REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE Sub-Registry, San-Fernando

Claim No: CV2017-04122

BETWEEN

SUSAN JEREMIAH-ALEXANDER

First Claimant

FELIX ALEXANDER

Second Claimant

AND

JOEL JOHN
(TRADING AS "CAPTIVATIVE SOLUTIONS")

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Friday 24 June 2022

Appearances:
Vishnu Bridgemohan instructed by the firm of Dipnarine Rampersad & Co for the Claimants
Angela Mohammed for the Defendant

DECISION ON THE DEFENDANT'S NOTICE OF APPLICATION TO SET ASIDE

DEFAULT JUDGMENT

Introduction

1. By Notice of Application supported by an affidavit of Joel John filed on the 8th January 2020, the Defendant pursuant to **Rule 13.3 (1) (a) and (b) of the Civil Proceedings Rules 1998**, as amended [hereinafter referred to as "CPR"], applied to the Court for an Order seeking the following reliefs: *inter alia*

    a. That the date set for the hearing of Judgment Summons filed on 10th April 2019 together with an affidavit in support dated 10th January 2019 be vacated.

b. That the Judgment in Default of Appearance made against the Defendant dated 16th July 2018 be set aside.

c. That the Claimants do serve the Defendant with the claim form and statement of case together with all documents relative to the subject action by a specified date to be determined by the Honourable Court.

d. That the Defendant do file and serve his defence by a specified date to be determined by the Honourable Court.

e. Costs to be awarded if deemed appropriate; alternatively, no order as to costs.

f. Any other order applicable in these circumstances.

2. The Claimants resisted the application.

Background/Procedural History

3. The relevant procedural history of this matter is as follows:

a. By letter dated the 17th February 2013, the Claimants' attorney wrote to the Defendant calling upon the Defendant to repay the sum of $67,200.00. The Claimant paid this sum as a down payment pursuant to a construction agreement for work on the property. The "17th February 2013" appears to be an error, and the letter should have been dated 17th February 2014.

b. By letter dated the 11th March 2014, the Defendant's attorney wrote to the Claimants' attorney denying the assertions that he is liable to repay the sum mentioned. Instead, the Defendant claimed that he is entitled to $45,000.00. This sum is forfeited from the deposit paid under the contract as liquidated damages for default, breach and repudiation. Also, the Defendant proposed that the sum of $20,000.00 be refunded to the Claimants.

c. On the 14th November 2017, the Claimants filed their claim form, statement of case and supporting documents.

d. A process server and agent for the Claimants, Wendell Prime, on 31st January 2018, 9th February 2018, 17th February 2018, 5th March 2018 and 7th March 2018, attempted to personally serve the Defendant the said claim form and statement of case. The attempts to serve the Defendant were made at 17 Covigne Road, Diego Martin, which is the address stated on the claim form as being the Defendant's.

e. On the 13th March 2018, the Claimants filed a Notice of Application and a supporting affidavit pursuant to **Rule 5.12 of the CPR** for an order for service by a specified method. Also, an order extending the validity of the Claim for the purposes of service per **Rule 8.14(3) of the CPR**.

f. On the 16th March 2018, this Court granted the order extending the validity of the Claim Form and dispensing with personal service of the claim form and statement of case. It was ordered that service of the claim form and statement of case be effected by advertisement in a local daily newspaper of general circulation in Trinidad and Tobago once per week for two (2) consecutive weeks. On the 21st May 2018, an affidavit of service was filed. The affidavit of service said that the advertisement appeared in the Trinidad Express on Wednesday, 25th April 2018 and Wednesday, 2nd May 2018.

g. On 16th July 2018, the Claimants requested an entry of Judgment in default of appearance against the Defendant.

h. On the 16th July 2018, judgment in default of appearance was entered by the Registrar.

i. On 10th April 2019, the Claimants filed a Judgment Summons.

j. According to the Affidavit of Service by Wendell Prime filed on the 8th January 2020, he served the Defendant on the 16th November 2019 with a true and correct copy of the Notice of Adjourned Date dated and filed on the 15th

October 2019 together with a copy of the Judgment Summons and an affidavit of Susan Jeremiah-Alexander dated and filed on the 10th April 2019.

k. On the 31st December 2019, the Defendant was served with the filed Judgment Summons, an affidavit of Susan Jeremiah-Alexander and Judgment in Default of Appearance Order.

l. On January 8th 2020, the Defendant filed the Notice of Application to set aside Judgment in default of appearance which was listed for hearing on the 7th February 2020 but was rescheduled to 13th March 2020 on which date counsel for both parties made oral submissions and thereafter gave the undertaking to engage in settlement negotiations.

m. By Order dated the 13th March 2020, this Court ordered that the Judgment Summons dated and filed on the 10th April 2019 be stayed pending the outcome of the Notice of Application to set aside Judgment in default of appearance. The Court also adjourned the matter to 27th March 2020 for further consideration. However, due to the national lockdown from the 22nd March 2020 of all non-essential services in the country resulting from the Covid-19 pandemic, the hearing was adjourned to 27 August 2020.

n. At the hearing on 27th August 2020 the Court was informed that settlement negotiations were unfruitful whereupon the Court gave directions for the filing of submissions. On the 18th September 2020, counsel for the Claimants and Defendant filed submissions. On the 2nd October 2020, counsel for the Claimant filed reply submissions.

o. On the 6th November 2020, counsel for the Claimants and the Defendant appeared (virtually via MS Teams) and were heard on the application.

Law and Analysis

4. According to the Defendant's Notice of Application, the application to set aside the judgment in default of appearance is made pursuant to *"**Part 13.3 (1) (a) and (b)**… and the inherent jurisdiction of the Honourable Court to grant an Order".* However, the grounds of the application and the affidavit of the Defendant include facts that are relevant for due consideration per **Rule 13.2 of the CPR** and **Rule 13.3 of the CPR**, that is, the Defendant was not properly served with the Claim and Statement of Case.

5. Counsel for the Claimants submitted orally that the application was only made pursuant to **Rule 13.3 (1) (a) and (b) of the CPR**. Therefore, the **Rule 13.2 of the CPR** is not relevant. Accordingly, counsel for the Claimants' submissions were limited to **Rule 13.3 (1) (a) and (b) of the CPR.**

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

   Rule 13.2 of the CPR 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."

Rule 13.3 of the CPR provides:

*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 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."

Rule 12.3 of the CPR:

Conditions to be satisfied — judgment for failure to enter appearance

At the request of the claimant, the court office must enter judgment for failure to enter appearance if—

(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. (Rules 5.5, 5.9, 5.10 and 5.13 deal with how to prove service of the claim form and statement of case)

7. **Rule 13.2 (2) of the CPR** provides: "

   ***"**The court may set aside judgment under this rule on **or without an application**."*

   Therefore, because the Defendant's affidavit included the ground that he was not properly served with the Claim, the Court gave due consideration to the issue of personal service.

8. Thus, two issues arise for determination as follows:

   [1] Whether the Claim was properly served on the Defendant? and, if yes,

   [2] Whether the conditions in Rule 13.3 (1) (a) & (b) of the CPR 1998 were satisfied?

Issue [1]: Whether the Claim was properly served on Defendant

9. The importance of service of the claim form was noted in **Hoddinott v Persimmon Homes (Wessex) Ltd [2008]**[1]**:**

[1] **1 WLR 826, 821 at para 54**

"But service of the claim form serves three purposes. The first is to notify the Defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The second is to enable the Defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the Defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the Court to control the litigation process. If extensions of time for serving pleadings or taking other steps to justify, they will be granted by the Court. But until the claim form is served, the Court has no part to play in the proceedings…"

10. **Per Rule 5.1 of the CPR**, the general rule is that a claim form **must be served personally**.

11. **Rule 5.3 of the CPR – Method of Personal Service:**

(a) A document is served personally on an individual by handing it to or leaving it with the person to be served.

(b) A document is served personally on a company or other corporation by handing it to and leaving it with a director, officer, receiver, receiver-manager or liquidator of the company or other corporation.

12. Meanwhile, **Rule 5.12 of the CPR** gives the power of the Court to make an order for **service by a specified method**.

(1) The Court may direct, that a claim form and statement of case may be served by a method specified in the Court's order.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence—

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of case.

13. Service by a specified method is service on the Defendant in a manner specified by the Court in situations where it is difficult to locate the Defendant, or it is believed that the Defendant is evading service. Once service is effected in the manner prescribed by the Court, it is deemed that service takes effect at the time prescribed. For example, advertisement in a newspaper is one of the approved methods that the Court employs for allowing substituted service.[2] When making the application, the affidavit in support must contain, *inter alia*:

    a. The specific efforts made at serving the defendant personally; and

    b. Stating with great particularity that all practicable means of effecting personal service have been exhausted.

14. Therefore, a proper investigation must be made before making the application. The importance of personal service cannot be overstated since notification is a fundamental principle of the concept of justice.

15. The Claim Form stated the address of the Defendant as No. 17 Covigne Road, Diego Martin. The process server and agent for the Claimant went to that said address on five occasions to serve the Defendant. Having failed to effect personal service, the Claimant applied and was granted an order to dispense with personal service. **That application hinged on the process server's inability to locate and serve the Defendant at No. 17 Covigne Road, Diego Martin[3]** . The process server made all

[2] **Cook v Dey (1876) 2 Ch. D 218; Crane v. Jullion (1876) 2 Ch.D 220**
[3] Paragraph 7 of the affidavit of Vidivarty Ramkhalawan filed on 12th March 2020

reasonable and practicable efforts and used all means in his power to serve the Defendant[4]. Also, the process server verily believed that the Defendant was evading service.[5]

16. By affidavit filed on January 8th 2020, the **Defendant stated his address as LP#84 Covigne Road, Diego Martin, (formally of LP#77 Covigne Road, Diego Martin)**. He also deposed that he has had no sight of the claim form or statement of case. Nonetheless, he was personally served the Judgment Summons. However, it was noticed that the Judgment Summons incorrectly stated his address as #17 Covigne Road, Diego Martin, rather than #77 Covigne Road, Diego Martin. Also, he said that the Claimants would have been aware of his proper address because it is stated in the construction contract and letters, which were exchanged between the respective attorneys. He also said that he conducted a search on the Companies Registry via the Ministry of Legal Affairs website and found that the address for his company, Captivative Solutions, is listed as #77 Covigne Road, Diego Martin. He stated that despite the error of address on the Judgment Summons, the process server could still find him and serve him because the process server called, and they made arrangements to meet at a mutual location. He said that it is unreasonable that he was not personally served with the original proceedings since the Claimants had the means of doing so.

17. He also stated that he does not buy physical newspapers since he reads news articles online.

18. Counsel for the Defendant submitted that the failure to serve the original proceedings was due to the Claimants' inadvertence and/or error in inserting the incorrect address of the Defendant in all of its documents. Also, the Order by this Court on the 16th March 2018 was granted based on the representations and evidence of the Claimants' process server that all attempts had been made to find the Defendant. Yet, the failure

[4] Paragraph 9 of the affidavit of Wendell Prime filed 13th March 2018
[5] Paragraph 10 of the affidavit of Wendell Prime filed 13th March 2018

to serve was due to an error by the Claimants, who failed to state the correct address in their documents.

19. The position articulated by the Defendant save paragraph 14 above and the submission by Defence counsel are not unreasonable. The Claimants incorrectly stated the Defendant's address for service. The proper address should have been known to the Claimants since it appeared on various written communications between the parties and the contract. The address is incorrect and would not have been known to the Court when the application for substituted service was made. Therefore, it would appear that a proper investigation was not conducted, and all reasonable and practicable efforts were not exhausted.

20. Taking all the circumstances into context, this Court cannot be satisfied that the claim form and statement of case have been effectively served. In those circumstances, I find that the Claim was not properly served on the Defendant.

21. Therefore, I am mandated to set aside the default Judgment as conditions in **Rule 12.3 (a) of the CPR** have not been satisfied. This finding is dispositive of the matter. However, as discussed below, **Rules 13.3 of the CPR** would have been satisfied even if I am wrong.

Issue [2]: Whether the conditions in Rule 13.3 (1) (a) & (b) of the CPR 1998 were satisfied?

22. In **Rule 13.3 of the CPR,** the Court has the discretion to set aside a default judgment. However, **per Rule 1.2 of the CPR**, the Court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rule.

23. Under **Rule 13.3 of the CPR**, the test is twofold, and the Defendant must satisfy both limbs.

Promptitude

24. A Defendant who seeks to have a default judgment set aside is required to act as quickly as possible in filing the application to set aside the default judgment. The Defendant must also explain any delay from the time it was discovered that default judgment was entered and the eventual filing of an application to set aside the judgment. In **Nizamodeen Shah v Lennox Barrow**[6], Mendonça JA identified two categories of cases. The first category is cases where the Court can look at the facts and conclude that the Defendant acted as soon as reasonably practicable. The second category is cases where the Defendant must put some material before the Court on which the Court can conclude that the Defendant has acted as soon as reasonably practicable.

25. Counsel for the Claimant did not contest whether the Defendant acted promptly.

26. The evidence of the Defendant demonstrated the application to set aside was filed within seven days. On the 19th December 2019, he received a telephone call from a process server named Selwyn Mark, who informed him that he had documents. The Defendant was in Tobago and was scheduled to return to Trinidad at the end of the month. On the 31st December 2019, he called the process server. After that, he was served with The Judgment Summons, affidavit of Susan Jeremiah-Alexander and the Judgment in Default of Appearance Order. On the 2nd January 2020, he contacted Attorney-at-Law Ms Angela Mohammed, who indicated that she was not in the country until the 6th January 2020. Accordingly, the application to set aside was filed on the 8th January, 2020.

27. Therefore, I conclude that the Defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.

[6] **C.A. Civ. 209 of 2008**

A Realistic Prospect of Success

28. In **Anthony Ramkissoon v Mohanlal Bhagwansingh**[7] Mendonça JA described the test of realistic prospect of success as follows:

> *"Rule 13.3 (1) (a) requires a defendant to show that he has a realistic prospect of success. The rule directs the Court to determine whether there is a realistic as opposed to a fanciful prospect of success (see Swain v Hillman and Anor. [2001] 1 ALL ER 91). A 'realistic prospect of success' is therefore to be distinguished from prospects that are fanciful."*

29. The burden of proving this realistic prospect of success in defending the claim is on the Defendant.[8]

30. Further, concerning the Defendant's duty as a defence, Mendonça JA in **MI-5 Investigations v Centurion Protective Agencies Limited**[9] stated:

> *"Where there is a denial it cannot be a bare denial but it must be accompanied by the Defendant's reasons for the denial. If the Defendant wishes to prove a different version of events … he must state his own version".*

31. The object of the rule is not to conduct a mini-trial. It is designed to deal with cases that are not fit for trial. For example, it may be possible to say before the trial that the factual basis for the claim is fanciful because it is entirely without substance. For instance, the statement of facts is contradicted by all documents or other materials on which it is based.

32. **Richard Jaldoo v Malabar Farms Food Services Ltd CA P-243/2021**:

[7] **C.A. Civ. No S 163 of 2013 at para 9**
[8] **Marouf PVC Professional Construction Limited v Majilla Maria Mahabir CV2016-02807 at para 35**
[9] **C.A. Civ. 244 of 2008 at para 7**

"…where you have those two very competing statements both of which are on their face equally probable and there is nothing else to show otherwise on which the Court can place reliance, the Court cannot say that the Appellant's version does not give rise to a reasonable prospect of success.

There is no obligation on the part of the Appellant to provide evidence to corroborate his version of events and his affidavit in support of the application to set aside the judgment is evidence of his version of events."

33. In light of the foregoing, the following are the relevant facts before this Court:

Claimants' Case

a) The Claimants entered into discussions with the Defendant to construct an elevated floor adjoining the property to create a two-level extension to the existing property.

b) On or about the 16th October 2013, the Claimants received an estimate from the Defendant and signed by the Defendant. This estimate is annexed to the Claimants' Statement of Case and marked as "A" and essentially identifies the scope of works to be conducted by the Defendant, the material list required, the estimated costs (inclusive of contingency costs) and the estimated time for completion.

c) Further to the estimate, it was orally agreed between the Claimants and Defendant that should there be any cost overrun, it should not exceed One Hundred and Thirty-Five Thousand Dollars ($135,000.00).

d) On or about the 18th November 2013, the Claimants and the Defendant entered into an Agreement. This Agreement is annexed to the Claimants' Statement of Case and marked as "B" and includes clauses outlining the

description of services, scope of works, payment, term, free access to worksite, and default.

e) Pursuant to the Agreement, the Claimants made an initial down payment of Sixty-Five Thousand, Two Hundred and Fifty Dollars ($65,250.00). The cheque is annexed to the Claimants and Defendant's Statement of Case and marked "C". The cheque is dated 20th November 2013.

f) An addendum to the Agreement was orally agreed between the parties wherein the list of materials and services as stated in the estimate would be incorporated into the Agreement.

g) The Defendant commenced work on or about the 29th November 2013 and on or about the 3rd December 2013 the Defendant informed the Claimants that there would be a cost overrun due to an error in the estimation of the height of the roof.

h) Pursuant to a request by the Claimants the Defendant submitted an updated estimate in the sum of One Hundred and Forty-Eight Thousand, Seven Hundred and Fourteen Dollars ($148,714.00). The Claimants said the estimate remained unsigned and never altered the Agreement.

i) By letter dated 11th December 2013 and pursuant to clause 11 (D) of the Agreement, the Claimants terminated the said agreement with the Defendant due to being unable to agree to the updated estimate.

j) The Claimants assert that after the termination of the Agreement, the Defendant had completed the digging of three holes measuring 3ft x 3ft x 3ft for columns and two unfinished holes for columns. The Claimants have annexed to their Statement of Case and marked as "F" photographs of the works completed by the Defendant. The Claimants further assert that the

works completed by the Defendant were unfit for the intended purposes of creating a two-level extension to the property.

k) The Claimants then sought the services of another contractor to perform corrective works to restore the property to its original condition. The Claimants paid this contractor the sum of $1,000.00 for his services.

Defendant's Case

a. On or around October 2013, the Claimants came to the Defendant for consultation regarding construction work to be carried out in their home. After a site visit, a construction agreement was formalised by a contract dated 18th November 2013.

b. After the construction works began, the Claimants wished to have a variation of the contract, which incurred an additional charge.

c. The Claimants then suddenly excluded him and his workers from the premises and terminated the contract on the 11th December 2013, referring to the variation as "a rise in cost".

d. Regarding the work already completed or initiated, he instructed his then Attorney-at-Law to write to the Claimants. The letter was annexed to his affidavit and marked **"J.J.1"**. The letter is dated 18th December 2013 and stated that the Defendant commenced work on the 4th December 2013. On the 4th December 2013, the Claimants made inquiries of him on the costs which were likely to be incurred if the Claimants varied the contract to increase the height of all the columns from 9 feet to 15 feet. At the Claimants' request, the Defendant provided an estimate of the varied works but also indicated an alternative at a marginally increased cost. However, no agreement had been reached between the Claimants and himself on the varied works. The Defendant contended that the contents of the letter dated 11th December 2013 were a fabrication to disguise the Claimants' default.

e. Defendant said that he is entitled to the sum of $45,000.00. This sum is forfeited from the deposit paid under the contract as liquidated damages for default, breach, and repudiation. Also, the Defendant proposed that the sum of $20,000.00 be refunded to the Claimants.

f. By letter dated 11th March 2014, The Defendant, through his attorney-at-law, responded to a pre-action protocol letter of 17th February [2014]. The letter contained, *inter alia*:

   i. On the 1st December 2013 the Defendant visited the property to advise the Claimants on the start date when he was informed by the Claimants, specifically the First Claimant, that the roofing contractor had replaced the roof of the original front flat house at the height of 13 feet which was an increase of 6 feet from the height initially confirmed by both the Claimants and their roofing contractor.

   ii. Having regard to the increased height of the roof the, Defendant offered the Claimants two options: (1) that the design of the two-floor addition be varied to omit the cantilevered balcony or alternatively (b) the columns of the two-floor addition be increased to cater for the altered height of the original flat front house of 13 feet, to allow for the cantilevered balcony.

   iii. The Defendant made it clear, and the Claimants acknowledged that the second option would increase the contract's cost. However, the First Claimant requested that the Defendant prepare a revised estimate as she had only budgeted the sum of $135,000.00 for the construction works.

   iv. In accordance with the Claimants' request, the Defendant provided the revised estimate on the 2nd December. Although it was over the budgeted figure indicated by the Claimants, the Claimants instructed the Defendant to commence the said works and that they would arrange to source the money.

v. On the 3rd December 2013, the Defendant commenced the works in accordance with the contract as varied, and it was on the 7th December 2013 that the Claimants, specifically the First Claimant, advised the Defendant that she could not afford the increased costs occasioned by the varied contract and verbally terminated the said contract.

34. Looking at the evidence, the Court cannot determine the truth or falsity of the allegations made at this stage. There are two competing versions, and each alleges that conduct by either party resulted in breaches of specific clauses of the Agreement. The Claimant asserts that the Defendant varied the contract. The Defendant denies and countered that the Claimants' insistence increased the costs. There is nothing to show otherwise on which version the Court can place reliance. The Defendant denies the liability, and his affidavit contained reasons for the denial. At this stage, the Court cannot draw conclusions or inferences adverse to the Defendant, nor can the reasons for the denial be tested. The Court cannot say that the Defendant's version does not give rise to a reasonable prospect of success. Both versions alleged that there exist oral agreements or utterances which would need to be tested to determine their truthfulness.

35. Therefore, the Defendant has established a reasonable prospect of success.

Disposition

36. Accordingly, in light of the foregoing analyses, the order of the Court is as follows:

ORDER:

1. **That the Default Judgment entered on the 16th July 2018 in default of appearance be and is hereby set aside.**

2. **Consequently, the Judgment Summons issued on 10 April 2019 be and is hereby struck out.**

3. **Service of the Claim and Statement of Case filed on 14 November 2017 be and is hereby dispensed with on the basis that the Defendant is now fully aware of the contents thereof.**

4. **The Defendant shall file and serve his Defence on or before 25 July 2022.**

5. **Costs of the Defendant's Notice of Application filed on 8 January 2020 as well as all costs thrown away as a result of this order be and are hereby reserved until determination of this matter.**

6. **The Case Management Conference is fixed for 26 September 2022 at 11:45am in courtroom SF09.**

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Robin N. Mohammed
Judge