

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCH2006/0232

BETWEEN:

BERNADINE JOSEPH

Claimant

and

IVOR GORE JNR
SHERILYN FREDERICK

Defendants

Appearances:

Mr. D. Raimon Hamilton for the Claimant
Ms. Veronica Thomas for the Second Defendant

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2009: October 29
2010: January 15
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JUDGMENT

- [1] **MICHEL, J:** On 10th May 2006 the Claimant, Bernadine Joseph, filed a Claim Form and Statement of Claim against the Defendants, Ivor Gore Jr. and Sherilyn Moore, claiming damages for personal injuries, interest on such damages pursuant to statute and costs. On 2nd October 2006 an Amended Claim Form and Amended Statement of Claim were filed by the Claimant which amended the surname of the Second Defendant to Frederick but otherwise reproduced the contents of the original Claim Form and Statement of Claim.

- [2] The original and amended Claim Forms and Statements of Claim were served on the Second Defendant on 5th October 2006 and on the First Defendant on 23rd February 2007.
- [3] On 12th April 2007, no Acknowledgement of Service having been filed by either of the Defendants, the Claimant filed a Request for Entry of Judgment in Default for damages to be assessed with costs and a Judgment in Default of Acknowledgement of Service against the Defendants for damages to be assessed was entered on that date.
- [4] On 22nd June 2009 the Second Defendant was served with a copy of the Judgment in Default of Acknowledgement of Service dated 12th April 2007.
- [5] On 17th July 2009 the Second Defendant filed a Notice of Application with Affidavit in Support for an order pursuant to Rule 13.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 (the CPR) that the Judgment in Default of Acknowledgement of Service entered on 12th April 2007 be set aside.
- [6] In her affidavit in support of the application to set aside the Default Judgment, the Second Defendant stated that in October 2006 she was served with the Amended Claim Form, Amended Statement of Claim and other documents in this matter and immediately took them to her insurance company and left copies with the insurance company. She stated that she heard nothing further from her insurers and concluded that the matter had been settled, since her vehicle had been insured at the time of the accident. She stated that it was only when she was served with the Default Judgment on 22nd June 2009 that she realized that the matter had not been dealt with by the insurance company and she immediately took a copy of the Default Judgment to her insurers and sought legal advice in respect of the matter. She stated that she was advised and verily believes that she has a real prospect of successfully defending the claim. She exhibited a draft

of her defence with her affidavit and prayed that her application to set aside the Default Judgment be granted.

- [7] The defence of the Second Defendant consists of non admissions of the allegations contained in the Statement of Claim, except for her ownership of the motor car involved in the accident which she admits but states that at the time of the accident the First Defendant was not driving as her servant or agent and that she permits the First Defendant to use the car for his own purposes.
- [8] On 23rd September 2009 Counsel for the Claimant filed a written submission in opposition to the application of the Second Defendant, together with a copy of the case of **Perez v Banner**,¹ which he cited in support of his submission.
- [9] The matter came before the Court on 25th September 2009 but was adjourned to 29th October 2009, on which latter date the matter was argued by Counsel on behalf of the parties and the Court reserved its decision.
- [10] In her oral submission to the Court, Learned Counsel for the Second Defendant contended that all three pre conditions for setting aside a default judgment had been satisfied by the Second Defendant and she cited the case of **Rambarran v Gurrucharran**² in support of her submission.
- [11] In his oral submission to the Court, as in his written submission, Learned Counsel for the Claimant conceded that the Second Defendant had satisfied the first of the three pre conditions under Rule 13.3 (1) of the CPR but contended that she had not satisfied the other two.
- [12] Rule 13.3 (1) states that the Court may set aside a default judgment only if the defendant –

1. (2009) 73 WIR 74

2. [1970] 1 All ER 749

- (a) applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and
- (c) has a real prospect of successfully defending the claim.

[13] Counsel for the Claimant having conceded (a), the issue in this case becomes whether the Second Defendant has given a good explanation for her failure to file an acknowledgement of service of the Amended Claim Form and Amended Statement of Claim and whether she has a real prospect of successfully defending the claim.

[14] The Second Defendant's explanation for her failure to file an acknowledgement of service is that, upon receipt of the claim form, statement of claim and other documents, she immediately took them to her insurance company and left copies of the documents with the company and, since she heard nothing further from them, she concluded that the matter had been settled because she had insurance on the vehicle.


[15] The Court has several problems with this explanation. First of all, it does not explain why the Second Defendant chose not to acknowledge that she was served with a claim form and statement of claim arising from a motor vehicle accident involving her vehicle, neither is it helped by the issues raised by her Counsel in the oral submission to the Court that the Second Defendant knew the Claimant and did not want any acrimonious proceedings and hoped that the matter would be handled amicably. This certainly does not explain why the Second Defendant did not acknowledge that she had been served with the claim form and statement of claim, even if she chose not to defend the claim. Further, if that was the reason for the Second Defendant not acknowledging service of the claim form and statement of claim, why is she now seeking the leave of the Court to put in a

defence denying liability altogether, instead of pressing her insurance to settle the claim.

- [16] Learned Counsel for the Second Defendant submitted to the Court in her oral presentation that the Second Defendant did what any reasonable person in the circumstances seeking an amicable resolution would do and the Court should be satisfied that she had a good reason for not filing an acknowledgement of service. This Court is, however, totally unimpressed with how the Second Defendant treated a matter in which a seventeen - year old girl known personally to her appeared to have been seriously injured, including with bruises to her face, consequent on the apparent negligent driving of the Second Defendant's car by her son, and almost five years afterwards the Second Defendant is only now discovering through service of the Default Judgment on her that the young girl has not been compensated for the injuries thus sustained or for the expenses thereby incurred.
- [17] The Court is not satisfied that the Second Defendant has given a good explanation for her failure to file an acknowledgement of service. Giving the conjunctive nature of the prerequisites laid down by Rule 13.3 of the CPR, it is unnecessary to determine whether the Second Defendant has a real prospect of successfully defending the claim and the Court accordingly declines so to do.
- [18] One of the three prerequisites to the Court's exercise of its discretion to set aside the Judgment in Default of Acknowledgement of Service in this case not being satisfied, the application by the Second Defendant to set aside the Default Judgment is therefore denied.
- [19] I am prepared to go further though and to say that, if all three of the prerequisites to the Court's exercise of its discretion had been satisfied, the Court would then have been in a position to exercise a discretion to set aside or not to set aside the Default Judgment in this case, in which event I would in the circumstances have

declined to exercise my discretion in favour of the Second Defendant setting aside the Default Judgment.

[20] The application by the Second Defendant is dismissed with costs in the sum of \$1,000.



Mario Michel
High Court Judge