“I indicated to the Defendant that there were some documents to be served on her”**; (ii) **“I reluctantly told the Defendant that the documents were from Neil Payne”**; and (iii) **“I recall that it was her son who stood next to her and who said ‘mummy just see what it is about’ and reached out and took the documents in hand from the said Roxanna Phillips. I recall that the documents were then handed immediately to the Defendant by her son and the Defendant began flipping through the pages of the said Claim.”**

Thus, on their affidavit evidence, the Claimant's case is that (i) Denise refused to accept the documents and thus (ii) Delicia told Denise that she had court documents to serve on her and that those documents were from Neil Payne; and (iii) that the son took the documents and immediately handed them to Denise.

[34] As stated in the case law, the requirements for personal service are that the process server leave the documents with the defendant **or near the defendant**. In my opinion, by leaving the documents with the son who immediately handed them to Denise in the presence of the process server, the Claimant has effectively left the documents near the Defendant.

[35] However, the first issue of whether Roxanna properly informed Denise of what the documents contained, remains for determination.

Under cross-examination, Roxanna's evidence on this latter sub-issue was as follows:

Roxanna: *"I didn't say it to her, Ms Bethelmy told her what the documents were about, **that it was Court documents from Neil Payne**"*

Court: *"okay what, what did she tell her about the documents, did she identify the documents?"*

Roxanna: *"she told her, **she said it was the Statement of Case and Claim Form and that we had in the documents for the Court matter from Neil Payne.**" (Sic)*

Delicia's oral evidence was similar as follows:

*"...we thereafter said we had some documents, we have some documents here to serve on you, I said that. She pressed on, who are the documents from, she was very, questioning a lot. Am what they were concerning. **Reluctantly, I told her they were for a Court matter. Court matter against who, against Neil Payne.**"*

[36] Immediately, I note the slight discrepancy between the two witnesses evidence being that Roxanna stated that she heard Delicia expressly tell Denise that the documents were a Claim Form and Statement of Case whereas Delicia's evidence was that she only told Denise that the documents were for a Court matter from Neil Payne.

[37] In my assessment, Delicia's evidence was more believable for two reasons (i) she was the one who informed Denise of the contents and thus, Roxanna's evidence is merely seeking to recall what she heard and (ii) Delicia's oral evidence coincides with both of their affidavit evidence, which mentioned nothing about informing Denise that the documents included a Claim Form and Statement of Case.

[38] Thus, the issue is narrowed even further and amounts to the following question: **Whether it is sufficient to inform the Defendant that the documents are merely Court documents from a person for the purposes of proper personal service?**

Unfortunately, neither party has provided any learning specific to this narrow issue.

[39] Nevertheless, I am of the opinion that this is not sufficient information about the contents of the documents being served on them. I find that Delicia and Roxanna were required to inform Denise that (i) it was a Claim Form and Statement of Case; (ii) that it was issued by Neil Payne, the Claimant against Denise, the Defendant; and most importantly (iii) **that the documents concern a property situate at LP 51 Achong Trace.**

By merely indicating that the documents were court documents from Neil Payne and/or failing to inform Denise of (iii) above, she would not understand the gravity of the documents nor what the matter is about.

**In those circumstances, I find that the Claim was not properly served on the Defendant.**

[40] Given this finding, **Part 13.2** states that I am mandated to set aside the default Judgment as the conditions in **Part 12.3 (a) and 12.4 (a)** have not been satisfied. This finding is dispositive of the matter and there is no need to go into the other requirements for setting aside Default Judgment in **Parts 13.2 & 13.3 of the CPR 1998.**

### **III. Disposition:**

[41] Accordingly, in light of the foregoing analyses, the order of the Court is follows:

#### **ORDER:**

- 1. That the Order for Default Judgment entered on the 10<sup>th</sup> May, 2017 be and is hereby set aside.**
- 2. That the parties be heard on the issue of Costs.**

---

**Robin N. Mohammed**  
**Judge**