

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF JUSTICE

CLAIM No. CV 425 OF 2023

BETWEEN:

YASMINE HARMOUCH
(doing business as HELEN GOLF CART RENTAL)

Claimant

and

MARK ANTHONY WHITE

Defendant

Appearances:

Mr. Estevan Perera for the Claimant

Mr. Mark Williams for the Defendant

2024: January 4;

June 7.

JUDGMENT

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT

[1] Nabie J.: This is an application to set aside judgment in default of acknowledgement of service. I refuse the application for the reasons set out below.

BACKGROUND

[2] By claim form and statement of claim filed on 6th July 2023, the claimant is seeking damages in the sum of **Thirty-Two Thousand Four Hundred and Thirty-Four**

Dollars and Fifty Cents (\$32, 432.50) for breach of contract by the defendant who did not return to the claimant, a 2007 Club Car Villager (the golf cart) that he, the defendant rented on 1st June 2023 and for the loss of one month's rent of **One Thousand Two Hundred Dollars (\$1200.00)**. In the alternative, the claimant is seeking an Order that the defendant pay the claimant the sum of **Twenty-Nine Thousand Two Hundred Dollars (\$29,200.00)** being the replacement value of the golf cart rented and loss of one month's rental value. Further, in the alternative, the claimant seeks the return of the golf cart that the defendant rented from the claimant.

- [3] The claimant pleads in her statement of case that the defendant rented the golf cart on 1st June 2023 for **one (1) month** for the rental price of **One Thousand Two Hundred Dollars (\$1200.00)** and there was an implied term that it would be returned at the end of the rental period. The golf cart was not returned. The claimant sourced the price of a replacement golf cart in the sum of **Twenty-Eight Thousand Dollars (\$28,000.00)** from Captain Shark's Service Center in San Pedro, Belize. A copy of the quotation is annexed to the pleadings.
- [4] On 14th August 2023, the claimant filed a request for entry of judgment in default of acknowledgement of service. Judgment in default is dated 18th September 2023.
- [5] On the 29th of September 2023, the defendant filed a notice of application to set aside the default judgment, supported by an affidavit of the defendant and a draft defence. The defendant's affidavit set out that the defendant had been served on the 14th of July 2023 and he had approached a friend who was a former employee of a law firm for advice and was misled as to the date to file an acknowledgment of service in the matter. Thereafter, the defendant sought consultation from an attorney but nothing was still filed. The friend who used to work at the law firm thereafter indicated to the defendant that the time to file the acknowledgment had passed. The defendant then retained his present attorney and an acknowledgement was uploaded but was not accepted by the court office. The defendant's defence was that the golf cart had been stolen on or about the 12th of June 2023 and he had informed the claimant's husband who had assisted him in searching for the golf cart.

The defendant deposed that the claimant would not attend the police station to make a report and alleges that the claimant was contributorily negligent for the situation.

[6] The claimant filed an affidavit in opposition to the defendant's application on 16th November 2023. The claimant set out the facts surrounding what led up to the default judgment. The claimant conceded that the defendant filed the instant application as soon as reasonably possible. She deposed that all three elements required to set aside judgment in default had not been satisfied, that there was no reasonable excuse for the defendant's actions and based on the draft defence there was no realistic prospect of success.

[7] **ISSUES**

1. Whether the court should set aside the judgment in default?
2. Did the defendant provide a good reason for his actions?
3. Does the defendant have a realistic prospect of success?

LAW AND DISCUSSION

[8] The **Supreme Court Rules (CPR)** provides with respect to setting aside default judgments:

"CPR 13.3 (1) Where Rule 13.2 does not apply, 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 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.”

[9] Therefore, in accordance with **CPR 13.3(1)**, there are three (3) conditions that have to be satisfied for the court to set aside a default judgment made under **CPR 12**¹.

AS SOON AS REASONABLY PRACTICABLE

[10] The claimant has conceded that the first condition has been satisfied. The defendant has made the application as soon as reasonably practicable after finding out that the judgment has been entered. It was the claimant’s evidence that the judgment was received on the 26th September 2023 and the notice of application to set aside the default judgment was filed on the 29th September 2023. The claimant further deposed that the judgment was served on the defendant on 13th November 2023.

GOOD EXPLANATION FOR THE FAILURE TO FILE AN ACKNOWLEDGMENT OF SERVICE

[11] The defendant’s evidence is that he was served with the proceedings on 14th July 2023. He thereafter contacted a friend who used to work in the office of an attorney at law for assistance in completing the form. The friend had kept the documents for a while and subsequently advised that as the court vacation was approaching, time would not run against the defendant. A short time later, the defendant again enquired of the friend as to the status of the case. At that time, the friend informed the defendant that it was too late to file the acknowledgement of service as she had gotten advice from someone else. The defendant states this was the reason for not filing the acknowledgement of service. Thereafter, upon the advice of the friend, the defendant had a telephone conversation with an attorney for which he paid a consultation fee. Nothing was filed after that consultation. At that point, the

¹ Belize Telecommunications v Belize Telecom Limited et al Civil Appeal No. 13 of 2007

defendant deposed that he was desperate and was advised by a police officer to consult with his current attorney at law on 21st August 2023. The acknowledgment was uploaded and filed on 22nd August 2023 but it was not accepted by the court office.

- [12] The defendant argues that he has provided a good explanation for his inaction. He relies on several authorities. The defendant refers to the Privy Council decision of **Attorney General v Universal Projects Limited**², where he submitted that even an oversight can be a good explanation. Paragraph 23 of the **Universal Projects Limited** matter states:

“....First, if the explanation for the default i.e. the failure to serve a defence by 13 March connotes real or substantial fault on the part of the defendant, then it does not have a “good” explanation for the breach. To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency.”

- [13] The defendant argued further that he sought assistance in filling out the form which does not require the legal skill or competence of an attorney and could be done by himself. He therefore submitted that there was nothing unreasonable in doing so and ought not to be punished for it. Mr. Williams further stated that the actions of the defendant and the explanation given were *“genuine and not a strategy aimed at frustrating proceedings”*³. Accordingly, it was contended that the explanation satisfies this test and the defendant’s actions could not be seen as stalling or seeking to frustrate the proceedings. The defendant should be seen as actively

² [2011]UKPC 37

³ Narda Garcia v Alex Sanker Claim No. of 766 of 2021 para 8 pg 3

taking steps to respond to the claim in a timely manner even though it was eventually a mix-up as to whether an acknowledgement of service could be filed during the long vacation. Finally, the defendant suggested that he was not nonchalant but showed a degree of vigilance and was actively pursuing the matter.

[14] The claimant relied on the matter of **Raquel Campbell v Sabrina Miller**⁴ which he submitted established that the negligence of an attorney could now be considered a good explanation. **Campbell** changed the position that had been held for a number of years. In **Campbell**, the applicant has provided a detailed account of all that was done and communication that the applicant had with her attorney. The claimant's position is that the defendant's affidavit fails in that regard.

[15] The claimant further contended that the defendant is unable to rely on **Campbell** as in this case, the failure or negligence of an attorney is not an issue. It was argued that this scenario could open the pandora's box for future applications as assistance was sought from a layperson. It was posited that the affidavit lacks details of times, dates and names of persons as well as the qualification of the layperson. The claimant summarized the defendant's "good explanation" as the following:

- a) negligence of a layperson in assisting the defendant with the matter;
- b) reliance on a layperson's advice; and
- c) negligence of a layperson in giving wrong legal advice to the defendant.

[16] There is not a set formula regarding what is a "good explanation", guidance can be found in the case law. The matter of **Campbell** followed the Court of Appeal decision in **Bernaldo Jacobo Schmidt v. Ephriam Usher**⁵ where it stated that the failures

⁴ Claim No. 468 of 2021

⁵ Civil Appeal No. 14 of 2017

of an attorney amounted to a good reason⁶. In **Narda Garcia v. Alex Sanker**, Farnese J. commented as follows:

“...What is clear from the case law provided is that the courts have been better at articulating when an explanation does not meet the standard of being good than when it does”.

[17] In this matter, the defendant’s affidavit does not provide sufficient details and without which, it is difficult to establish if the defendant was actively pursuing the matter. I agree with the claimant that the account of what transpired after the date of service is lacking in details of time, dates and names of the persons except for the attorney with whom he consulted by telephone. However, there is no evidence that that attorney was instructed to do anything. The only date given is the date of 21st August 2023 when the defendant’s present attorney was retained. The defendant, in my view, did not prove that he exhibited the requisite diligence required. Further, he sought the assistance of a person who is not an attorney and failed to provide an adequate account of all that transpired from the service of the claim form to retaining his present attorney. I do not accept that the defendant’s actions which included approaching a lay person who used to work in a law firm and a police officer or as was submitted that he made efforts through persons who had some connection or involvement with the legal process was satisfactory and can amount to a good explanation. There was a time when failure by an attorney was not considered a good explanation. The claimant argued that while an attorney’s conduct may amount to a good explanation and this should not be extended to a lay person. The defendant countered by submitting that one did not need an attorney to fill out the forms. This line of argument does not assist the defendant as it make his explanation even weaker in the circumstances in that he should have been able to follow the instructions on the form and file his acknowledgement.

[18] In the circumstances, the defendant has not convinced me that he has a good explanation. Accordingly, **CPR 13.3(1)(b)** has not been fulfilled. It is undisputed that

⁶ Campbell v Miller Claim no. 468 of 2021 para 15 pg 9

all three (3) limbs of **CPR 13.3(1)** must be satisfied. My finding on this limb can bring the matter to an end. However, for completeness, I will consider the third limb.

REALISTIC PROSPECT OF SUCCESS

- [19] In **Swain v Hillman**⁷, it was stated by Lord Woolf that the words “no real prospect of being successful or succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success or, as counsel in that matter submitted, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success. The court therefore is not required to conduct a mini-trial on the pleadings.
- [20] It was submitted that the defendant fiercely denies the pleadings in the statement of case that related to the contract. The core issue in the matter is whether the defendant entered into any such contract and/or if he did whether such contract was valid and binding. Further, the draft defence apports blame to the claimant for the loss and non-recovery of the golf cart as the claimant did not file a police report upon request from the defendant. The defendant’s case appears to be hinged on whether the contract exhibited to the claim form was valid as it was executed after the commencement date. The defendant’s view is that such an issue needs to be tried.
- [21] The claimant in response pointed out that there was no counterclaim in the draft defence and further it contains no pleadings of misrepresentation, mistake, or undue influence. The claimant submitted that the defendant has not presented a good defence of excusing him from returning the golf cart in good condition or payment for losses incurred by not returning it.

⁷ [2001] 1 All ER 91; [1999] EWCA Civ 3053

[22] In the draft defence, the defendant disputes the day he rented the golf cart. He claims it was the 4th of June 2023, while the claimant says it was the 1st of June 2023. However, the claimant exhibits a rental agreement which is signed by the defendant and which purports to be for a period of **one (1) month** from 1st June 2023, at a cost of **One Thousand Two Hundred Dollars (\$1200.00)** whereas, the defendant says he agreed to pay a rental of **Three Hundred Dollars (\$300.00) per week**. The defence is essentially that the golf cart was discovered stolen on or about 11th to 12th June 2023 and that the contract for the rental was backdated. In my view, the stance that there was no contractual obligation is a weak defence as the parties entered into a contractual relationship when the golf cart was rented. It matters not that the agreement was formalized subsequent to the date. There is no pleading that the defendant was forced to sign the agreement. Secondly, the defendant claims that the claimant was contributorily negligent for some of the losses as she did not attend the police station to make a formal report. However, it was pleaded that the defendant made a formal report on 12th June 2023. It is difficult to believe that a police officer is unwilling to take a report from the person renting the golf cart which was stolen. Further, the defendant has not set out how the claimant's attendance would have prevented further loss. It is stated in paragraph 2 of the draft defence that the agreement annexed to the statement of case was signed at the police station on the 12th of June 2023. However, there is no explanation about how this actually happened.

[23] I am of the view that the draft defence has no realistic prospect of success. There is no averment that precluded the defendant from the responsibility of returning the cart. The defendant does not deny the existence of a contract nor that he was in control of the golf cart at the time that it went missing.

[24] In conclusion, the defendant has failed to satisfy two of the three requirements of **CPR 13.3(1)** to set aside the judgment in default.

DISPOSITION

[25] It is hereby ordered:

- (i) that the application is dismissed.
- (ii) costs are awarded to the claimant.

Nadine Nabie

High Court Judge