THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-00634

BETWEEN

RAYMOND KENRICK LA FORTUNE

Claimant

And

RICHIE REBEIRO

First Defendant

KERRON REBEIRO

Second Defendant

Before the Honourable Mr Justice Robin N Mohammed

Date of Delivery: 30th June 2023

Appearances:

Ms. Zelica Haynes-Soo Hon instructed by Ms. Raisa Caesar for the Claimant

Mr Shawn A. Roopnarine instructed by Roopnarine & Co for the Second Defendant

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DECISION ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

I. INTRODUCTION & BACKGROUND

[1] Before this Court is the Second Defendant's Notice of Application pursuant to **Part 13.2(1) (a) of the Civil Proceedings Rules 1998, as amended** ('CPR') to set aside a Default Judgment entered against him due to his failure to file a Defence to this Claim in the prescribed time.

[2] The Claim was issued on 14th February, 2020 supported by Statement of Case wherein the Claimant sought the following reliefs against the Defendants:

(i) General Damages inclusive of aggravated damages for personal injuries and consequential loss caused by the trespass to the Claimant and assault and battery committed by the First and Second-Named Defendants on the Claimant;
(ii) Special damages due the trespass to the Claimant's person and assault and battery committed by the First and Second-Named Defendants;
(iii) Interest at a rate and for the period as the Court may deem just in the circumstances pursuant to section 25 of the Supreme Court of Judicature Act Chapter 4:01 of the Laws of Trinidad and Tobago;
(iv) Costs;
(v) Such further and/or other relief that the Honourable Court deems just.

[3] On 22nd February 2020 the Claim was served on the Defendants. In response thereto, the Second Defendant entered an appearance as a litigant in person on 2 March 2020. However, he failed to file a Defence in the time required by **Rule 10.3 (1) of CPR**. In this regard, the Claimant sought permission and obtained Default Judgment against the both Defendants on 29 July 2020 having satisfied the requirements of **Rule 12.4 of the CPR**.

[4] On 25th November 2020, the matter was set for Assessment of Damages before a Master but was later rescheduled to 11th February, 2021.

[5] On 19th January 2021 the First Defendant (though not seeking to set aside the default judgment) made an application for an extension of time to file his Form 7A as required by **Rule 16.2(4) of the CPR** in order to be heard at the hearing on the assessment of damages.

[6] On 1st February 2021, the subject Application was filed by the Second Defendant supported by an Affidavit. By this Application, the Second Defendant seeks to set aside the judgment on the following grounds:

(1) The Second Defendant is impecunious and was unable to retain the services of an Attorney at Law on or about 21 February 2020; he approached the Legal Aid and

Advisory Authority for assistance in obtaining an Attorney at Law. On the 25th January, 2021, the Second Defendant was notified that the firm of Messrs Roopnarine & Co., was assigned to his file by the Authority.

(2) The Second Defendant has a realistic prospect of success in defending this claim in that he will be contending, if given the chance to defend the claim that the Claimant's injury resulted from an altercation between the Claimant and the First Defendant on 22nd April 2019 and in which he played no role. In other words a complete denial of the allegations against him.

(3) The Second Defendant will assert that on 22nd April 2019, he was working at Lam's Bar located in Penal Rock Road Junction whilst the Claimant and the First Defendant were on the premises. The Second Defendant will assert that he played a game of cards with the Claimant and one Mr Mills before returning to the stock room to finish his assigned task.

(4) The Second Defendant will assert that while completing his tasks in the stock room, he heard loud talking and a commotion coming from outside the bar. He came out to investigate and saw the Claimant trying to pull off his jersey which was on fire. The Second Defendant will also assert that the First Defendant who was in the bar informed him as to what transpired.

[7] In opposition to the Application, the Claimant filed submissions on 14th May 2021. On 27th May 2021, the Second Defendant filed Submissions in reply.

II. ISSUES

[8] Before I delve into the issues, I must make mention of a few observations regarding the Second Defendant's Notice of Application. The Court notes that the Application was made pursuant to **Part 13.2(1) (a) of the CPR**. This Rule specifies that default judgment **must** be set aside where a defendant fails to **enter an appearance**. However, the facts of this case do not support an application under this Rule since the Second Defendant in fact entered an Appearance in this matter. It therefore stands to reason that the Application relies on an incorrect Rule of the CPR.

[9] Notwithstanding this, the grounds of the Application and submissions of both parties disclosed facts and addressed the law in relation to **Part 13.3(1) of the CPR**, which is

applicable on the facts of this case. In this regard, I shall approach this decision as if the application was made under Rule 13.3(1).

[10] Accordingly, the following issues fall for the Court's determination of this Application:

1. **Does the Second Defendant have a realistic prospect of success in defending the claim? and**
2. **Did the Second Defendant act as soon as reasonably practicable when he found out that judgment had been entered against him?**

III. LAW AND ANALYSIS

[11] **CPR 13.3(1)** outlines the circumstances under which the Court can exercise its discretion to set aside a judgment entered in default of a defence. It states:

> **"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."**

[12] It is trite law that both limbs of the test must be satisfied in order for the Defendant to succeed in his application.

[13] In **Des Vignes v Manning and Gordon** H.C.1867/2007, Kokaram J (as he then was) explained at paragraph 4.2 that the overriding objective of the CPR constrains the Court to considerations of these two factors only in determining whether to exercise its discretion. In this regard, he surmised at paragraph 4.4 as follows:

> *4.4 Therefore, if the Defendant fails to satisfy the Court of any one of the conditions set out in 13.3(1) of 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 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. See Nizamodeen Shah V Lennox Barrow5 and Bertin Benny v Brian Benny

<u>Issue 1</u>: Does the Second Defendant have a realistic prospect of success in defending the claim?

[14] In **<u>Anthony Ramkissoon v Mohanlal</u>** Civil Appeal No. 163 of 2013, Mendonça JA emphasized that a realistic prospect of success must be distinguished from a fanciful prospect of success. He stated the following at paragraphs 9-10 of the decision:

9. 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.

10. Rule 13.4 (5) provides that an application (other than an application by the claimant) must be supported by evidence. Under the Rules of the Supreme Court, 1975 (RSC, 1975), it was an almost inflexible rule that an affidavit of merit was required. This, in my view, is no less true under the CPR as it was under the RSC 1975. The defendant must, by evidence, establish he has a defence that has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate the defendant has a realistic prospect of success.

[15] In demonstrating that a realistic prospect of success exists, the Second Defendant must by his evidence be able to show that he has a "better than" arguable case. While the Court need not conduct a microscopic assessment of the evidence nor a mini-trial of the

matter to make its determination, it ought to consider what evidence will be available at trial to support any purported defence[1].

[16] By this Claim, the Claimant alleges that on 22nd April 2019 he was at Lam's Bar located at Penal Rock Road junction which is owned by the Defendants' brother, Joel D. Rebeiro. Both Defendants assist their brother in the bar. While there, he ordered a "petit quart" of Puncheon Rum and the Second Defendant instructed the First Defendant to serve the Claimant. The Claimant contends that the First Defendant realized that the contents of the rum bottle was insufficient to fill the Claimant's order so he left the bar with the bottle and went to a building next door to the bar. When he returned, the Claimant observed that the bottle contained a larger quantity of alcohol with which to serve the Claimant.

[17] The Claimant avers that he protested and stated that the alcohol was not what he ordered and in response the First Defendant stood over him, stated, "You don't want the rum!" Then, he threw the alcohol onto the Claimant's head which ran down to his face, neck, chest and back. Thereafter, the Second Defendant took out a lighter and ignited it upon the Claimant causing a flame. The Claimant avers that because of the Defendants' actions of wrongful and intentional trespass to his person he has sustained severe burns and personal injuries to his head, face, hands, neck, shoulders, chest and hands. He also suffered pain and suffering, loss of amenities, mental distress, humiliation, physical discomfort, loss and damages.

[18] The Claimant alleges that the First and Second Defendants were at all material times actuated by malevolence and spite towards him and thereby intended to and did humiliate him in the presence of onlookers and subjected him to ridicule in public by reason whereof his injuries were greatly aggravated.

[19] By his Application to set aside the default judgment entered against him, the Second Defendant argues that he has a realistic prospect of success in defending this Claim as he contends that the Claimant's injuries resulted from an altercation between the Claimant and the First Defendant in which he played no part. In support of this

[1] See CV 2012-02508 **Building Concepts & Construction Ltd. v The Trinidad and Tobago Housing Development Corporation**, Des Vignes J

contention, he exhibited a draft copy of his Defence to his Notice of Application as well as an affidavit in support.

[20] By this proposed Defence, the Second Defendant denies liability and contends that the allegation that he took a lighter and ignited the Claimant is a fabrication. He asserts that he was not even present to witness the escalation of the argument or the igniting of the Claimant's clothing.

[21] At paragraph 2 of the draft Defence, the following is stated:

> "This Second Defendant will assert that on the 22nd April 2019, he was working at Lam's Bar, Penal Road assisting the owner. Sometime in the afternoon of Easter Monday there was a conversation between the Claimant and the First Defendant over alcohol during the course of the conversation the Second Defendant returned to the stock room to complete his work. Whilst in the stock room, he heard loud talking and commotion outside coming from the bar. He then left the stock room to inquire about the commotion coming from outside the bar. He then left the stock room to inquire about the commotion outside [*sic*], when he observed that the Claimant was seeking to pull off his shirt and/or jersey, which was on fire, and running towards his father's home, which was nearby. The Second Defendant then spoke to the First Defendant who informed him of the events that transpired."

[22] With respect to general and special damages, the Second Defendant neither admitted nor denied them but expressed the desire to cross-examine the doctors as to the nature and extent of the Claimant's injuries.

[23] These pleadings suggest an alibi or bare denial on the part of the Second Defendant.

[24] The Claimant submitted that it is fanciful for the Defence to merely state that the Second Named Defendant had left the room. He argues that this bare denial is at odds with the contemporaneous investigations and charges laid against the Second Named Defendant arising out of the incident. It also is at odds with the First Named Defendant's (his brother) failure to file a Defence although he received legal aid since November 2020.

[25] The Second Defendant however contended in his Reply submissions that the factual circumstances of this case dictated that there were no other witnesses beside the Claimant and the First and Second Defendants nor were there documents in support to produce. It was asserted that the matter concerns direct conflicting versions of events. Thus, it was a question of fact whether the Second Defendant was present at the material time of the Claimant's injuries and the Court has to resolve it by testing the Claimant and Second Defendant's credibility. It was therefore only at a trial the Court could decide who was telling the truth. It was also advanced that the First Defendant's acceptance of liability concerned his own involvement and did not affirm the liability of the Second Defendant.

[26] While the Court agrees that the First Defendant's acceptance of liability cannot impeach the Second Defendant's defence as each defendant was sued separately, I am not satisfied with the assertion that there are no other witnesses to this matter beside the two Defendants and the Claimant. In fact, the Second Defendant's own grounds of this application and affidavit evidence contradict this assertion made in his Reply submissions. This as he indicated in his affidavit that on the day in question, "*he played a game of cards with the Claimant and one Mr Mills before returning to the stock room to finish my assigned task*." This evidence suggests that there was in fact at least one other witness who could attest to the Second Defendant's absence at the time the Claimant was injured. Notably, no mention was made of this card game or Mr Mills in the Second Defendant's Defence. His proposed Defence is in stark contradiction to the grounds in his application to set aside and his Reply submissions.

[27] The Second Defendant also took issue with the Claimant's reliance on the fact that he was charged by the police, to contest that he lacked a Defence. He argued that this submission elevated the charge to the status of a conviction and he was entitled to be presumed innocent until proven guilty. The charge was therefore irrelevant to the Court's finding of whose version of events to be preferred.

[28] This Court however disagrees with the Second Defendant The charge against him and any other contemporaneous evidence led by the Claimant at the trial, relating to the investigations surrounding his involvement in the incident will be particularly relevant to this Court's determination of his liability. The absence of a conviction by a criminal

court does not prevent a civil court from relying on evidence from criminal investigations in adjudicating on liability. This is as the court's determination will be based on a lower standard of proof than a criminal trial, namely, on a balance of probabilities. In this regard, such evidence that suggests involvement on the part of the Second Defendant will be useful at trial in displacing his Defence.

[29] A fundamental success factor of applications to set aside is the existence of supporting evidence and/or witnesses to confirm the Second Defendant's defence. In this case, the Second Defendant has submitted little evidence to establish the truth of the facts of his case. The affidavit evidence presented in support of this Application is a mere verbatim republication of the pleadings in the draft Defence and grounds of the Application save for the Second Defendant's involvement in a card game with the Claimant. The Second Defendant is unlikely to have other supporting witnesses as he submits that there are no other witnesses involved in the incident, notwithstanding the fact that it contradicts his affidavit evidence that Mr Mills was present. Further, it is the case of the Claimant that the assault took place in the presence of onlookers. He even named Nicholson Phillip as an onlooker who called the police.

[30] There is therefore likely to be no evidence at the trial of the Second Defendant other than his own testimony to contradict the contemporaneous documents and eyewitness' account of any witness called by the Claimant. I therefore find that the Second Defendant by his application and evidence has fallen below the threshold requirement of proving he has a more than arguable case.

[31] Accordingly, I am of the view that the Second Defendant has no realistic prospect of success in defending this claim. In this regard, it is unnecessary for the Court to address the second limb of the test. Nonetheless, for completeness, I will briefly discuss the issue.

Issue 2: Did the Second Defendant act as soon as reasonably practicable when he found out that judgment had been entered against him?

[32] In **Nizamodeen Shah V Lennox Barrow** CA 209 of 2008 Mendonça JA outlined the two categories of cases in considering the issue of promptness. He stated:

> *In the first category, one finds cases where the Court can simply look at the facts and conclude that the Defendant acted as soon as reasonably practicable.* ***In other cases, the Defendant has an 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****.*

[33] The learned judge later opined that where an application to set aside is made a couple months after a default judgment has been entered, the Defendant must put some material before the Court to show that he acted as soon as reasonably practicable. Mendonça JA stated at paragraph 12 -

> *There are no doubt cases where the application to set aside the judgment is made a very short time after the judgment is entered so that, on the face of it, the Court can say that the defendant acted as soon as reasonably practicable. In this case however the application was made at least two months after the date when the Appellant found out that judgment was taken up against him. This 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 of 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.*

[34] It is noted that default judgment was entered against the Second Defendant on 29th July 2020 and the Second Defendant's application to set aside came some six months thereafter on 1st February 2021. It is apparent from the date of filing of this Application this case falls into the second category of cases described by Mendonça JA in **Nizamodeen**. Accordingly, the Court had to assess the material in the Second Defendant's affidavit to determine whether he had acted as soon as reasonably practicable.

[35] The Second Defendant asserted that he received a copy of Claim Form and Statement of Case on 22nd February 2020. However, he was without funds to retain an attorney so he approached the Legal Aid and Advisory Authority (LAAA) who informed him of

the documents and information he was required to produce to the Authority. He was also advised to enter an Appearance in the matter, which he did on 2nd March 2020. A chain of events followed which ultimately led to his filing of this Application in February 2021.

[36] A brief timeline of the events described by the Second Defendant are recorded below:

- **11th March 2020**- He returned to LAAA with requested documents and paid $50.00;
- **Unspecified date**- He returned to LAAA to follow up at least three (3) times after the Covid-19 "lockdown" and was informed that his application was processing;
- **5th September 2020**- He received Court Order in mail but did not know what it meant [Judgment in Default of Defence]
- **7th September 2020**- He was informed that his application for legal aid was refused and he was advised to re-submit his application along with bank statements
- **17th September 2020**- He visited the High Court to seek advice and was told to return 25th November 2020; He also returned to LAAA to re-apply
- **18th September 2020**- He received a call from Legal Aid
- **28th September 2020**- He returned to Legal Aid with bank statements
- **14th October 2020**- He received two (2) letters in the mail, (1) initial refusal from LAAA; and (2) a letter from High Court.
- **[Unspecified date] in October 2020**- He received call from LAAA for an appointment on 19th November 2020
- **19th November 2020**- He was informed that the file was still at head office in Port of Spain. Second Named Defendant reminded LAAA that his matter came up for hearing on 25th November 2020. He was advised by a LAAA representative to attend Court on 25th November 2020 and explain to the Court that he was seeking legal representation and an adjournment.
- **20th November 2020**- LAAA informed him that his file was still at the Authority's head office.

- **[Unspecified Date]- 20th November 2020-** He went to an appointment with First Named Defendant at his Attorney's office and was informed that they were appointed to act for First Named Defendant only.
- **24th November 2020**- He was informed that his file was in front of LAAA's Board for review.
- **[Unspecified Date]-**He spoke with a representative from the Court and was told the matter was coming up on 11 February 2020 (2021) [sic]
- **January 2020 (2021) [sic]-** He received a call that the matter was assigned to Ms. Chattergoon, Attorney-at-Law who returned file.
- **25th January 2020**- He received a letter that Shawn Roopnarine, Attorney-at-Law assigned to his matter.
- **26th January 2020**- Second Defendant met with Mr Roopnarine and he found out that judgment was entered against him.

[37] From the Second Defendant's evidence, he received notice of the entry of the Default judgment against him on 5 September 2020; however, he did not understand what it meant. It was not until 26 January 2020 when he met with his attorney, Mr Roopnarine that he understood that judgment was entered against him.

[38] The Claimant however contended that the language of the order was straightforward and he could have simply asked someone what it meant. Further, he failed to demonstrate that he had pursued all his options and seemed to have only relied on Legal Aid although there was no guarantee to obtain their representation.

[39] In this regard, I disagree with the Claimant. In the Court's view, the Second Defendant has demonstrated by his evidence that he took an interest in defending the Claim by his numerous approaches to the Legal Aid Authority to seek representation. He also attended the Court to seek assistance. Further, while the Court Order appears to be in plain language, it cannot be said that a litigant-in-person understood it in the same manner as an attorney. Accordingly, I accept that there existed the possibility that the Second Defendant did not fully appreciate the meaning and effect of the Judgment until Mr Roopnarine advised him on the 26 January 2020.

[40] Against the background of this material, the Court can be persuaded to conclude that the Second Defendant acted as soon as reasonably practicable as he filed this Application six (6) days after being advised by Mr Shawn Roopnarine.

CONCLUSION & DISPOSITION

[41] Notwithstanding my conclusion on the latter issue, given the Second Defendant's failure to satisfy both limbs of the test set out in **Part 13.3 of the CPR**, his Application to set aside the default judgment must fail.

[42] Having regard to the above analyses and findings the Order of the Court is as follows:

ORDER

1. **The Second Defendant's Notice of Application filed on 1st February 2021 to set aside default judgment entered against him on 29th July 2020 be and is hereby dismissed.**

2. **Permission is granted for the Second Defendant to file and serve a Form 7A as required under CPR Rule 16.2(4) indicating his intention to be heard on the quantum of damages on or before 7th July 2023.**

3. **On the basis that the Second Defendant is legally aided by the Legal Aid and Advisory Authority, the Court is constrained to make any order as to costs against him.**

Robin N Mohammed
Judge