IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-01217

BETWEEN

FRANCIS VINCENT

Claimant

AND

MERLENE VINCENT

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

****

Before: Master Alexander

Appearances:

For the claimant: **Mr Asaf Hosein**

For the defendant: **Mr Kijana M De Silva**

REASONS

1. These reasons relate to an application to set aside default judgment (hereinafter "the judgment") entered against the first defendant for failure to file an appearance. The judgment was obtained on 16th June, 2008 for the payment of an amount of money to be decided by the court. The application to set aside was made on 13th July, 2011.

2. On 14th April, 2003, as a result of complaints made by the first defendant, the claimant was arrested for breach of a protection order (1602/02). The claimant appeared before the Couva Magistrate's Court where he was granted bail in the sum of $2,000.00. He attended court on a number of occasions until 3rd June, 2004 when the first defendant indicated that she no longer wished to pursue the matter and it was dismissed. The claimant claims that the first defendant knowingly made a false and malicious complaint against him for the purpose of having him

arrested and kept incarcerated and as a result of this, he was put to stress and inconvenience and suffered loss and damages. On 11th January, 2010 the matter was withdrawn against the second defendant by consent.

3. There are two issues to be resolved in this matter. The first issue is whether the court is satisfied that the judgment was properly obtained. If so, the second issue which arises is whether the first defendant has satisfied the court that she has a defence which has a realistic prospect of success and she acted as soon as reasonably practicable when she found out that the judgment had been obtained against her.

Whether the judgment was properly entered?

4. I have found that the first defendant had notice of the instant high court proceedings and, therefore, the judgment was properly obtained. The first defendant claims in her affidavit in support of the application that she was never served and that she first became aware of these proceedings when she received a letter dated 8 March, 2010 from the claimant's attorney at law advising her of the assessment date. In a supplemental affidavit filed on 16th November, 2011 she maintained that she was not served but stated that, "*I do recall being in my sister's shop on an occasion when the claimant walked in. The claimant had some papers in his hand and he threw them at me. Given the history between the claimant and me, I immediately walked out of the shop.*" It is clear that the person served was the one intended to be served. The relevant **Part 5.3 of the Civil Proceedings Rules, 1998 as amended** (hereinafter referred to as "**the CPR**") states that a document is personally served on an individual by handing it to or leaving it with the person to be served. Therefore, proper service was in fact effected on the first defendant and the judgment entered was a regular judgment.

PART 13 CPR APPLICATIONS

5. When making an application to set aside a judgment pursuant to **Part 13, CPR** a defendant must establish that he had a realistic prospect of success in the claim, and that he acted as soon as reasonably practicable when he found out that judgment had been entered against him. See

Nizamodeen Shah v ***Lennox Barrow***[1]***.*** Kokaram J in ***Des Vignes*** v ***Manning and Gordon*** H.C.1867/2007 explained:

> *Although, the overriding objective of the CPR is to deal with cases justly, it is now well accepted that the exercise of the discretion to deal with cases justly under rule 13.3 (1) CPR is limited to considering only those two factors. Accordingly our rule 13.3 (1) CPR lies in stark contrast to the English CPR equivalent in which the discretion is wider and the fact that the defendants have given no reason for a delay is, not always and in itself sufficient to justify the court in refusing to exercise its discretion and refusing relief. Barrow JA in* **Kenrick Thomas v RBTT Bank Caribbean Ltd***. made the following useful observations in reconciling the stricter approach advocated in our rules with the overriding objective:*
>
> > *"The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules. The language that the rule makers chose to frame Part 13.3 (1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and lawyers must now accept that CPR 2000 has gone significantly further that the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that."*
>
> *Therefore, if the Defendant fails to satisfy the Court of any one of the conditions set out in 13.3(1) the CPR his application fails. Accordingly,* **a Defendant can have a realistic prospect of success in defending the claim but because he failed to act as soon as reasonably practicable after he found out that judgment had been entered against him the judgment cannot be set aside***. Similarly the Defendant can act promptly, immediately after he found out that judgment had been entered, but if he has no realistic*

[1] *Nizamodeen Shah* v *Lennox Barrow Civ App No 209 of 2008 at page 3 para 11*

prospect of success in defending the claim the judgment remains. Both conditions are critical to the success of any application under Part 13.3 CPR. [Emphasis mine]

6. In ***Rohini Khan*** **v** ***Neville Johnston***[2] the Court of Appeal re-emphasized that applications to set aside judgments, like the instant one, are not subject to an implied sanction imposed by the rules and that a defendant did not have to satisfy the conditions stipulated in **Part 26.7, CPR** in addition to **Part 13.3, CPR**. See also ***The AG*** **v** ***Keron Matthews***.[3]

<u>Reasonable Prospect of Success</u>

7. The first defendant's obligation at this stage is to establish a realistic prospect of success in the claim, being a prospect of success that is real and not false, fanciful or imaginary. In circumstances where a decision was taken by her not to even enter an appearance, it cannot be sufficient for a court to exercise its discretion without some material from the first defendant as to the nature of the defence that she wishes to raise. She does not have to prove her case at this stage, merely to establish that the defence has a realistic prospect of success.

8. This term was defined by Moosai J in ***John*** **v** ***Mahabir***[4] et al as, "*[A] realistic prospect of success means that the defendant has to have a case which is better than merely arguable (International Finance Corporation v Utexafrica Sprl (2001) CLC 1361 and ED&F Man Liquid Products Ltd v Patel (2003) EWCA Civ 472). 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 had a real prospect of success, <u>the court should not apply the same standard that would be applicable at trial, namely the balance of probabilities</u>.* ***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.*" [emphasis mine]

---

2 *Rohini Khan* v *Neville Johnston Civ App No 56 of 2011*
3 *The AG* v *Keron Matthews* [2011] UKPC 38
4 *John* v *Mahabir* HCA No 866 of 2005

9. The first defendant has exhibited an affidavit in support of the instant application in which she states that she has a realistic prospect of success in defending the claim. The claim is for damages for: the procuring of an arrest warrant against the claimant; false arrest; wrongful imprisonment and malicious prosecution arising out of a complaint by the first defendant that was dismissed on 3rd June, 2004. She explains that the claimant breached the protection order by breaking the lock on the gate to the former matrimonial home and entering the compound. Further, he broke the lock of the door to the said home and went into the house. She claims that the claimant was arrested on the compound whilst he was committing the act and as such, her complaint was based on reasonable and probable cause.

10. At this stage, it is not required to test the full strength of the defence. The first defendant has exhibited to her affidavit the protection order, as well as an answer and cross petition and other documents from previous matrimonial proceedings, but has not brought any other evidence to the court to establish the truth of her version of the facts, such as the police report or other corroborating evidence. To my mind, this is not fatal. The question is would this evidence be available at trial since, as noted in ***John* v *Mahabir*** (supra), the court should also consider the evidence that could reasonably be expected to be available at trial. Further, it is to be noted that a case may be held to have a real prospect of success even if it is improbable.

11. The first defendant has satisfied the test laid down in ***John* v *Mahabir*** (supra), which is a lower standard than on a balance of probabilities. She has shown that she has a defence with a realistic prospect of success. I will now look at the second limb of **Part 13, CPR**.

As Soon as is Reasonably Practicable

12. As a rule, a defendant who wishes to apply to set aside a judgment under **Part 13, CPR** must act reasonably promptly, and where there is delay it must be explained in his affidavit of merit. In ***Thorn plc* v *MacDonald***[5] the following principles on delay were outlined:
    i. while the length of any delay by the defendant must be taken into account, any pre action delay is irrelevant;
    ii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a good reason to refuse to set the judgment aside;

[5] *Thorn plc* v *MacDonald* (1999) The Times, October 15, 1999

iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done;

iv. prejudice (or absence of) to the claimant should also be taken into account.

13. The first defendant denies that she was served with the claim form and statement of case filed on 4th April, 2008. She claims that the first time she became aware of these proceedings was when she received a letter dated 8th March 2010 from the claimant's attorney. However, she has not stated the date of receipt. It can be assumed that she received notice that judgment was entered against her (via this letter) sometime between 8th March, 2010 and 10th June, 2010. She asserted that she acted as soon as reasonably practicable when she found out that judgment had been entered against her. She retained Mrs Seecharan Scott, attorney at law, on 10th June, 2010.

14. A defendant against whom a judgment has been entered because of the failure to comply with the timelines set in the rules must act swiftly to set aside that judgment and do so in as reasonably practicable a way as possible. Of utmost relevance is the timeframe between learning of the judgment and the application to set aside. I accept that the conduct of the first defendant is material only after she became aware of the default judgment. In the instant case, however, the application to set aside was dated and filed on 13th July, 2011 over one year after retaining counsel and after finding out that an assessment was proceeding against her on the basis of a judgment. In these circumstances, did the first defendant act as soon as reasonably practicable and/or promptly?

15. Reasonably practicable is "*a much lower standard and it acknowledges that there will be … glitches in the attorneys' office ... that you may not get in … you might see an attorney and that is not his area of the law, he doesn't want to take it and he refers you to another attorney; you might go with no documents, it might be your first court matter, he sends you back, he fixes an appointment for another two, three days .. It's a less trying standard than, say, if you have to have an exceptional reason or a very good reason. … 'reasonable practicable' seems to me to suggest a more mundane type of standard that you will look at these things and the way things might work*." Per Kangaloo JA in ***Rohini Khan*** (supra) at page 4.

16. In ***Nizamodeen Shah*** (supra) Mendonca JA in commenting on an application that was made at least 2 months after it was found out that judgment was taken up stated, "*[T]his delay does not fall into that category of case where you can simply look at it and say that the Appellant acted as soon as reasonably*

practicable after finding out that the judgment was entered. In those circumstances what then is the obligation on the Appellant. The obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable."

17. The first defendant insists that she has acted as soon as reasonably practicable. She claims to have secured legal representation shortly after receiving notice of the assessment proceeding against her and/or finding out that judgment was entered. She provides no date when she received actual notice. She was advised by her attorney at law that the delay in finalizing her affidavit was occasioned by the need to search the proceedings and to obtain office copies of both these proceedings and the former matrimonial proceedings. No mention was made of any attempts to secure the requisite documents from the claimant's attorney or of any administrative difficulties in her attorney's office that stymied the process. The delay of over 1 year was occasioned by the waiting on office copies.

18. Given the above, I bear in mind the Court of Appeal decision of ***Rohini Khan*** (supra) where it was noted that in terms of satisfying the overriding objective to do justice between the parties, the first limb of the **CPR Part 13.3** is more important and as such, will carry more weight. Kangaloo JA stated that, "*When the language is such as "reasonably practicable," when that is the language that is used, then it gives you a range of behaviour on the part of the person, but if the person satisfies what can be considered the more important limb of 13.3 and you get to the other one and you find that he is, all right, he is within the range of behaviour, maybe he is at one end or the other, but he is within the range, in other words, <u>he didn't take too long, you know what he did, he could have done a little quicker, but he did it fairly quickly and he put it in the hands of his attorneys, who thereupon had difficulties</u>, then why should he be deprived of having his day in court?*"[6]

19. Kangaloo JA also further explained, "… *So they did everything they could, they put it in the hands of their attorneys. And if the attorneys, thereafter, have difficulties, they acted as soon as reasonably practicable after finding out about … now, <u>I am not saying that the attorneys could sit on it forever and a day, but if the attorneys go on affidavit and say what the problems are, and the problems are understandable, although understandable problems sometimes could be avoided</u>, why should the litigant suffer?*"[7] [Emphasis mine]

[6] Court of Appeal Transcript dated 18th April, 2011, page 7
[7] Court of Appeal Transcript dated 18th April, 2011, page 3

20. It must be noted that although there is no prescribed timeline to define the meaning of "as soon as reasonably practicable"[8], this cannot be used to cover excessive and/or unreasonable periods of delay such as in the instant case. I accept also as the Court of Appeal has emphasized that the applicant does not have to account and give an explanation for every day of the delay, however, affidavits cannot be thin but must give some particulars. In the instant case, the court was not provided with any affidavit from the attorneys of the first defendant explaining the delay in the retrieval of office copies or with respect to any administrative issues in the attorney's office. It was her responsibility, as the litigant seeking to set aside this judgment, to put in evidence all the steps taken to satisfy the court that the fault was due to administrative or other hurdles. Simply saying that she was awaiting office copies for over a year, without more, is not enough. Whilst I accept that the first defendant has provided some reasons for the delay in making the application, including that she was only made aware of the proceedings at the assessment stage, in my view, the present matter does not fall into the category of cases described by the learned judge in ***Rohini Khan*** (supra). She has failed to pass the threshold test for 'reasonably practicable'.

21. Thus, in these circumstances, the first defendant has not satisfied the requirements of the **CPR Part 13.3(1) (b)**.

22. It is, therefore, ordered that -
    1. The application to set aside the default judgment is dismissed.
    2. Costs of the application in the sum of $1,000.00 to be paid by the first defendant to the claimant.

Dated 24th May, 2012

Martha Alexander

Master (Ag)

Judicial Research Assistant: Ms Kimberly Romany

---

[8] See *Louise Martin (as widow and executrix of the estate of Alexis Martin, deceased)* v *Antigua Commercial Bank* ANUHCV 1997/0115 and *Rohini Khan* v *Neville Johnston* CV 2009-02311 (unreported) at pages 2-3