THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-00567

BETWEEN

VASHTI SINGH

Claimant

AND

ORAL SOOKDEO

Defendant

Before Master Sherlanne Pierre

Date of Delivery: 26 October 2020

Appearances:

Claimant: Mr. Mustapha Khan instructed by Ms. Kristin Khan
Defendant: Mr. Faraaz Mohammed

DECISION

1. This was the defendant's application to set aside the claimant's judgment in default of appearance for an amount to be decided by the court.

2. The claimant sued the defendant-contractor in contract and negligence. She alleged that he failed to complete work on her dwelling house pursuant to their oral agreement and, what he did complete, did not meet industry standards.

3. Prior to entering the default judgment which was the subject of the instant application, the claimant made two requests to enter default judgment against the defendant.

4. The first request for judgment was queried by the Registrar for non-compliance with **Rule 5.5(1) of the Civil Proceedings Rules 1998**[1] ("**the CPR**") which deals with proof of personal service. The claimant did not satisfy the Registrar's query and withdrew the request. The claimant thereafter made a second request after purportedly leaving the claim form and statement of case with the defendant's mother. That second request was also subsequently withdrawn.

5. The third request ultimately resulted in default judgment being entered before the Registrar. However, it was first referred to a Judge pursuant to **Rule 5.10(4) of the CPR**[2] to consider whether the claimant's affidavit of service setting out 'service' on the defendant's mother, satisfactorily proved service. Wilson J. ordered that the claimant serve the originating process by a specified method and directed that '*Service is to be effected on the defendant by registered mail at No. 30 Grant Road Iere Village Princes Town on or before the 22 November, 2020*.'

6. The claimant posted the originating process together with a copy of the Judge's Order by registered mail on 11 November 2020. Judgment was entered for the claimant on 17 December 2020 and the assessment of damages fixed before this court for 15 February 2021.

7. At the assessment hearing on 15 February 2021, the defendant's attorney indicated his intention to apply to set the judgment aside. The court directed that any such application be filed on or before 12 March 2021 and gave consequential directions for affidavits and submissions in opposition and reply.

8. In support of his application to set aside the default judgment, the defendant submitted that:

[1] **Rule 5.5(1) of the CPR**: Personal service of any document is to be proved by an affidavit sworn by the server of the document stating—
(a) the date and time of service;
(b) the precise place or address at which it was served;
(c) precisely how the person served was identified; and
(d) precisely how service was effected.

[2] **Rule 5.10(4) of the CPR**: If the court is not satisfied with the method of service the court office must fix a date, time and place to consider making an order under rule 5.12 and give at least 3 days' notice to the claimant.

a. Default judgment was wrongly entered because the order of Wilson J. required that the papers were to reach the defendant by 22 November 2020 and they did not until January 2021. Therefore, there had not been service in compliance with the Order;
b. Alternatively, the default judgment was wrongly entered because the records of the postal service established that the papers had not been delivered on the defendant until January 2021, that is, after default judgment had been entered;
c. In any event, the defendant had a realistic prospect of success on his proposed defence in which he disputed material terms and conditions of the oral agreement and that he had executed sub-standard work;
d. The defendant acted as soon as reasonably practicable in applying to set the judgment aside after he learnt that the judgment had been taken up; and
e. The defendant would suffer prejudice if the judgment were not set aside.

9. In response, the claimant submitted that:
a. The claimant had complied with all procedural requirements of **Part 12 of the CPR** and therefore, the defendant was not entitled to have the judgment set aside *ex debito justitiae*;
b. The defendant had not shown he had a realistic prospect of success as his evidence did not come up to proof; and
c. The defendant did not act as soon as reasonably practicable having filed his application one month and 9 days after he said he found out about the judgment.

10. The main question for determination was whether this court should set aside the claimant's default judgment. There were three sub-issues for determination:
a. Was judgment wrongly entered? If yes, then the court must set it aside.[3]
b. If not, did the defendant have a realistic prospect of success in the claim?; and

[3] **Rule 13.2 of the CPR**: *(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.

c. Did he act as soon as reasonably practicable when he found out judgment was entered against him?

DISPOSITION

11. The court decided the issues as follows:

a. Judgment was *not* wrongly entered because the claimant had satisfied all procedural requirements for entry of judgment in default of appearance including compliance with the order for service by registered mail. The defendant was, therefore, not entitled to have the judgment set aside *ex debito justitiae*.

b. The defence raised by the defendant, that the oral variations to the oral contract resulted in cost overruns which were not met by the claimant and that his standard of work met industry standards, if proven to be true, had a realistic prospect of succeeding in the claim for breach of contract and negligence.

c. In addition, the parties were in discussions from the date the defendant was served in January 2021 up to 12 February 2021. The latter date was a Friday and the parties appeared before the court on the Monday for the assessment of damages. At the Monday hearing, the court gave directions for the filing of the subject application with which the defendant complied. Therefore, the defendant had acted as soon as reasonably practicable in applying to set aside the judgment.

12. In the circumstances, the judgment in default of appearance was set aside with no order as to costs. There was no order as to costs, the court having been satisfied that the defendant had not been served with the proceedings before judgment was entered.

DISCUSSION

13. It is now necessary to set out the relevant aspects of **the CPR**:

Alternative methods of service

Rule 5.10 (1) Instead of personal service a party may choose an alternative method of service.

(2) Where a party chooses an alternative method of service and the court is asked to take any step on the basis that the claim form and statement of case have been served, the party who served the claim form and statement of case must prove service to the satisfaction of the court by filing an affidavit—

(a) giving details of the method of service used; and

(b) showing that—

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he would have been able to do so; and

(c) stating the time when the person served was or was likely to be in a position to ascertain the contents of the documents.

(3) The court office must immediately refer any affidavit filed under paragraph (2) to a master or judge who must consider the evidence and endorse on the affidavit whether it satisfactorily proves service.

(4) If the court is not satisfied with the method of service the court office must fix a date, time and place to consider making an order under rule 5.12 and give at least 3 days' notice to the claimant.

Power of court to make an order for service by a specified method

Rule 5.12 (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.

Proof of service by specified method

Rule 5.13 Service must be proved by an affidavit by the person who served the document in accordance with the court's order showing that the terms of the order had been carried out.

Deemed date of service

Rule 5.17 (1) Where a claim form has been served by pre-paid post, it is deemed to be served, unless the contrary is shown, on the fourteenth day after it was posted.

(2) If a claim is sent to a party's attorney-at-law who certifies that he accepts service on behalf of his client, the claim is deemed to have been served on the date on which the attorney-at-law certifies that he accepts service.

(3) Where an appearance is entered, whether or not the claim form has been duly served, the claimant may if he so wishes treat the date of entering the appearance as the date of service.

Conditions to be satisfied—judgment for failure to enter appearance

Rule 12.3 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.

Cases where the court must set aside judgment entered under Part 12

Rule 13.2 (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.

Cases where the court may set aside or vary judgment entered under Part 12

Rule 13.3 (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.

(2) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

Was judgment wrongly entered?

14. The defendant submitted that the order of Wilson J. meant that the papers were to have reached the defendant by 22 November 2020 and there was non-compliance with that Order. It would have been unusual to request a claimant to guarantee the date that the papers would reach the defendant through registered post; that is ordinarily a matter outside a party's control once she releases the documents into the care of the postal service. It is one of the reasons **the CPR** provides for a deemed date of service when service is effected by registered mail. I did not understand the judge's Order to mean what the defendant said it did. A literal and plain reading of the Order was that the claimant was to effect service on or before 22 November 2020 and if the court meant that the papers were to have reached the defendant no later than 22 November 2020, the Order would have clearly said so. I, therefore, accepted that the service on 11 November 2020 complied with the order for service by a specified method[4].

15. Fourteen days after the date of posting was 25 November 2020 which date was treated as the deemed date of service[5]. The period for entering an appearance elapsed eight days after the deemed date of service.[6] The claimant's request for judgment in default of appearance was made on 17 December 2020, that is, after the period for entering an appearance. At the time the request for default judgment was made, there was no evidence that the papers had been returned undelivered to

[4] See affidavit of Melissa Khan filed on 16 November 2020

[5] A material part of the Registrar's default judgment stated: 'Y*ou[the defendant] have not filed an appearance to the claimant's claim form and statement of case deemed to have served (sic) on you on the 25th November, 2020 and the time for so doing has expired.'*

[6] Rule 9.3 (1 of the CPR

the claimant.

16. The defendant deposed that he had received the documents on 19 January 2021 and alternatively, the records of the Trinidad and Tobago Postal service (TTPOST) showed that the papers were delivered on 22 January 2021. He submitted that (whether one uses the 19th or 22nd of January 2021) he had therefore adduced evidence which rebutted the presumption of the deemed date of service of 25 November 2020. The claimant's default judgment predated the date of service and was, therefore, wrongly entered.

17. The England and Wales Court of Appeal (EWCA) decision of **Akram v Adam**[7] is persuasive authority that the relevant time for determining whether judgment was wrongly entered is at the time the default judgment was entered. If at the time the default judgment was signed, there was proof that a claimant had followed all procedural steps and there was nothing contrary known to the claimant or the court, such a default judgment was not wrongly entered[8]. The Court cited with approval, the position expounded by Orr LJ in a dissenting judgment in **Thomas Bishop Ltd v Helmville Ltd**[9]:

> [31] …"*... the point of time to be looked at in deciding whether the judgment was regularly obtained is the time when the judgment was given or signed, and that if at that time there is nothing known to the court (or to the plaintiff whose duty it would be to communicate it to the court) which indicates that the relevant process has not been delivered in the ordinary course of post, it is to be deemed to have been so delivered for the purposes of that judgment, although it will be open to the defendant to apply to have the judgment set aside in the court's discretion on the ground, inter alia, that he was not served or was not served in time."*

18. The EWCA therefore held as follows:

[7] [2004] EWCA Civ 1601, [2005] 1 All ER 741
[8] Akram v Adam, ibid at paragraph 31
[9] [1972] 1 All ER 365 at 376-377

[34] In the present case on the findings of the district judge the judgment was regularly entered because it was posted to the defendant at his usual residence and the district judge made no finding that the claim form was returned undelivered. The situation might have been different if she had found that the claimant deliberately suppressed the claim form when it arrived by post in [the defendant's] house. It follows that on the ordinary interpretation of the relevant provisions of the Civil Procedure Rules supported by the judgment of this court in Smith v Hughes…this judgment could only be set aside as a matter of discretion pursuant to CPR 13.3…

19. Examples of judgments wrongly entered would be where the mail was returned undelivered or the mail was sent to the wrong address or the claimant failed to file an affidavit of service which set out all relevant particulars or the defendant had satisfied the judgment debt before date of entry. Where, as here, the claimant has shown proof of service in compliance with the method specified by the court, and at the time the Registrar entered default judgment nothing contrary had surfaced, she was entitled to have her judgment treated as one which was regular or properly obtained. In the circumstances, I found that the judgment was not wrongly entered and the defendant was therefore not entitled to have the judgment set aside *ex debito justitiae*.

20. The defendant was then required to show that he had a real prospect of success in defending the claim and that he acted as soon as reasonably practicable when he found out that judgment had been entered against him.

Did the Defendant have a reasonable prospect of success?

21. It was clear from the supporting affidavits that the parties had agreed for the defendant to do some construction to the claimant's dwelling house. Both sides have put forward different reasons as to why the work ended, with the claimant saying the defendant wanted more money to complete the work and that he abandoned it to take on another job. The defendant's proposed defence was that the claimant had made various oral requests and variations to the scope of works which affected the original costs. She could not meet the costs and therefore, he stopped the work. He also stated that the claimant's complaints about the quality of his work surfaced for

the first time with the filing of the claim. It was noted that there was one material aspect in which the parties' evidence was consistent and that was, that the defendant required more money to complete the job.

22. The parties differed as to material aspects of the agreement such as: when the contract was entered into; the time for completion; whether variations were made to the original agreement and if so, when and in respect of what works; what monies were paid and for what purpose; when the works ceased and the reasons for same. Their respective positions were based primarily on oral communications. There was no written agreement.

23. The claimant submitted that the original oral agreement was subsequently reduced into writing and attached a copy of a paper writing to her statement of case. That document bore the title 'Cost Summary Labour and Material' and was undated and unsigned. It did not set out a date of commencement, date of completion, when payments would become due and/or payable - the cash flow projection page was blank - nor the total consideration for the contract. It was a printed document which contained insertions in manuscript of figures and other jottings and the word 'paid' next to some of the figures. It was unclear who was the author of the insertions and when they were made.

24. Both parties relied on bank statements. The claimant's bank statements showed cheques in favour of the defendant but there was no indication what those cheques were for, whether for example they were meant to cover labour and/or material and in respect of which tranche or stage of the work. The defendant's bank statements showed direct purchases during the relevant period to various hardware, electrical, building supplies and plumbing shops. Neither side had cogent written documentation in support of their respective assertions.

25. Zuckerman on Civil Procedure suggested the approach a court should take in circumstances like these. He stated:

"*It is important to appreciate the limitations on the court's ability to investigate issues of fact on such applications. The application process is simply unsuited to*

"mini-trials" to probe genuinely conflicting witness or expert evidence. Consequently, unless it is clear that the defendant's evidence cannot be believed, the court would tend to conclude that there is a real prospect of successfully defending the claim."[10]

26. I found that there was nothing in the defendant's version of events which was inherently improbable and if his version is correct, then he would have a realistic prospect of success in the claim.

27. However, there was the second limb which must be satisfied by the defendant, whether he acted as soon as reasonably practicable after he found out judgment had been entered against him.

Did the defendant act as soon as reasonably practicable?

28. The claimant submitted that the defendant was aware of the litigation because of the two previous attempts to serve him. However, the first affidavit of service did not meet the requirements for proof of service under **the CPR** and Wilson J. had not been satisfied as to service on the defendant through his mother. In the circumstances, I was not prepared to accept that the defendant had notice/service of the proceedings before 19 January 2021.

29. When the defendant learnt of the judgment on 19 January 2021, he retained attorneys who engaged Counsel for the claimant immediately thereafter with a view to having the claimant withdraw the default judgment. Counsel for the claimant responded in writing that he would so withdraw and the defendant proceeded on the understanding that the judgment would be withdrawn. It turned out, however, that Counsel for the claimant had omitted the word '*not'* in a key sentence in his letter of response. When the error was discovered, the parties then engaged in exchanges with a view to having the judgment set aside by consent.

30. However, by 12 February 2021, it was clear between the attorneys that there would be no withdrawal or setting aside by consent. In a letter of that date, the claimant

[10] Zuckerman on Civil Procedure: Principles of Practice 4th Ed at paragraph 9.24

invited the defendant to make his application if he were so minded.

31. The parties were therefore in discussions from the date the defendant was served on 19 January 2021 up to 12 February 2021 with the specific purpose of obviating the need for the instant application. Thus, they were engaged in advancing the overriding objective of saving expense, judicial time and the court's resources. In the circumstances, a reasonable time for the defendant to make its application would have been from Friday 12 February 2021. The parties appeared before this court on the next working day, Monday 15 February 2021, at which time, the court gave directions for the filing of the application with which the defendant complied.

32. I, therefore, found that the defendant acted as soon as reasonably practicable in making the application.

33. In the circumstances, the judgment in default of appearance entered on 17 December 2021 is hereby set aside. Having accepted that the defendant was served in January 2021 after default judgment had been taken up, there shall be no order as to costs.

Sherlanne Pierre
Master