IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV00 1113 of 2007

BETWEEN	*GUARDSMAN ALARMS LIMITED*	*CLAIMANT/ RESPONDENT*
AND	*GRAYMILL ENGINEERING LIMITED*	*1ST DEFENDANT*
AND	*NOEL GRAY*	*2ND DEFENDANT*

Miss Ayisha Robb instructed by
Rattray, Patterson, Rattray for the Claimant

Mr. Stuart Stimpson instructed by
Pickersgill, Dowding and Bayley Williams for the Defendants

Heard: *27TH October, 2009 and 11TH November, 2009*

Practice and Procedure – Application to set aside default judgment Rule 13.3 of the CPR.

i). A real prospect of successfully defending a claim cannot be demonstrated by vacuous assertions, supported by nothing more than the Defendant's oath;

ii). The burden is on the Defendants to place before the court such material as will enable the Court to say whether they applied as soon as was reasonable practicable;

iii). In considering R.13.3(1)(b) the court is required to evaluate the bona fides of the explanation, in the sense of, is it genuine or satisfactory? Which is a much lower standard than, is it reasonable?

Evan Brown, J. (Ag.)

1. By Notice of Application for Court Order, filed on 4th July, 2008, the 1st and 2nd Defendants/Applicants sought to favourably stir the Court's discretionary power to set aside a judgment entered in default on the 4th July, 2007, Binder #743 Folio 278. Further, as a corollary, an order that the Defendants be given permission to defend and to file Defence within 14 days from the date of the order herein."

2. This was a regularly obtained judgment in default of the filing of an Acknowledgement of Service. The Claim Form and Particulars of Claim were served on the 1st Defendant on the 28th March, 2007, at its registered office. Similar service was effected on the 2nd Defendant. Rule 9.2(1) (a) requires a defendant who wished to dispute a claim to file an acknowledgment at the registry and then to send a copy to the Claimant. The general rule for that filing is 14 days after the date of service of the Claim Form together with the Particulars of Claim: R.9.3(1). Rule 10.3(1) stipulates the time for filing a defence as 42 days after the same point of service. Neither was done in this case.

3. That judgment remaining wholly unsatisfied, an Order for Seizure and Sale of the Defendants goods, under the hand of the Registrar, was filed on the 25th April, 2008 and signed on the 27th May, 2008. The Bailiff's return of the 15th July, 2008 shows a payment of $180,000 in favour of the Claimant. Thereafter the Claimant filed an Order for Payment out on the 25th August, 2008.

4. Rule 13.3 governs an application to set aside or vary a default judgment in exercise of the court's discretion. For ease of reference the rule is set out hereunder:

R.13.3(1)

1. The court may set aside or vary a judgment entered under Part 12 [Default Judgment] if the defendant has a real prospect of successfully defending the claim.

2. In considering whether to set aside or vary a judgment under this rule, the Court must consider whether the defendant has:

   (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

   (b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case maybe.

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

5. Without requiring interpretive insight, it is palpable that the Defendants must place their lever of a real prospect of successfully defending the Claim upon the fulcrum of the court's discretion. In para. 36 of his affidavit of merit, the 2nd Defendant/Applicant asserts that he and the 1st Defendant have a real prospect of successfully defending the claim. In the Claim Form dated 29th November, 2006 and filed on 9th March, 2007, the Claimant claimed "the sum of $252,544.24 and $258,219.44 for repayment of security services extended by the claimant." The Particulars of Claim amplified the Claim Form in averring that "the sum due and owing to the Claimant [is] for security services rendered to the First Defendant for the period July 1, 2003 to March 31, 2006, respectively."

6. The 2nd Defendant in his affidavit of merit alleged that Claimant/Respondent failed to perform the contract, resulting in the Defendants/Applicants suffering loss and damage. The 2nd Defendant alleged a twofold breach viz, failure to make two random checks at each of the 1st Defendant's premises each night, and omitting to replace the control panel at the 1st Defendant's premises. In addition, the Defendants/Applicants contended that in any event the sum claimed should be reduced by the amount of $67,376.22, representing cheque payments made by the 2nd Defendant on the 2nd September, 2004 and 22nd April, 2005.

7. As a result of these breaches, the 2nd Defendant said, each of its two secured premises was burgled. In consequence of which as an act of *mea culpa*, the Claimant 'promised to make good' on the losses but reneged. That the Defendants/Applicants' assertions would be undergirded by means of documentary evidence, is not at all unreasonable. But even a search conducted with the diligence and patience of the archaeologist, not one scintilla of documentary support is revealed. As learned counsel for the Claimant/Respondent submitted, the report of the alleged burglaries should have generated a police report. Likewise, there was no documentation to fortify the contention of the lifespan of the control panel. And what of the returned cheques which were used to make the payments? The Court cannot but agree with the Claimant's counsel that these assertions are as bold as they are bald.

8. The Claimant/Respondent, through the affidavit of Errol McGregor, denied the several affirmations of the Defendants/Applicants. Mr. McGregor exhibited a memorandum showing that the 2nd Defendant requested one random check per night for his Spanish Town Road premises. Also exhibited was the manufacturer's warranty, limited to eighteen (18) months immediately post purchase. This destroys the Defendants/Applicants' averment that the Claimant./Respondent failed to replace the control panel, since the warranty had long expired at the material time.

9. The Defendants/Applicants argued that the burglary, at its Hagley Park Road premises could have been 'discovered or averted' for two reasons. First, "evidence suggest ... the electronic alarm had been functioning." That 'evidence'

is anybody's guess at this stage. That notwithstanding, on the 2nd Defendant's own admission, almost one year earlier, the Claimant disclosed to the 2nd Defendant that the panel was 'not fully functional' and its replacement was recommended. Secondly, the Claimant's omission to do routine, random checks. To say, routine, random checks could have 'averted' a burglary with any certainty is an unsound argument, a *non sequitur par excellence.*

10. The foregoing analysis demonstrates that the proposed defence has faltered and foundered at the bar of R.13.3(1). A real prospect of successfully defending a claim is not demonstrated by vacuous assertions supported by nothing more than the Defendant's oath. Without conducting a mini trial, the proposed defence is doomed to end in ashes without the rejuvenating force of the phoenix. Finding as I have, that the defence is hopelessly unconvincing, that should be dispositive of the matter. However, the dictum of Lord Brown in ***Dipcon Engineering Services Ltd. Privy Council Appeal #49/2002*** dated 1st April, 2004, urges further ratiocination. Lord Brown said:

> ***The merits of a proposed defence are of importance often perhaps of decisive importance, upon an application to set aside a default judgment. But it should not be thought that it is only the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them ..... will also be material."***

This dictum is no more than the judicial expression of the legislative injunction of R.13.3(2), to which attention is now turned.

11. Final judgment in default of the filing of an Acknowledgement of Service was entered on the 4th July, 2007, in Binder #743 Folio 278. The 2nd Defendant's affidavit of merit is bereft of any intimation of when he found out that judgment had been entered. Rule 12.3(2) (a) enjoins the court to consider the promptitude of the defendants, subsequent to discovering that the court's coercive power had been invoked against them.

12. Although judgment was entered on the 4th July, 2007, it was not filed until the 25th January, 2008. While not inescapable, it seems nevertheless reasonable to infer that some time elapsed between the entry of judgment and the Defendants becoming aware of that entry. What that time was remained a matter of speculation. There is however, no uncertainty in that the matter proceeded to execution on 25th April, 2008 before the Defendants/Applicants were roused into action on the 4th July, 2008 with the filing of the Notice of Application for Court Orders. To say that the Defendants became aware of the judgment before 4th July, 2008 is manifestly obvious. However, what is definitely not apparent is the point in time the Defendants became clothed with that knowledge.

13. Any finding on the promptitude of the Defendants would be a matter of conjecture and speculation. And for a court, it would be a monumental act of unwisdom to go where angels fear to tread. But should the Defendants have the benefit of this unsatisfactory state of affairs? The Defendants are not seeking as a matter of right to have the default judgment set aside. In seeking to persuade the court to exercise its discretion in their favour, the Defendants must beg, pray or plead in the proper manner: Master Chambers in ***General Motors Co-op v. Canada West Indies Shipping Co. Ltd. CL 1700/67 – Essays on the Jamaican Legal System 1660 - 1973 p. 65.***

14. It is the Defendants/Applicants who must place before the court such material, as will enable the court to say whether they applied as soon as was reasonably practicable after finding out that judgment was entered. This the Claimant/Respondent may seek to rebut but the onus is on the Defendants/ Applicants. The conclusion seems inexorable, that the burden cast on the Defendants/Applicants to show that the application was made with all due expedition as was reasonably practicable, remains undischarged. That surely doesn't find harmony with R.1.1.(d) and so attracts an adverse ruling, which should again give the matter its quietus but *ex abundanti cantela*, I go on to consider the explanation.

15. The explanation for breaching the rules is contained in the 2nd Defendant's affidavit of merit from paragraph 29 to paragraph 35. There the 2nd Defendant spoke to his frustrated efforts to convene meetings with the agents of the Claimant and the 'proactive and mutually beneficial relationship existing between them. He said in paragraph 35 that it was always his 'aim to amicably resolve the issues between the 1st Defendant and the Claimant. This resulted in the delay in filing the Defence and applying to set aside the subsequently entered default judgment."

16. Counsel for the Defendants/Applicants submitted that the explanation for the delay lies in the negotiations between the parties and the nature of the relationship which continued after the documents had been filed. He directed the court's attention to the paragraphs in the affidavit of merit which speak to the intended meetings.

17. Learned counsel for the Claimant/Applicant rejoined, first, that there was no correspondence to show that the 2nd Defendant had in fact been in contact with the Claimant's attorneys-at-law and that the latter offered to discuss the claim. Secondly, pending negotiations are not a good reason. Ms. Robb submitted that without an expressed agreement to hold the prosecution of the suit in abeyance, the Defendants have nothing to rely on. For this proposition she relied on Mr. Justice Neuberger's dictum in ***Annodeus Ltd. and Anor. v. Mark McDonald Gibson & Anor*** as cited in the judgment of Master Simmons (Ag.) in ***Arawak Woodworking Estb. Ltd. v. Jamaica Development Bank C.L. 1981/A080*** July 20, 2009.

18. There was, as a matter of fact, no negotiations taking place between the parties. The affiant Grey swore to failed attempts to contact agents for the Claimant and a broken promise to convene a meeting. That a commercial relationship continued between the Claimant and the 1st Defendant, *ad interim*, could not *per se* operate as a stay of the prosecution of the suit. The 2nd Defendant is then left with nothing but his good intentions, with which the broad road that leads to destruction is paved. For such, is the fate of his explanation.

19. Rule 13.3(1)(b) enjoins the court to consider whether the Defendants have given a good explanation for their failure. The modifier 'good' suggests that the explanation given should be tested. The court is required to evaluate the bona fides of the explanation, in the sense of, is it genuine or satisfactory. Which is a much lower standard than, is it reasonable? The authorities suggest that the explanation does not have to be reasonable: ***Dipcon Engineering Services Ltd.***, supra. If it were otherwise, that is, if no evaluation was required, the architects of the Civil Procedure Rules (CPR) would have simply said, an explanation.

20. That the Defendants/Applicants were lulled or cajoled into inaction in the circumstances described by the 2nd Defendant is remarkable for its incredulity. The 2nd Defendants' efforts to actualize his intention to amicably resolve the issues, unsubstantiated as they were, were like seeds upon stony ground. He was either getting no response or no encouraging response, yet, he rested on his laurels. Another shocking feature of this explanation is the 2nd Defendant's lengthy detour from his beaten path to lay the blame for the delay at the feet of the Claimant. The Claimant was the one who was out of pocket but seemed at ease in Zion while the 2nd Defendant was the only proactive party. That implied characterization of the Claimant of course explodes in the face of the swiftness with which the Claimant moved to prosecute the suit, down to execution and application for payment, out. In sum, the explanation is not good that is neither genuine nor satisfactory. At best it is contrived.

21. How then does a court fulfill its mandate under R.1.1 to deal with the instant case justly? It is clearly the policy of the CPR to abbreviate the passage of cases which fail to demonstrate a real prospect of success: Parts 13 and 15. Further, alacrity in compliance with the rules is promoted under the court's case management powers: Part 26.

22. Finding as I have that the proposed defence does not have a real prospect of succeeding, allowing it to go onto trial would result in discord with the spirit of the CPR. That surely would be a profligate, uneconomic use of the court's resources, instead of saving expense. All expedition and fairness would be lost if the satisfaction of the judgment is postponed to an uncertain future with the resultant expense of prosecuting a claim in which the Defendants cling to a 'fanciful' prospect of success.

23. The only way to deal justly with the instant case is to refuse the application. It is therefore ordered:

1. Application to set aside default judgment and for extension of time within which to file defence is refused.

2. The Claimant is at liberty to apply for payment out of the sums recovered by the bailiff.

3. Costs of this application to the Claimant to be taxed if not agreed.