

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 91 OF 2009

IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF POSSESSORY TITLE

BETWEEN:

**DAWN CHANCE**

Claimant

v

**JAMES CHANCE**

Defendant

**Appearances:** Mr. Emery Robertson, Snr., for the Claimant  
Mr. B. Commissiong, Q.C. for the Defendant

-----  
2010: 7<sup>th</sup> October  
2011: 2<sup>nd</sup> February  
-----

**DECISION**

[1] **JOSEPH, Monica J:** This is an application filed on 27<sup>th</sup> April 2010, by the Defendant husband by virtue of Part 13.3 of the Civil Procedure Rules (CPR), to set aside a judgment obtained by the Claimant wife on 5<sup>th</sup> October 2009, in default of filing of a defence (default judgment). The grounds of the application are that the Claimant is not entitled in law to have that order made in her favor, and the Defendant has a defence to the claim which has a real prospect of success at trial.

## **CLAIM**

[2] The default judgment arises under a claim form and statement of case filed by the Claimant on 18<sup>th</sup> March 2009 seeking:

- (1) a declaration that she is entitled to one half share in the proceeds of sale of lands situated at Pembroke which was sold to developers of Ridgeview Development at Pembroke for the sum of 1.2 million dollars (the land).
- (2) a mareva injunction freezing the sum of \$600,000.00 or any sum paid into the Defendant's account at the Bank of Nova Scotia and or St. Vincent Building and Loan Association or any other bank in St. Vincent and the Grenadines until the said suit is determined or until an order by consent is made.
- (3) interest on the sum of \$600,000.00 at the rate of 6% interest from the date of sale until the date of payment.
- (4) an order that the Defendant pay the costs of these proceedings and such further order or direction as the Court seems just.

## **WRITTEN SUBMISSIONS**

[3] By an order made on 7<sup>th</sup> October 2010 entered on 29<sup>th</sup> December 2010, the parties were to file legal submissions on or before 18<sup>th</sup> November, 2010 with any further submissions to be filed on or before 3<sup>rd</sup> December 2010.

## **PROCEDURAL HISTORY:**

[4] On 1<sup>st</sup> April 2009, the Defendant was served personally with a Claim Form, an Acknowledgment of Service and a Defence Form. On the same day, solicitors signed an Acknowledgement of Service which was filed in the Registry of the High Court on 14<sup>th</sup> April 2009. That Acknowledgment of Service carried an endorsement that a Defence is to be filed within 42 days of service of the Claim Form. On 14<sup>th</sup> April 2009 the Registrar of the High Court filed a Notice to Claimant/Legal Practitioner, of acknowledgement of service.

- [5] A request for entry of judgment in default in the sum of \$615,350.00 was filed on 10<sup>th</sup> August 2009. An order in favor of the Claimant was made on 25<sup>th</sup> September 2009, 'settled as amended' on 28<sup>th</sup> September 2009 and entered on 5<sup>th</sup> October 2009:
- a) a declaration that she is entitled to a one half share in the sum of 1.2 million being \$600,000.00 monies realized by the Defendant for sale of land to Ridgeview Development at Pembroke.
  - b) Interest on the said sum from the date of sale until the date of payment at the rate of 6% per annum.
  - c) an order that the Defendant do forthwith pay over to the Claimant the said sum together with interest thereon.
  - d) costs in the sum of \$2,000.00.

[6] The record shows that on 7<sup>th</sup> September 2010 a judgment summons was filed for the Defendant's appearance on 7<sup>th</sup> October 2010, to be examined on oath as to his means to satisfy the default judgment debt. That judgment summons was supported by an affidavit of the Claimant filed on 16<sup>th</sup> September 2010. A request for issue of a writ of execution against the Defendant was filed on 24<sup>th</sup> November 2009. The next document, filed on 27<sup>th</sup> April 2010, is a notice of application to set aside the default judgment.

#### **PROCEDURE TO SET ASIDE JUDGMENT - CPR 13**

[7] Mr. Robertson submitted that judgment was obtained against the Defendant and there was no application for the staying of execution on the judgment. Further, Mr. Robertson submitted that the Defendant cannot obtain any relief from the High Court, this matter being outside the Court's jurisdiction, as the law and procedure are specifically laid out by 'both the substantive act and the rules of court'.

[8] By Rule 13.4 (2) an application to set aside a default judgment is to be supported by evidence on affidavit accompanied by a draft of the proposed defence. That procedure was followed in that an affidavit of James Chance was filed on 27<sup>th</sup> April 2010, to which a draft defence was exhibited.

**Rule 13.3 (1)**

[9] Which authorizes the Court to set aside a default judgment, reads:

....the Court may set aside a judgment entered under Part 12 only if the defendant –

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

[10] Mr. Robertson contended that the Defendant failed to apply promptly for the setting aside of the default judgment, or to give any plausible excuse for the delay, on which the Court can exercise its discretion. Cases cited: **Civil Appeal 3 of 2005 Kenrick Thomas v RBTT Louise Martin (as widow and executrix of the Estate of Alexis Martin deceased v Antigua Commercial Bank, Earl Hodge v Albion Hodge BVHC 2007/0098.**

[11] Learned Senior Counsel Mr. Commissiong referred to Kenrick Thomas case where Barrow SC J.A. commented that all three conditions must be satisfied for a successful application of the setting aside of a default judgment. The Court, it was held, has no discretion to allow an application if one of the conditions is not satisfied.

[12] Learned Counsel submitted that that approach did not and could not take away from the discretion of the Court hearing the application to set aside an assessment on the particulars of the case of what is reasonably practicable after finding out that judgment had been entered; or whether the Defendant has a real prospect of successfully defending the claim or what is a good explanation for the failure to file a defence.

- [13] It was Learned Counsel's submission that, as long as all factors are satisfied, it is for the Court to decide which factor weighs most heavily in the decision to allow or refuse the application to set aside.
- [14] In giving a discretion to the Court to set aside a default judgment, the rule sets out all the factors to be taken into consideration in the exercise of that discretion.
- [15] The first factor: has the Defendant applied to the Court as soon as reasonably practicable after finding out that the judgment has been entered? The second factor: has the Defendant given a good explanation for the failure to file a defence. A decision to set aside or not set aside a default judgment depends on the particular circumstances of a case.
- [16] The Claimant's affidavit filed on 5<sup>th</sup> May 2010 in opposition to the Defendant's application to set aside the default judgment, deposes that a copy of the judgment was delivered and copy served on the Defendant (who served and the date of service were not stated). The deponent stated that Learned Counsel for the Defendant requested her solicitor's consent to the setting aside of the default judgment.
- [17] I accept from the Claimant's affidavit that an informal attempt was made by solicitors for the Defendant to have the judgment set aside by consent. That attempt establishes that Solicitor for the Defendant was aware that there was a default judgment although there is no date when he became aware.
- [18] There is an affidavit of service by M. Mulcaire, a bailiff of the High Court, filed on 22<sup>nd</sup> September 2010, that he personally served the Defendant on 20<sup>th</sup> September 2010, with a Judgment Summons and an affidavit in support of Judgment Summons. I see no affidavit of service of the order made on 25<sup>th</sup> September 2009.
- [19] The Defendant deposed that he became aware that there was a default judgment when the writ of execution was served on him in November 2009. In the absence of an affidavit

of service of the 25/9/2009 order, I accept that the date the Defendant became aware of the default judgment was September 2010 as sworn by a bailiff of the High Court.

[20] I have seen copies of correspondence between counsel for both parties and it is evident at a point in time that an attempt was being made to arrive at an amicable solution. Counsel for the Claimant's letter of 29<sup>th</sup> April 2008, in mentioning the legal principles regarding division of property, expressed the hope for an amicable solution. The last letter dated 23<sup>rd</sup> April 2009, from counsel for the Defendant to counsel for the Claimant, reads:

"We owe you a defence in the above mentioned matter. We are however extremely busy preparing the arguments for ... Ottley Hall Commission of Inquiry matter which must be filed in a few weeks. We would therefore be much obliged if you would consent to an extension of time to file the defence; this will also give us some more time to talk to our client about a settlement proposal.

If you can accede to our request please sign the enclosed form so that we may file the details of our agreement. As always the courtesies you extend to your colleagues are greatly appreciated."

[21] I have not seen a reply to this letter. That is not surprising, as the letter was silent as to the period of time requested for the extension of time for filing of a defence.

[22] The Defendant's explanation for the delay, which appears in paragraphs 14, 15 and 17 of his affidavit, was that he was awaiting valuation of property.

14. When I first went to my solicitors I was advised that to properly defend the claim I must have valuations of my wife's properties made. I asked several persons to do the valuations for me and even though they promised they never did. One of them told me that he went but he was threatened by wife's relations and left without doing any measurement. My solicitors told me that while I was waiting to have valuations done they would be writing to the Claimant's solicitor she also called him on the telephone on more than one occasion and he assured her on one such occasion that it was not necessary to draw up the agreement required by the Rules, they should "play it by ear". She assured me that she was very upset when she discovered that judgment in default had been entered against me without any prior notification to her.

15. My solicitors also tried to obtain valuations of the Claimant's properties from her solicitors. In 2007 after the land was bought the Claimant's solicitor wrote to my solicitor asking that I give one half of the \$1.2 million that I was paid for the land. My solicitors replied to the Claimant's solicitor by several letters asking for valuations of the Claimant's said properties, none has ever been provided by the Claimant... Not knowing what value to put on the Claimant's properties I offered \$50,000.00 from the \$1.2m taking into account the properties she owns and the amounts I had to pay out of that money and that I had to provide for the four children by my first marriage and myself. She refused that offer demanding to be paid \$50,000.00 but still wanted to have the matrimonial home transferred to her and made no mention of my interest in her properties.
16. When I discovered that judgment had been taken up I made further effort to get the valuations done and with the assistance of my solicitors I retained the services of Mr. Archie Williams, the Government Valuer. It has taken him from October 2009 to the present time to do the valuations partly because he could not get access to one of the properties due to the Claimant's threats. I am informed by Mr. Williams and do believe that not being able to get access to the property and the burden of his substantive duties prevented him from doing the valuations before now."

[23] I am a little puzzled by the statement that it took the valuator from 'October 2009' when the valuation reports state that the valuations were requested by solicitor in March 2010. Did the valuator commence working on the survey before he was actually retained? The Claimant's affidavit did not address that statement and I do not take it any further.

[24] Mr. Williams' Valuation Survey and Report on the Rillan Hill property dated 28<sup>th</sup> March 2010, under inspection wrote

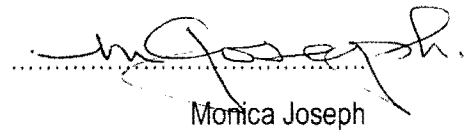
"... in a previous attempt (undated) I was ordered off the premises by Dawn Chance in the presence of her x-husband. Therefore measurements of this building were not taken. However pictures of the building were taken and measurements were obtained from other source."

[25] The Claimant's affidavit filed in opposition to the Defendant's application to set aside the default judgment was silent as to any allegations of threat against valutors. She deposed that awaiting a valuation on property could never be a valid excuse.

- [26] I accept that awaiting a valuation on property per se may not be a plausible reason. An applicant should not 'sleep' on steps to be taken in furtherance of a claim to the Court. However, a reason for the delay in obtaining a valuation is that the Claimant contributed to the delay by using threats to a valuator. I accept that that is a sufficient reason in this case.
- [26] I do not think that the Claimant can be heard to say that the Defendant's application to set aside a judgment is tardy and should not be granted, when the Claimant contributed to that delay by the use of threatening language to valuers attempting to do a valuation of property which is the subject matter of the claim.
- [27] The Claimant cannot, on one hand, be approaching the Court for justice when, on the other hand, she was hindering the justice process by her conduct. I find that her conduct contributed to the delay.
- [28] I hold that the two factors: the Defendant applied to the Court as soon as reasonably practicable after learning of the default judgment in the circumstances outlined and a good explanation for the delay in filing a defence, are present.
- [29] The third factor: does the Defendant have a real prospect of successfully defending the claim. To decide this question I am not required to have a mini trial. I consider what both parties have presented to the Court. The Claimant claims, as the Defendant's wife, a declaration that she is entitled to a one half share in the proceeds of sale of land that was sold to developers.
- [30] The Defendant claims that the Claimant lives in the matrimonial home, that she continues to run the shop in the matrimonial home, (which at one point both of them ran) and makes a good living. He also claims that she owns other property. Further, that he has to make provision for the children of the first marriage. I think that the Defendant has a real prospect of successfully defending the claim.

**CONCLUSION**

- [31] I find that the three factors set out in the rule are present. In all the circumstances the Defendant applied to the Court as is reasonably practicable and gave a good explanation for the delay in filing a defence. The Claimant contributed to the delay in threatening a valuator who attempted to have a valuation made of properties, one of which is claimed to be the matrimonial home. There is a real prospect of the Defendant successfully defending the Claimant's claim as the question of division of matrimonial property has been raised by both parties.
- [32] I set aside the default judgment. The Defendant is to file and serve the defence exhibited with his affidavit filed on 27<sup>th</sup> April 2010, within seven days.
- [33] The Defendant to pay prescribed costs to the Claimant.

A handwritten signature in black ink, appearing to read 'M. Joseph', written over a horizontal dotted line.

Monica Joseph

**HIGH COURT JUDGE (ACTING)**

16<sup>th</sup> January 2011