IN REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S-163 of 2013

BETWEEN

ANTHONY RAMKISSOON

Appellant

AND

MOHANLAL BHAGWANSINGH

Respondent

PANEL: A. Mendonca, J.A.
P. Jamadar, J.A.
N. Bereaux, J.A.

APPEARANCES:

Mr. L. Chariah and Ms. S. Nanan for the Appellant.

Mr. K. Ratiram for the Respondent

DATE OF DELIVERY: 19th July, 2013

Delivered by P. Jamadar, J.A.

JUDGMENT

Introduction

1. This procedural appeal concerns the refusal of a case management judge to set aside a default judgment entered on the 27th March, 2013. The application to set aside and for an extension of time to file a defence was brought pursuant to Rule 13.3, CPR, 1998. The relevant procedural history of this matter is as follows:

(a) By letter dated 22nd August, 2012 the claimant's attorney allegedly wrote to the defendant calling upon the defendant to repay the sum of $113,414.10. This sum was allegedly loaned to the defendant in order for him to construct the foundation for a house. The defendant denies receiving any such letter.

(b) On the 28th September, 2012 the claimant filed his claim form and statement of case together with a list of the documents he intended to rely on in support of his claim.

(c) On the 3rd December, 2012 the defendant was served with the claim form, statement of case and supporting documents.

(d) On the 10th December, 2012 the defendant filed his appearance. The defendant had 28 days from the 3rd December, 2012 to file his defence.[1]

(e) On the 14th December, 2012 the defendant's attorney wrote the claimant's attorney requesting a three month extension from the 3rd December, 2012 for the filing of the defence. On the 17th December the claimant's attorney agreed.[2]

(f) On the 20th February, 2013 the defendant filed an application together with an affidavit in support for an extension of time to file his defence pursuant to Rule 10.3 (9) CPR, 1998. The grounds were:

[1] See Rule 10.3 CPR, 1998.
[2] See Rule 10.3 (6) CPR, 1998.

(i) the defendant's attorney intended to be out of the jurisdiction from 22nd February to 4th March, 2013; and

(ii) the defendant's attorney was awaiting documents from the defendant in order to prepare the defence.[3]

(g) This first application for an extension of time was served on the 22nd February, 2013 and scheduled for hearing on the 4th March, 2013. On the 4th March, 2013 the case management judge considered the application and in the absence of the defendant and his attorney dismissed it with no order as to costs. The defendant's attorney discovered this on the 6th March, 2013 and received a copy of the court order on the 11th March, 2013.

(h) On the 21st March, 2013 the defendant's attorney filed a second application for an extension of time to file a defence.[4] The reason for non-filing or non-readiness of the defence remained the same as with the first application for an extension. No reasons were expressly given for the non-attendance of the defendant or his attorney on the 4th March, 2013, though the defendant's attorney's absence from the jurisdiction was likely a cause.

This second application was scheduled and heard on the 26th March, 2013. This application was dismissed with costs to be paid by the defendant after due consideration. No appeal was filed in relation to this order of dismissal.

(i) On the 26th March, 2013 the defendant himself was not in court, but stated that on that date: "I was informed by my attorney-at-law that the Claimant made a request for entry of judgment in default of defence".[5]

[3] This was the first application for an extension of time.
[4] Also pursuant to Rule 10.3 (9) CPR, 1998.
[5] Para. 3, affidavit in support of the defendant's application of the 9th May, 2013.

It is to be noted that in the first application for an extension the order sought and attached to the application was "a further extension of time to 3rd April, 2013 for the Defendant to file the Defence". And in the second application for an extension the order sought and attached to the application was "a further extension of time to 30th June, 2013 for the Defendant to file the Defence". Despite the order sought in the first application for an extension, no draft defence was attached to the second application for an extension and no affidavit of merit deposed to.

(j) On the 27th March, 2013 judgment in default of defence was entered.

(k) On the 9th May, 2013 this application to set aside the default judgment entered on the 27th March, 2013 and for an extension of time to file the defence was filed. The application was made pursuant to Rule 13.3 CPR, 1998. It was scheduled and heard on the 21st June, 2013. The application was dismissed with costs to be paid by the defendant. The judge gave extensive oral reasons which were filed for the purpose of this appeal on the 12th July, 2013.

2. The trial judge dismissed the application to set aside the default judgment on three bases:

(i) abuse of process;

(ii) no reasonable prospect of success – the proposed defence being characterized as a bare defence; and

(iii) unreasonable delay in making the application.

Abuse of Process

3. The judge was of the view that he having already dismissed the defendant's applications for extensions of time to file a defence and there being no appeals: "My order (of the 26th March, 2013) dismissing the application for an extension of time to file the defence effectively in my view shuts the door on the Defendant".[6] In the judge's opinion this was because: "Firstly where

[6] See para. 3 of the oral judgment.

the Defendant has not appealed that decision he impliedly accepts that he cannot have permission to file a defence and secondly that decision paves the way for judgment to be entered against the Defendant by the Claimant."[7]

4. It is clear that the request for the entry of a judgment on the 26th March, 2013 was as a consequence of the failed application (the second application) by the defendant for an extension of time to file a defence. The defendant and his attorney knew of the request on the 26th March, 2013 yet nothing was done in relation to the decision and order of the judge. This was clearly a procedural decision from which a procedural appeal would lie.[8] Such an appeal must be filed within seven days of the date of decision.[9] No such appeal having been filed, the judge's decision on the second application to extend time for the filing of a defence stood unchallenged. That is, the judge's ruling that no permission to file a defence in this matter stood unchallenged. It is clear that pursuant Rule 10.2 a defendant who wishes to defend all or part of a claim must file a defence. Further, extensions of time to file a defence beyond the single three-month period that can be agreed between parties, can only be granted by court order.[10]

5. It is clearly an abuse of the court process to seek an extension of time for the filing of a defence, fail on the application, choose not to appeal knowing that a request for default judgment is to be made and to sit by and wait for that judgment to be entered and then seek to set it aside and also an extension of time to file a defence. By whatever way one chooses to describe it, this is an attempt to circumvent the court process and avoid the consequences of an unchallenged decision and order of the judge. What the defendant is really seeking is an opportunity to file a defence and therefore an extension of time for so doing; which he has already sought twice and failed to obtain after due consideration.

6. This abuse of process effectively disposes of this appeal, which must be dismissed with costs. However, the trial judge also dealt with the application to set aside on the merits.

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[7] See para. 3 of the oral judgment.
[8] See Rule 64.1 (2), CPR, 1998.
[9] See Rule 64.5 (a), CPR, 1998.
[10] See Rule 10.3 (5), (6), (7) and (9), CPR, 1998.

Rule 13.3(1)

Rule 13.3(1), CPR, 1998 states 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 acted as soon as reasonably practicable when he found out that judgment had been entered against him."

Bare Defence

7. The trial judge dealt in great detail with this aspect of the issue.[11] The first thing one notes is that the affidavit in support of the application did not purport to verify the factual bases of the purported defence – but simply annexed it.

8. Rule 13.3 (1) requires that the defendant demonstrate that he "has a realistic prospect of success" in defending the claim. Part 12 CPR, 1998, deals with the general rules concerning applications for court orders. It provides that generally every application must be in writing;[12] it must include certification that any facts stated are true;[13] and where evidence in support of an application is required it must be contained in an affidavit.[14]

9. In this application the defendant did certify in the application that the facts stated in the defence are true, but did not depose to those facts in his affidavit. In my opinion, on an application pursuant to Rule 13.3 to set aside default judgments – the affidavit in support of the application must condescend to deposing to the facts which substantiate the requirements of both limbs of the rule. An affidavit of merits is required. It is not enough to rely on the certificate to the application and to simply attach the defence.

10. Further and in relation to a defendant's duty in relation to a defence, as Mendonca J.A. explained in **MI5 Investigations Ltd. V Centurion Protective Agency Limited**[15]: "Where

[11] See paras. 7 to 10 of the oral judgment.
[12] Rule 11.4, CPR, 1998.
[13] Rule 11.7, CPR, 1998.
[14] Rule 11.8, CPR, 1998.
[15] Civ. App. No. 244 of 2008, at para. 7.

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".

11. The particulars of the claim are set out in some detail at paragraphs 3, 4, 5, 6 and 7 of the statement of case. Furthermore, the documents in support of the claim, including the alleged handwritten estimate for meterial and labour given by the defendant to the claimant in October 2008,[16] were attached to the statement of case. Essentially the claimant is claiming the sum of $113,414.00 being money lent to the defendant at his request for the purpose of constructing the foundation of a house.

12. The defendant's defence is simply to deny the stated paragraphs and put the claimant to "proof of the sum" of money "alleged lent".[17] The only additional feature in the defence is a sentence in paragraph 3 which states[18]: "The Claimant also agreed to purchase a property for the Defendant at a price of $500,000.00. This never materialized despite numerous requests made by the Defendant to the Claimant".

13. If this was the defendant's "different version of events", then surely he must have reasons for his denials and particulars to properly support his contending version of events. None of these are apparent from the defence filed. It therefore does not meet the minimum requirements of Rule 10.5 CPR, 1998 and the judge was right to so hold. In this failure it also does not satisfy the requirements of Rule 13.3 (1) (a) of the CPR, 1998 and is therefore another reason why the application to set aside the default judgment was properly adjudged to have failed.

[16] See para. 3 of the statement case.
[17] See paras. 4 and 7 of the defence.
[18] Presumably in answer to paragraph 3 of the statement of case.

Promptitude

14. There is no need to go further and to decide whether the appellant acted "as soon as reasonably practicable".[19] On the facts the judge found that he had not. It is difficult to fault the judge in his analysis or conclusion, even if we may have determined this issue otherwise.

Conclusion

15. The appeal is therefore dismissed. The appellant should ordinarily pay the respondent's costs. These costs ought to be two-thirds of the costs assessed below (in the sum of $1,500.00). The parties will however be heard on the question of costs.

P. Jamadar
Justice of Appeal

[19] See Rule 13.3 (1) (b), CPR, 1998.