IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. 468 of 2021

BETWEEN

RAQUEL CAMPBELL

CLAIMANT

AND

SABRINA MILLER

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Hearing Date: February 21, 2023

Submissions: March 13, 2023

APPEARANCES:

Mr. Mark E. Williams, Counsel for the Claimant

Ms. Payal B. Ghanwani, Counsel for the Defendant

DECISION ON APPLICATION TO SET ASIDE DEFAULT JUDGMENT

INTRODUCTION

1. The defendant seeks to set aside a judgment in default dated August 26, 2022 entered against her for failure to file a defence. I find that the defendant has succeeded in satisfying the requisite conditions to have the default judgment on liability set aside.

2. The defendant is a businesswoman and an owner of the non-profit organization "*Corozal Animal Rescue Experience*." The claimant's case is that she invested BZ$26,000 into this business venture, which she alleged was a joint venture, and provided certain items for use in its operation. The defendant then took exclusive control of the business and wrongfully detained her items, refusing to return them to her. The substantive matter from which the application arose, therefore, involves a claim for a declaration that the claimant is the owner of: one dog house, two metal dog cages and one gas container, which are allegedly in the defendant's possession. The statement of claim also seeks: an order for delivery of the said items or their value of BZ$827; damages for wrongful interference with these items by their detention; and a refund of BZ$26,000 being the claimant's share or investment in the business; interest and costs.

3. Having failed to file a defence, the court entered judgment in default of defence for damages for breach of contract in the sum of BZ$26,000; interest at the assessed rate of 6% from December 10, 2020 to the date of judgment and, thereafter, statutory interest at the rate of 6% until payment in full as well as costs on the prescribed basis of BZ$3,900. This is the judgment that the defendant seeks to have set aside by her application filed on October 07, 2022. The defendant also seeks permission to file and serve a defence within fourteen days of the hearing of the application. In support of her application, she filed an affidavit of merit and a draft defence, and has annexed numerous pieces of documentary evidence including receipts and photographs of "returned" items. As judgment was entered only for refund of the BZ$26,000, I assumed that the other reliefs were dismissed or abandoned.

4. The main issue, at the hearing of the application, is whether the default judgment should be set aside, which can only happen if the requirements for the grant of such an order are met. There was no evidence that an assessment hearing was convened and it appears that both the judgments on liability and the assessment were done on the papers. This application seeks to overturn the default judgment on **liability**, which has not been obtained by a substantive trial of the issues but on a default of procedure. The application came after the

assessment was completed so once successful, it means that the assessment of damages would necessarily be overturned as well. However, this does not mean that the default judgment on liability cannot be set aside. In ***Strachan*** v ***The Gleanor Company Ltd***[1], the Board made it clear that a default judgment, where **liability** is not determined on the merits, can be set aside even after the assessment of damages. The Board referenced ***Evans*** v ***Bartlam***[2], where it was stated:

"*The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.*"

This still remains good law in this jurisdiction so I proceeded with my deliberations on the application in the context of the relevant rules.

THE LAW

5. Rule 13.3(1) of the Supreme Court (Civil Procedure) Rules 2005 ("the CPR") provides that a court may set aside or vary a judgment entered under Part 12 of the CPR, if the defendant satisfies three conditions. These conditions are: (i) if the defendant makes the application to the court as soon as reasonably practicable after finding out that judgment has been entered; (ii) gives a good explanation for failure to file an acknowledgement of service or defence; and (iii) has a real prospect of successfully defending the claim. All three conditions must be satisfied for a regularly obtained default judgment to be set aside, a position recently reaffirmed by the Court of Appeal in the case of ***Belize Telecommunication Limited*** v ***Belize Telecom Limited et Al***[3]. It means that for the defendant to succeed on her application, all three conditions under this rule must be satisfied or the application must be

[1] PC No. 22 of 2004 delivered on July 25, 2005
[2] [1937] AC 473 page 480
[3] BZ 2008 CA 3, Civil Appeal No.13 of 2007

refused. The defendant alone bears the burden of proof to convince the court that the judgment is to be set aside[4].

ANALYSIS

(a) AS SOON AS REASONABLY PRACTICABLE

6. I considered first the "as soon as reasonably practicable" limb and that there is no fixed timeframe that qualifies as the threshold for satisfying this requirement. The rule on setting aside simply requires the defendant to make the application as soon as reasonably practicable after finding out that judgment in default was entered against her. Further, any delay is to be explained in an affidavit of merit[5].

7. To determine the "reasonably practicable" limb depends, therefore, on the evidence of the date the defendant found out about the judgment against her. It is her actions after becoming aware that default judgment is entered against her, and not when the claim was served on her, that are relevant. Hence, it is not the date judgment is entered or the date she was served with the claim that is used in determining if this limb is satisfied. I, therefore, gave no consideration to the claimant's evidence in her affidavit in opposition that the defendant was aware of the application for default judgment via email dated June 06, 2022 or had given instructions to her previous counsel to respond to the claimant's demand letter and/or that her counsel had responded to the proposed claim by his letter dated January 27, 2021. That evidence of the claimant is of no relevance to the test that the defendant has to satisfy to get the default judgment set aside. The issue is, did she act within a reasonably practicable timeframe after she learnt of the judgment against her.

8. To determine if this limb is satisfied, I can consider a range of divergent circumstances or conduct by the defendant to assess if her steps, after learning of the judgment, are executed

[4] *ED & F Man Liquid Products Ltd.* v *Patel & Anr.* [2003] EWCA Civ. 472 at paragraph 9
[5] *Thorn PLC* v *Kathleen MacDonald and Peter MacDonald* [1999] EWCA Civ. J0901-6

within a reasonably practicable timeframe. There is no fixed or settled standard in the rules on what constitutes a satisfaction of this criterion so each case must be determined on its own factual context. In my judgment, the rule requires the defendant, upon finding out about the default judgment, to be sensible and move with due dispatch to apply to set it aside[6]. I understand "as soon as reasonably practicable" to mean that she ought not to procrastinate or to take measured or slow steps in seeking to set the judgment aside. In my deliberations, I am not bound to limit myself to a narrow approach, in interpreting the timelines, as the test allows for a certain level of flexibility. To exercise my discretion, however, I need evidence of the events that unfolded after the defendant learnt of the default judgment against her. It is the defendant who must provide this evidence in her affidavit and/or a draft defence or it will be difficult to determine if she acted as soon as reasonably practicable.

9. The defendant stated that she learnt of the default judgment when she was served with the order on September 09, 2022. Immediately, thereafter, she instructed her recently retained attorneys-at-law to file the application. It was filed on October 07, 2022 approximately twenty-eight days after learning of the judgment. It is her evidence that she tried to obtain her file from her previous counsel, without success. I considered that the defendant is not required to file the application <u>immediately</u> nor do the rules stipulate a fixed timeframe within which she must file. I considered also that it would have taken some time to recreate a file, give instructions, prepare an affidavit and a draft defence, as well as to collate documents to put before the court. Time would also have been required to prepare and file the requisite application to set aside or vary the default judgment.

10. This is a defendant who had to retain new legal representation so this would have affected the dispatch or speed with which the application was prepared and filed. In my judgment, twenty-eight days, in the context of this matter, is not an unreasonable or inordinate delay in filing the application. I find that the defendant has acted as soon as reasonably practicable. She has crossed this hurdle.

[6] *Narda Garcia* v *Alex Sanker* Claim No. 766 of 2021 where an application was filed within three days

(b) <u>GOOD EXPLANATION</u>

11. The defendant must have a good explanation for failing to file a defence. What constitutes a good explanation for failure to file a defence is not contained in the rules or in any exhaustive list of factors. Courts have accepted diverse explanations as constituting "good explanations" such as administrative glitches, mix ups, lapse of memory, minor slip ups or confusion. In the case of ***Narda Garcia*** v ***Alex Sanker***[7], Farnese J held that once an explanation is "*genuine and not a strategy aimed at frustrating the proceedings,*" it can meet the standard of a good explanation. It will depend on the context of the case so it will not be a good explanation where the defendant shows unconcern or disinterest in what can happen if he fails to act.[8] In certain circumstances, oversight may be excusable but not inexcusable oversight or administrative inefficiency[9]. Where an explanation is given that points to fault (real or substantial) on the defendant's part, it will not constitute "a good explanation"[10]. Further, it will also not be considered a good explanation where a defendant shows an indifference to the risk that default judgment might be entered against her: see ***Sylmord Trade Inc.*** v ***Inteco Beteiligungs AG***[11]. In ***Sylmord***, the Eastern Caribbean Court of Appeal upheld the ruling that there was not a good explanation, which the trial judge had defined as:

"*[A]n account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, [and] an administrative mix up are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered.*"

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[7] Claim No. 766 of 2021

[8] *Garbutt* v *Maheia's United Concrete and Supplies Ltd.* Claim No. 621 of 2017 para. 23 identified administrative oversight, negligence, inattention, deliberate disregard of the court process as not meeting the standard of good explanation.

[9] *The Attorney General* v *Universal Projects Limited* [2011] UKPC 37

[10] Supra note 9

[11] (2014) ECSC J0324-3

12. I considered the evidence before me and whether it shows an indifference or disinterest on the part of the defendant to the risk that judgment might be entered against her. The defendant gives a full account of what occurred since receiving the proceedings, which demonstrates her active interest in instructing counsel to defend the claim and maintaining contact with him. She avers in her affidavit in support that she provided her previous counsel with her responses to the claim within a short timeframe of receiving it. She was served with the claim on July 29, 2021 and on August 03, 2021 delivered all requisite documents to her former counsel to enable him to respond to the claim. She remained in periodic contact with him about the progress of her matter and was advised that it was not to her advantage "*to rush this*" and counsel will file the necessary response. She provides the several dates and messages, showing her contact with her former counsel on the matter's progress. She was under the impression that having acknowledged service, he would have filed a defence since he was apprised fully of her responses to the claim. She learnt, subsequently, that her former counsel was negligent in failing to file the defence within the requisite timeframe, on the basis that it could be filed after the Supreme Court's long vacation. He also failed to seek an extension of time from the claimant or the court. On several occasions thereafter, she sought to communicate with her previous counsel, without success, and was even unable to secure the return of her file. She stated that her failure to file a defence was not due to any fault or indifference to the claim or consequences of failing to take a step but mainly to the lack of diligence by her former counsel.

13. In her affidavit in response, the claimant chided the defendant for intentionally leaving the procedural progress of the matter solely up to her former counsel and for taking no personal responsibility for monitoring the status of the claim and ensuring that he was acting in accordance with her instructions. She asked the court to reject this approach by the defendant to litigation as being against the spirit of the CPR. The claimant states, further, that it is clear that the defendant, after being served with the claim, was prepared: (i) to sit back in the hope that nothing would come out of the claim with which she was served on July 29, 2021; (ii) to shield behind her legal representative and; (iii) to take no active interest

in furthering the overriding objective of the rules by dealing with the matter expeditiously. The claimant, in further response, points to a letter dated January 11, 2021, from the defendant's former counsel, requesting proof of the investment. The claimant asserts that this shows that the defendant "*had virtually accepted the obligation*" to compensate her for her claim.

14. I do not agree with the view that the defendant's requests, for disclosure and evidence of the investment, show an acceptance of allegations in the claim. Indeed, this request does not constitute an admission of liability by the defendant. It also does not show any intention, by the defendant, to compensate the claimant in accordance with her demand in the letter dated January 11, 2021, which pre-dated the claim. I also do not accept the argument that the defendant demonstrated a lack of interest in pursuing a defence of the claim and ought to have done more. Counsel also argued that the defendant was seeking, actively, to flout the rules of the CPR by taking cover behind the inaction of her legal representative. I reject this argument. What is clear on the evidence is that the defendant actively sought legal representation to defend the claim. She acknowledged service and gave full instructions to file her response. These acts in no way evince any disingenuous or lackadaisical approach to the proceedings. There is no evidence of indifference or inaction on the defendant's part, as the claimant sought to convince this court. The defendant did her part and must rely on her legal advisor, who has knowledge of the law and its procedures, to take the requisite steps. I have considered what more a defendant could do to respond to proceedings in a timely fashion, having supplied her counsel with the requisite instructions to answer the claim. The defendant actively made enquiries and was given assurances by her counsel on which she relied. With full instructions in hand, her counsel was negligent in failing to file the defence. There is no evidence that the defendant secreted herself somewhere to avoid answering the claim or could not be contacted or was seeking to shelter under the non-action of her previous counsel as excuses for not defending the matter. This defendant shows active interest in her matter and did all that she could to ensure that her counsel could file her defence.

15. In ***Bernaldo Jacobo Schmidt*** v ***Ephriam Usher***[12], the Belize Court of Appeal, in deciding that failures by an attorney may amount to a good reason, cited with approval the approach of the Eastern Caribbean Court of Appeal in ***Joseph Hyacinth*** v ***Allan Joseph***[13] as follows:

"*Timelines in conducting litigation must be observed by a litigant, but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. However, the applicant must show that the delay was substantially due to the conduct of the attorney and litigants must show some degree of vigilance in protecting their own interest. Failing to make at least periodic enquiries with an attorney can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason. In this case, the appellant showed very little interest in defending himself against the respondent's claim.*"

16. In ***Bernaldo Jacobo Schmidt***, the Belize Court of Appeal cautioned courts not to set "*too high a standard for deciding what is acceptable as, 'a good explanation,'*" under the rules[14]. The Court of Appeal also clarified that the concept did not mean "*nothing less than a good and compelling reason.*[15]" In the context of the case before me, it is clear that the delay and inaction in filing the defence rest substantially, or wholly, with the previous counsel. The defendant was diligent and not indifferent to her matter but persisted in making enquiries of her previous counsel about its progress. Her previous counsel's failure to file the defence was beyond her control and a good explanation. Following the learning above, I find that the defendant has crossed this hurdle successfully to get the judgment set aside.

[12] Civil Appeal No. 14 of 2017
[13] GDAHCVAP 2015/0025
[14] *Bernaldo Jacobo Schmidt* v *Usher* Civil Appeal No. 14 of 2017 page 163, paragraph 27
[15] Supra note 14

(c) REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM

17. To succeed in getting a default judgment set aside, the defendant must have a real prospect of success in the claim. In ***Swain*** v ***Hillman & another***[16] Lord Woolf MR stated that, "*the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, they direct the court to the need to see whether there is a 'realistic' as opposed to a fanciful prospect of success.*" A case may have a real prospect of success even if it is improbable. [17] The test does not require a defendant to show that her case will probably succeed at trial or to prove her case. In determining if this limb has been satisfied, I am not required to conduct a mini trial or a meticulous assessment of the untested affidavit evidence. I can analyse the facts and consider connected documents, in determining the substance of the defendant's case. This is particularly relevant if factual assertions are contradicted by contemporary documents[18]. In so doing, I can look at the evidence in the affidavit and draft defence to see if there is a real prospect of success such as to enable the defendant to cross this threshold.

18. The overarching claim against the defendant is for a breach of contract. The breach arose, allegedly, from an oral agreement between the defendant and claimant, with claims also of wrongful detention of items and for return of monetary investment. The parties have taken opposing positions on the claim. The draft defence gives an alternative version of the facts and raises an arguable case. The defendant says in her draft defence that there was no agreement, arrangement or common intention between the claimant and defendant, whether orally or otherwise, in relation to operating the *Corozal Animal Rescue Experience*, as a joint venture business. It was a non-profit business and the claimant was simply volunteering her time to the business. Further, the defendant denied that the items claimed by the claimant to be in the defendant's possession were actually in the defendant's possession. In her draft defence, the defendant responded to this claim by stating,

[16] *Swain* v *Hamilton & another* [2001] 1 AER 91
[17] White Book 2007, Vol 1, para 24.2.3.
[18] Supra note 4 at paragraph 10 per Potter L.J.

categorically, that these items were returned to the claimant and that she had evidence to support this. In overall answer to the claim, the defendant stated that the non-profit business was hers and that the claimant had never invested any sum of money towards the start-up and operation of the defendant's business. In her alternative version, the defendant avers that she is the one who financed all purchases made by the claimant. She points out that the claimant has not exhibited to her claim any supporting evidence of her purported investment of BZ$26,000. The defendant attaches to her affidavit cheque stubs and deposit slips paid by her to the account of the claimant's husband as reimbursement.

19. In opposition, the claimant asserts that there is no real prospect of successfully defending the claim and the application ought to be dismissed. Counsel for the claimant points out that the defendant has contradicted herself in her affidavit, by admitting to the fact that both parties had conceived of the idea of opening the shelter together and that the claimant had made an investment in the project. Counsel argues that the defendant lacks candour and did not make full disclosure to the court so ought not to have the benefit of the favourable exercise of the court's discretion. Counsel also sought to rely on the balance of convenience argument based on the fact that the claimant would have suffered prejudice and inconvenience by facing an inordinate delay in the hearing of her case and greater costs and expenses to re-litigate the claim, all through no fault of hers.

20. The claimant's arguments about balance of convenience or prejudice caused by the delay and having to re-litigate the matter hold no sway. A default judgment is a procedural judgment, which, by its very nature, means that there was no trial on the substantive claim. There being no adjudication on the merits in relation to liability, I will say no more on these points made by the claimant's counsel. The rule is clear on the factors to be considered on an application to set aside a default judgment.

21. At this stage, where an application to set aside is being considered, I am not required to hold a mini trial nor is the defendant to prove that her case is fool proof. The defendant has addressed each allegation in the statement of claim frontally. She has annexed several

relevant documents to her draft defence and, undoubtedly, there will be evidence that will likely be available at trial. The parties are on opposite sides of the litigation spectrum. I find that there are sufficient materials before me in the draft defence to show an arguable case exists with triable issues that need an opportunity to be ventilated at a trial. A trial is the only way to determine the version that will prevail. The defendant has a real prospect of succeeding in the action. The defendant has satisfied this limb too.

DISPOSITION

22. It is ordered that:

a) The default judgment dated August 26, 2022 is set aside with costs to be agreed.

b) The defendant is to file and serve her defence within fourteen days of today's date on April 05, 2023.

c) The matter is adjourned for a case management conference on April 25, 2023.

Dated March 21, 2023

Justice Martha Alexander
Judge of the High Court of Belize