

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: **CV2018-02390**

Between

EVOLVING TECHNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED

Claimant

And

ENMAN SERVICES LIMITED

Defendant

Before Master Sherlanne Pierre

Date of Delivery: 25th July, 2019

Appearances:

Claimant: Mr. Haresh Ramnath

Defendant: Ms. Deirdre Maharaj

DECISION

1. The defendant has applied to set aside the judgement in default of defence obtained by the claimant against it following its failed application at first instance and on appeal disputing the court's jurisdiction. The defendant submits that the claimant's claim stood automatically struck out before judgment was entered pursuant to Part 8.13 (5) of the Civil Proceedings Rules (1998) as amended (CPR).

2. The procedural chronology is set out hereunder:
 - I. The claim form and statement of case were filed on 6th July, 2018;
 - II. The defendant entered an appearance on 30th July, 2018 in which it indicated that it was served with the claim form and statement of case on 17th July, 2018.¹ This means that the defence was due 28 days thereafter, that is, on or before the 14th August, 2018;

¹ Service had been effected by registered mail, however, the defendant acknowledged service prior to the expiration of 14 days thereafter.

- III. On 10th August, 2018, (prior to the date when defence was due) the defendant filed an application disputing the court's jurisdiction;
 - IV. On the 19th September, 2018, the defendant's application of 10th August, 2018 was dismissed and the court ordered that the 'matter to take its usual course';
 - V. On the 27th September, 2018 the defendant appealed that decision and the appeal was dismissed on the 17th December, 2018; and
 - VI. On the 19th February, 2019 the claimant filed its request for judgment in default of defence which was entered on the 30 April, 2019;
3. This court declines to set aside the judgment on the following basis:
- I. Rule 8.13(5) applies only where a claimant who can enter default judgment does not do so within six months of becoming entitled to do so. In circumstances where a defendant makes an application contesting the court's jurisdiction, the time for filing a defence is extended by the rules therefore the period which falls between the filing and determination of such application cannot be considered for the purposes of rule 8.13(5). Six months had therefore not elapsed by the time the claimant applied to enter judgment in default of defence.

4. It is convenient to set out the relevant Parts of the CPR here:

Rule 8.13(5) Where a claim form is duly served and a defendant either does not enter an appearance or file a defence and the claimant who can, does not apply for judgment pursuant to Part 12 within 6 months of becoming entitled to do so, the claim (including a counter-claim, ancillary claim and other similar claims) shall be automatically struck out.

Rule 9.7(1) A defendant who wishes-

- a) *to dispute the court's jurisdiction to try the claim; or*
- b) *to argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*

Rule 9.7(3) An application under this rule must be made within the period for filing a defence.

Rule 9.7(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including-

- a) *striking out any statement of case;*

- b) *setting aside service of the claim form and statement of case; and*
- c) *discharging any order made before the claim was commenced or the claim form served.*

Rule 9.7(7) if on application under this rule the court does not make a declaration, it-

- a) *must make an order as to the period for filing a defence; and*
- b) *may treat the hearing of the application as a case management conference.*

Rule 9.7(8) where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph (7) (a) and such period may only be extended by an order of the court.

Rule 10.3 (1) the general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of case.

Rule 10.3(10) the general rule is subject to rule 9.7.

Rule 12.4 at the request of the claimant the court office must enter judgment for failure to defend if-

- a) *The court office is satisfied that the claim form and statement of case have been served; or*
- b) *an appearance has been entered; and*
- c) *the period for filing a defence has expired;*
- d) *the defendant-*
 - I. has not served a defence to the claim or any part of it;*
 - II. where the only claim is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or*
 - III. has not satisfied the claim on which the claimant seeks judgment; and*
- e) *(where necessary) the claimant has the permission of the court to enter judgment.*

Rule 12.5 (1) A claimant obtains default judgment by filing a request (Form 6).

Rule 12.5(2) The judgment takes effect from the date that all requisite documents have been filed.

The Defendant's submissions

5. The defendant submits that the time for filing a defence expired on 14th August, 2018 given that time runs during the court vacation for filing statements of case². It submits that the claimant could and was entitled to enter judgment against it within 6 months from the 14th August, 2018, that is, up to 14th of February, 2019 but thereafter the claim stood automatically struck out. Given that the claimant's request for judgment was made on the 19th of February, 2019, the request was made after the claim was struck out and therefore the purported judgment was irregular. It further argues that the fact that the court's jurisdiction was challenged was not an impediment to the claimant applying for default judgment.

The Claimant's submissions

6. The claimant submits that it did not 'sit on its right to request judgment' but was awaiting the court's position on the question of jurisdiction and that this constituted a procedural impediment which prevented it from applying for judgement before the 17th December, 2018, the date on which the defendant's appeal was dismissed. Given that it could not enter judgment because of this procedural impediment prior to the 17th of December, 2018, the claimant submits that the default judgement is therefore properly entered.

Discussion

7. The rules have specifically set out that where a defendant disputes the court's jurisdiction, the relevant period for the filing of a defence is no longer 28 days but is extended until the time fixed by the court determining the jurisdiction issue.
8. To my mind therefore, the conjoint effect of rules 10.3(10) and 9.7(8) is that the filing of an application disputing jurisdiction has the effect of protecting the defendant against the risk of default judgment being entered against it during the pendency of its application. In respect of the claimant, it means that rule 8.13(5) has no application during this period because the operation of that rule is hinged on whether the claimant can enter default judgment and clearly until the court determines the jurisdictional application, it cannot so do.
9. On the 19th of September, 2018 the court dismissed the defendant's application and directed that, 'the matter to take its usual course'. Where, as in this case, the court does not make a declaration that it has no jurisdiction, rule 9.7(7) (a) states that the court must

² Part 2.9(1) of the CPR

make an order as to the period for filing a defence. This stands to reason given that the period for filing a defence is extended until the time specified by the court. No period was specified by the court for the filing of a defence as required by the rules, an aspect which may have escaped attorneys then.

10. The court saying the matter to take its usual course, could not mean, however, that the defendant had to file its defence within 28 days of being served with the claim form and statement of case, that is, by the 14th August, 2018, which would have already passed. Further, rule 9.7(8) clearly says that the time for filing of the defence was extended when the application disputing jurisdiction was made. The defendant invites this court to take 14th August, 2018 as the date on which the time for filing the defence expired, however, for all intents and purposes, the 14th of August, 2018 became irrelevant. That would not be the appropriate date from which time began to run. Time can only be taken to have begun to run again from the 19th September, 2019.
11. Rule 8.13(5) says that where the claimant who can, does not apply for judgement within six months of becoming entitled to do so, the claim is struck out. While no period was specified by the court for filing of the defence, what is clear is that by the time the claimant entered default judgment on 19th February, 2019, six (6) months had not elapsed from the 19th September, 2018, when the court disposed of the jurisdictional issue.
12. Then there is also the matter of the filing of the appeal. Until and unless an order at first instance is set aside, the order stands. The defendant appealed the Judge's order. What was the effect of the filing of the appeal on the running of time? The general rule is that the filing of an appeal does not operate as a stay. Rule 64.16 states, except so far as the court below or the court or a single judge may otherwise direct, an appeal does not operate as a stay of proceedings under the decision of the court below. I think that the judge having directed that the matter take its usual course, and the defendant not having applied for a stay, that time ran notwithstanding the filing of the appeal. It would mean that time ran against the defendant to file its defence and time ran against the claimant for the purposes of r.8.13 (5).

13. This is not a matter which falls within Smith v Bartholomew³ in which the court held that an application for an extension of time to file a defence is a procedural impediment to entering default judgment. When the Court of Appeal considered this decision in Gillard v AG⁴ it did not extend its application. Smith establishes that while there is a pending application to extend time for filing a defence, rule 8.13(5) does not apply. There is no such application in this case.

14. The defendant's application to set aside the judgment in default of defence was made solely on the basis that the claim was automatically struck out. The defendant has not advanced by way of an affidavit of merits that it has a realistic prospect of success in the claim and that it acted as soon as reasonably practicable when it found out that judgment had been entered against it. In the circumstances, I find that the claim was **not** automatically struck out under r.8.13 (5) and dismiss the defendant's application. The defendant shall pay the claimant's costs of the application in the sum of three thousand five hundred dollars (\$3,500.00) and that there be a stay of execution of 14 days.

Sherlanne Pierre

Master

³ Procedural Appeal No. 135 of 2012 Dr. Steve Smith v. Professor C. Bartholomew et. anor.

⁴ Civ. Appeal P-192 of 2013