COMMONWEALTH OF THE BAHAMAS **1998**

IN THE SUPREME COURT **No. 1185**

Common Law Side

B E T W E E N

ELODIE SANDFORD

Plaintiff

AND

WILLIAM BRET BARTON

First Defendant

AND

SPECIALTY CONSTRUCTION & MILLWORK LTD.
(also doing business as Specialty Construction systems)

Second Defendant

Appearances: **Oliver Lidell for the defendants**
Brian Simms and Tracy Ferguson for plaintiff

RULING

Estelle G. Gray Evans, Acting Registrar

This is an application by Summons filed May 17, 1999, on behalf of the defendants for an Order setting aside a judgment in default of defence pursuant to Order 19 rule 9 of the Rules of the Supreme Court which states:

> **"The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."**

Appearances were entered on behalf of the first and second defendants on January 4, 1999 and December 9, 1998, respectively.

The plaintiff filed her statement of claim on March 5, 1999, and on March 22, 1999 entered judgment in default of defence for the liquidated amount of $11,000.00 and damages and interest thereon to be assessed and costs to be taxed if not agreed.

The defendants' summons is supported by two (2) Affidavits of Simone Morgan-Gomez filed on May 31, 1999, and July 28, 1999, respectively and exhibited to these affidavits are a draft defence and an amended draft defence respectively.

It is accepted firstly, that the court's **"discretionary power to set aside a default judgment which has been entered regularly is unconditional, and ..... The**

purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default.

Secondly, that **"the primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."**

And thirdly, that **"if the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits" [Farden v. Richter (1889) 23 Q.B.D. 124.].**

Additionally, in the case of **Evans v. Bartlam (1937) A.C. 480 HL** at the suggestion of counsel that the applicant to set aside a regularly entered default judgment should satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, Lord Atkin said at page 482:

> **"I do not think any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion."**

The defendants in their affidavit in support of this application give an explanation for judgment in default being allowed to be entered against them and why they are now applying to have the judgment set aside. There was no serious objection to the plaintiff's explanation, though counsel for the plaintiff did say that the explanation given was a weak one. Nonetheless, I accept the defendant's explanation.

There is no dispute that the plaintiff has a regular judgment in default of defence and as indicated in the case of ***Farden v. Richter*** supra, it is an (almost) in flexible rule that there must be a defence on the merits.

So the question to be decided, as I see it, is: "having regard to the facts of this case, have the defendants in their draft defence shown that they have a defence on the merits to the plaintiff's claim?"

The plaintiff's claim in a nutshell, as I understand it, is that she entered into three (3) separate agreements with the defendants for the defendants to build, deliver and install certain wood work in the plaintiff's home in Lyford Cay; that each of the agreements contained provisions relating to the cost of the work, deposits payable and an express term that the work would be completed by 30th September, 1998. That to date the defendants have not completed the work as a result of which she has suffered loss and damage.

The defendants admit each of the agreements. They admit the work they were supposed to carry out and they admit the payment of the various deposits. They also

admit a further payment on account with respect to the first agreement. They deny that there was an express term in any of the agreements that the work would be completed by 30th September, 1998. However, they admit that, to date, the work has not been completed.

In regard to the work under the first agreement, i.e. "to build, deliver and install wall to wall bookshelves, desk and cabinets" the plaintiff alleges that the defendants have breached this term of the agreement in that, having installed a portion of the cabinets, the defendants removed some of them on 5th October, 1998, and have failed to complete the construction and installation of the said bookshelves and cabinets. The plaintiff also alleges that of the partially constructed bookshelves and cabinets that were installed, the same were defective and not according to the contract or, alternatively, the defendants misrepresented in drawings supplied to the plaintiff the size and dimensions of the bookshelves, desk and cabinets which as constructed were too small for the purpose for which they were built.

The defendants deny that they were in breach of the first agreement, though they admit that having installed a portion of the cabinets, they removed some of them on 5th October, 1998. However, the defendants say that the cabinets were removed on the instructions of the plaintiff who requested certain modifications within two (2) weeks. The defendants say further that they ordered and paid for some portions of the cabinets and manufactured the remaining portion of the cabinets prior to the 19th October, 1998. The defendants do not say that they completed the installation and they give no reason for not doing so. They merely say that the cabinets were ready for installation prior to the 19th October, 1998, but they do not say what is the relevance of that date.

The defendants deny the plaintiff's allegation that the installed cabinets were defective and say that the cabinets were in compliance with the drawings and that the drawings correctly reflected the finished size and dimensions of the cabinets. The defendants intend to rely on the drawings for their full effect and true purport thereof.

In connection with the second agreement, again the defendants deny that the agreement contained an expressed completion date, but they admit the other terms as alleged by the plaintiff. The plaintiff alleges that the defendants breached the second agreement in that the defendants have failed to supply and install the bi-folding cherry wood shutters by 30th September, 1998, or at all, as provided in the second agreement. The defendants deny any breach of the second agreement and say that they ordered and paid for the cherry wood shutters from the manufacturer prior to the 19th October, 1998. Again the defendants do not say that they have completed the installation of the

cherry wood shutters and give no reason for not doing so. And again I do not see the significance of that date.

The plaintiff alleges that as a result of the defendants' failure to install the cherry wood shutters, the consideration for the payment of the contract price of $11,000.00 in advance has wholly failed. The defendants deny that the consideration has failed and say that they were performing their obligations under the second agreement as agreed. Does that mean they were prevented from performing their obligations; and if so, by whom? Unfortunately, they do not say or give a reason for not having to date completed installation of the cherry wood shutters.

As regards the third agreement, again the defendants admit that they agreed to perform the work for the price alleged by the plaintiff. They admit having received the full contract price of $1,800.00 on the 31st August, 1998. They deny that the agreement contained an express completion date. They admit that they installed a partially constructed cherry wood fireplace and hearth bench on or before the 9th September, 1998. They say the cherry wood bench was 90% completed. They give no reason for the 10% incomplete portion of the work, but they say that the incomplete portion related to a missing hearth shelf which is "an ascetic accent."

The plaintiff alleges certain damage suffered as a result of the defendants alleged breaches which the defendants, of course, deny.

Counsel for the defendants was of the view and so submitted that "it is patently clear from the statement of claim and draft defence that there are real issues of fact between the parties and at the very least the defendants have an arguable defence."

He further submitted that there was no burden on the defendants to show that their defence would succeed on the merits; all that they had to show was that they had an arguable case.

Counsel for the plaintiff submitted that the threshold which the defendant had to pass in order to persuade the court to set aside a regular judgment was not whether the defendant had an arguable defence, but rather whether he had a defence on the merits.

Indeed, one of the propositions derived from the judgment of Sir Roger Ormrod in the case of **Alpine Bulk Transport Co. Inc., v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyd's Report 221** is:

> **"It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action"**

Counsel for the plaintiff submitted that the defendant has not by its draft defence shown a defence on the merits. He was of the view that the only issue between the parties was one of quantum of damages, as the defendants have in their draft defence admitted all the agreements and that the effect of the defendants' replies to the plaintiff's allegations is to admit the breaches claimed in the statement of claim. He further submitted that as the defendants have in fact admitted the breaches, the only question left to decide is whether as a result of the defendants' breaches, the plaintiff has suffered any damage. Therefore he submitted that the judgment should be allowed to stand and the action proceed by way of assessment of damages.

On the face of the draft defence, the defendants did raise issues of fact, namely:

- Was it an express term of each of the agreement that the work would be completed by the 30th September, 1998?
- Were the partially installed bookshelves and cabinets defective or were they in accordance with the contract? if so,
- Did the defendants misrepresent the size and dimensions of the wood work in the drawings supplied to the plaintiff?

However, I am also of the view that those issues of fact, even if they are resolved in favour of the defendants, go more to the quantum of damages than to the real issue between the parties which, as I see it is: Has the work been completed? If not, why not? The defendants admit that the work has not been completed. However, although it is now more than one (1) year since the first agreement, they give no reason and they allege no fault of the plaintiff.

Having considered the pleadings, submissions and authorities, I find that the defendants have not by their draft defence shown that they have a defence on the merits to the plaintiff's claim. Consequently the defendants' summons to set aside the plaintiff's judgment in default of defence filed March 22, 1999, is dismissed with costs to the plaintiff to be taxed if not agreed.

DATED this 24th day of September A.D. 1999

Estelle G. Gray Evans
Acting Registrar