REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA P107 of 2020
CV 2018-04248

BETWEEN

BRIAN CUMMINGS

Applicant/Defendant/Appellant

AND

ANTHONY AMOROSO CENTENO

Claimant/Respondent

AND

EASTERN CREDIT UNION CO-OPERATIVE SOCIETY LTD.

Garnishee

Before the Honourable Justice Prakash Moosai J.A.
Civil Chamber Court

Appearances

Appellant:	**Mr. Criston Williams.**
	Mr. Jerome Riley
Respondent:	**Mr. Felix Celestine**
	Mr. Rickie Pandohee

Date of Delivery: 1 June, 2020

REASONS

1. This is an application for a stay of execution of the judgment of Justice Rampersad, whereby he dismissed the application of the appellant to set aside the default judgment entered against him.
2. The court reminds that the granting of a stay is the exception, rather than the rule, as a successful litigant is entitled to the fruits of his judgment. To obtain a stay, the appellant must firstly establish that he has good prospects of success on the appeal. Only if he surmounts this first hurdle can the court move to consider the risk of injustice and whether the greater risk lies in granting the stay or refusing it. Specific to money judgments, the question of risk is assessed in light of whether the appeal would be stifled or otherwise rendered nugatory if he is forced to pay out the judgment sum immediately. Further, the court must consider whether or not there was a reasonable probability that the claimant/respondent would be in a position to repay the monies paid to him in satisfaction of the money judgment if the appellant is successful on his appeal.[1] (See Rodrigues Architects Ltd v New Building Society; National Stadium Project (Grenada) Corp. v NH International (Caribbean) Ltd)

Good Prospects of Success

3. To successfully set aside a judgment entered in default, Rule 13.3 of the CPR mandates that the defendant must show that he has a realistic prospect of success in defending the claim, and that he acted as soon as reasonably practicable when he found out that default judgment had been entered against him. The trial judge below found that the defendant did not establish that he had a realistic prospect of success, this conclusion being based solely upon the apparent weaknesses of the affidavit filed in support of the statement of defence. The affidavit was the subject of direct challenge by the claimant as it had not been sworn to by the defendant himself, but by his attorney-at-law. Following his detailed analysis of the law, the judge was of the view that the affidavit could not stand as one purporting to go to the merits of the defence, the deponent firstly having no personal knowledge of the facts relative to the claim. The judge went on to consider that as an attorney, the Code of Ethics posited that he should not be to be a witness for his own client except where it is essential to the ends of justice, the reasons for which must be properly and cogently set out. To this end, he was not at all satisfied with the reasons proffered for the failure of the appellant to personally depose an affidavit in support of his defence and found that

[1] See ***Rodrigues Architects Ltd v New Building Society (2018) 93 WIR 339***; ***National Stadium Project (Grenada) Corp. v NH International (Caribbean) Ltd. CA No 48 of 2011.***

the assertions as to medical disabilities which prevented same were bald assertions without any form of corroboration. He was of the view that insufficient steps were taken by the appellant to provide the court with his own, deposed evidence, even if he was in fact constrained by medical disability. In the circumstances therefore, it could not be said that it was essential to the ends of justice for the attorney to have sworn the affidavit on behalf of his client.

4. He found therefore that there was no valid affidavit before the court and the application to set aside was dismissed.
5. Rule 31.3 deals with affidavits in civil proceedings. The general rule is that an affidavit may contain only such facts as a deponent is able to prove from his own knowledge. However, an affidavit may also contain statements of information and belief where any of the rules so allow and where it is for use in any procedural or ***interlocutory*** application, or in an application for summary judgment. It is therefore permissible under the CPR in an application to set aside a default judgment, for the affidavit to contain statements of information not within the personal knowledge of the deponent. The rules go on to provide that where this is the case however, the source of such information as well as the grounds for such belief must be stated within the affidavit.
6. The affidavit filed in support of this statement of defence was sworn to by instructing attorney for the appellant, Mr Jerome Riley, and not by the appellant himself. The appellant is a permanent resident of the United States of America and resides there. According to statements contained in the affidavit, Mr Riley informed the appellant of the necessity of acting with expedition in applying to set aside the default judgment entered against him, and having been informed by the appellant of his medical challenges and the resultant difficulty this posed to him personally swearing an affidavit before a notary public within the time constraints advised, Mr Riley was instructed and permitted to swear the affidavit in support on the appellant's behalf.
7. The rules quite clearly permit such an affidavit to be sworn, provided of course that the source of the information as well as the grounds for the belief are stated within.[2] That the trial judge did not begin his analysis of Mr Riley's affidavit from the perspective that the rules of court allowed for such an affidavit if it met the criteria set out, *prima facie* raises to my mind an arguable case with good prospects of success on appeal. The cases cited and relied upon by the judge acknowledged that such an affidavit was permissible, but the court in each case found that the

[2] See ***Soogrim v Brown CA No 168 of 2000; Seeraj v SWRHA CA No 104 of 2019.***

deponent ultimately did not adequately establish the source of his information or the grounds for his belief.

8. Throughout the affidavit in question, Mr Riley quite clearly states that the source of his information is his client, the appellant. With regard to Mr Riley's statements concerning the medical condition of the appellant, it cannot be argued that there is an alarming paucity of corroborating evidence. The letter purporting to be from his caregivers is alarming for its brevity, not to mention the fact that it was not signed by any individual, despite being written in the first person. Nonetheless, I am of the view that given the nature of the claim, the seriousness of the appellant's assertions in defence, and the substantial sum of money at stake, the form of this medical evidence, while not wholly satisfactory, is but only one part of the equation. It may be prudent at this juncture to briefly set out the particulars of the claim. The respondent in this matter claims the sum of $534,000.000 plus interest, which he asserts was part of a larger sum loaned to the appellant. He further avers that two promissory notes were executed, which set out the sums to be repaid as well as the terms of repayment. In the statement of defence filed alongside the application to set aside the default judgment, the appellant trenchantly denies ever executing any such promissory note or notes and contends that the signatures that appear on the promissory notes are not his signatures, and/or was not signed by him and/or were fraudulently inserted onto the said notes. In support of this, copies of the appellant's passport and identification card showing his signature were annexed to the statement of defence. This is the ground for Mr Riley's belief that the appellant did not execute the said promissory notes and that he was a stranger to the circumstances surrounding same.
9. To this I will add that, given the defence to the claim is one that alleges fraud, it raises the question as to what more could have been led by way of evidence, even if the appellant himself had gone on affidavit. The actual facts of the alleged fraud would not be within the knowledge of the appellant in any event, and it seems to me that his attorney at law, having been informed not only of his client's denial of the claim, but the basis of the denial, is in no worse a position than the appellant to go on affidavit stating that the party he represents has no knowledge of the promissory notes purporting to have been executed by him and which therefore could only have been procured through some fraudulent means. To the extent that fraud is alleged, it is to be noted that the evidence of Mr Riley on affidavit comports with the draft defence.
10. For these reasons, it is my view that, in the circumstances of this case, the appellant has satisfied the requirement of a good prospect of success on his appeal.

The Greater Risk of Injustice

11. Both the appellant and respondent claim to have pressing needs for which the money that is the subject of the judgment order is vital. They are both senior citizens, with the respondent being the older of the two, and both claim to suffer from serious medical conditions. In this regard, the evidence of the respondent is of a significantly greater quality than that of the appellant, as he has annexed several medical reports to his affidavit in opposition to the application for a stay. There is however, a garnishee order in place which denies the appellant access to the specific sum which is the subject of this claim, and which will remain in place until the final determination of this matter. Additionally, the appellant through his attorney has displayed a willingness to give a further undertaking to not deal with the monies in any event, pending the outcome of the appeal. It does not appear that in this regard the appellant will be prejudiced if the stay is not granted and he has not averred that the availability of the judgment sum is integral to his ability to carry on this appeal.
12. There remains however, the question of whether or not the respondent would be in a position to repay the judgment sum in the event that the appellant is successful on his appeal. When asked about this directly, counsel for the respondent was not in a position to deny that his client would be placed in a difficult position if he were in fact called upon to do so. By all of his evidence, the respondent is in dire need of finances. He is now 78 years old with significant medical complications. Additionally, his rent is in arrears for at least 6 months. The court is placed in the unenviable position of having to balance the interest of a successful litigant who is entitled to the benefit of his judgment, but who will also undoubtedly be unable to repay any monies paid out to him in the event that the judgment is reversed on appeal, as against a party who has lost at first instance, but on the face of it appears to have raised an arguable case on appeal.
13. In all the circumstances, I am constrained to conclude that the greater risk of injustice would lie in not granting the stay as it is clear that the appellant would stand very little chance of recovering the judgment sum if successful on his appeal. In the interim, the respondent is reminded that this matter has already been deemed fit for urgent determination and a date for hearing set.

Orders

14. A stay of execution of the orders of Justice Devindra Rampersad dated 31 March 2020 is hereby granted.

15. The appellant undertakes not to deal with or otherwise dispose of the judgment sum in the amount of $573,457.83 standing in his account with the Garnishee, the Eastern Credit Union Co-Operative Society Ltd, pending the hearing and determination of the appeal scheduled to be heard on 6 July 2020.
16. After hearing the parties on the question of costs, both agreed that costs be costs in the cause. That order is accordingly made.