IN COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2020/CLE/gen/00950

BETWEEN

NORTH BIMINI BAY CONDOMINIUMS LTD.

Claimant

AND

MYRON SAUNDERS

"TO PERSONS UNKOWN"

Defendants

Before:	**The Honourable Madam Senior Justice Deborah E. Fraser**
Appearances:	**Mr. Ashley Williams for the Claimant**
	Mr. Sidney Campbell for Myron Saunders
Hearing Date:	**18 March 2024**

Application to Set Aside Judgment in Default – Part 13 of the Supreme Court Civil Procedure Rules, 2022 – Failure to file Defence – Failure to File Acknowledgment of Service - Application made as reasonably practicable after finding out the judgment has been entered- Good Reasons for not filing Defence – Good Prospect of Success of Defence

RULING

FRASER, SNR. J:

[1.] This is an application brought on behalf of the named Defendant, Myron Saunders ("**Mr. Saunders**"), requesting the Court to set aside a Judgment in Default of Appearance filed against him on 30 November 2020.

Background

[2.] On 23 September 2020, the Claimant, North Bimini Bay Condominiums Ltd ("**NBCL**")., filed a Specially Indorsed Writ of Summons ("**Writ**") against Myron Saunders and "to persons unknown" alleging trespass on Lot Number 3 in the subdivision known as Hemmingville Subdivision on the Northern part of Bimini, one

of the Islands of the Commonwealth of The Bahamas ("**Property**"). NBCL's claim to the Property is based on a Conveyance dated 21 September 2005 between Hank Weech and Yvette Weech of the one part and NBCL of the other part and recorded in the Registry of Records in the City of Nassau in Volume 9375 at pages 235 to 244.

[3.] NBCL claims that Mr. Saunders (and others) refused to leave the land, despite a letter being written (on 09 June 2017) to Mr. Saunders demanding he cease his alleged trespass. NBCL claims:

(i) Possession of the Property;
(ii) Mesne Profits thereon until possession is delivered up;
(iii) A Declaration that the Defendants are not entitled to enter or cross the Property;
(iv) An injunction to restrain the Defendants;
(v) Damages for the trespass to the Plaintiff;
(vi) Interest;
(vii) Costs; and
(viii) Such further or other relief as the Court deems just.

[4.] On 30 November 2020, NBCL filed a Judgement in Default of Appearance against Mr. Saunders (as Mr. Saunders was served, but did not enter an appearance in the proceedings) and "persons unknown".

[5.] On 09 April 2024, Mr. Saunders filed a Notice of Application and Affidavit requesting this Court to set aside the Judgement in Default of Appearance.

Issue

[6.] The issue that the Court must determine is whether the Judgment in Default of Appearance ought to be set aside?

Evidence

Mr. Saunders' Evidence

[7.] Mr. Saunders filed The Defendant's Affidavit of Merit on 24 October 2023 ("**First Affidavit**") which provides that: (i) Sometime in September of 2020, Mr. Saunders was served with the Specially Indorsed Writ of Summons and he noticed that the Writ of Summons did not have a date; (ii) He was told by Police Officer 3552 McPhee that Mr. Saunders only needed to look over the Writ. Thus, Mr. Saunders signed it and placed it

in his bag at home; (iii) Sometime in 2023, Mr. Saunders was seeking a loan from Scotiabank when he discovered there was a judgment made against him, filed 30 November 2020 (the Judgment in Default of Appearance is exhibited to the affidavit); (iv) Mr. Saunders contacted Sidney Campbell to assist him in having the Judgment in Default of Appearance set aside; (v) a title search was done showing that Mr. Saunders appears to be the owner of the Property (the title search report is exhibited to the affidavit); and (vi) there is a Conveyance recorded at the Registrar General's Department evidencing that NBCL had possession of the property since 21 September 2005.

[8.] The First Affidavit also provides that: (i) Mr. Edward Brennen signed and executed the conveyance in favor of NBCL and impressed at the foot or end of the conveyance the common seal of NBCL as a Director; (ii) on 12 April 2011, Mr. Edward Brennen executed a conveyance selling the Property to Mr. Saunders for the sum of $40,000.00 (the conveyance is exhibited to the affidavit); (iii) Mr. Saunders' conveyance is recorded in the Registry of Records in the City of Nassau in Volume 11349 at pages 040 to 057; (iv) that the legal description in NPCL's conveyance is denoted as Lot Number 3, however the lot number shown on the diagram or plan attached to the affidavit is Lot Number 4 and not Lot Number 3 (a Survey Plan is exhibited to the affidavit); and (v) based on the foregoing, Mr. Saunders believes that NBCL's claim is without merit. Mr. Saunders also exhibited a draft Defence to the affidavit.

[9.] Mr. Saunders filed the Affidavit of Edward Brennen on 05 April 2024 ("**Brennen Affidavit**") which provides that: (i) Mr. Edward Brennen ("**Mr. Brennen**") confirms that he sold Mr. Saunders the Property; (ii) Mr. Brennen was shocked when Mr. Saunders approached him and told him that the Parcel was sold to NBCL and is recorded in the Registry of Records at Volume 9375 at pages 235 to 244; (iii) he is not a director of NBCL.

NBCL's evidence

[10.] NBCL did not provide any affidavit evidence in response to this application.

Discussion and Analysis

Whether the Judgement in Default of Appearance ought to be set aside?

[11.] The Court's power to set aside/vary a Judgement in Default is governed by Part 13 of the Supreme Court, Civil Procedure Rules, 2022 ("**CPR**"). **Rules 13.2, 13.3 and 13.4 of the CPR** provide:

"13.2 Cases where Court must set aside default judgment.

(1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because, in the case of —

(a) a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied; or

(b) judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied.

(2) The Court may set aside a judgment under this rule on or without an application.

13.3 Cases where Court may set aside or vary default judgment.

(1) If 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.

(2) In any event the Court may set aside a judgment entered under Part 12 if the defendant satisfies the Court that there are exceptional circumstances.

(3) Where this rule gives the Court power to set aside a judgment, the Court may instead vary it.

13.4 Applications to vary or set aside judgment – procedure.

(1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

[Emphasis added]"

[12.] Rule 12.4 of the CPR is in relation to failure of the defendant to file an acknowledgment of service which, at the material time, was not applicable as this is a requirement under the CPR - which was not effective until March of 2023 (the original pleadings were filed on 23 September 2020 under the old Rules of the Supreme Court, 1978). Rule 12.5 of the CPR relates to failure of the defendant to file a defence. Again, this does not apply as there is presently no defence filed by Mr. Saunders. For clarity and the avoidance of doubt, these proceedings (and all proceedings henceforth in this matter) are governed by the CPR, pursuant to **Practice Direction No. 9 of 2023 section 2, paragraphs 2.2 and 2.3** The relevant excerpt reads as follows:

> 2. Civil proceedings commenced prior to the commencement date and a trial date has not been fixed for those proceedings
>
> 2.1 The [CPR] apply to proceedings commenced prior to the commencement date where a trial date has not been fixed for those proceedings.
>
> 2.2 An new interlocutory application which has to be made or any new document which has to be filed, including the Defence, must comply with the [CPR].

[13.] A trial date has not been fixed for this action as yet. Therefore, the proceedings are governed by the CPR.

[14.] In relation to the application before me, it is clear from Mr. Saunders' filings that he has indeed filed an application to set aside a Judgment in Default in compliance with Rule 13.4 of the CPR (i.e. a Notice of Application was filed along with a supporting affidavit which included the proposed draft Defence).

[15.] Mr. Saunders, however, must also satisfy this Court that: (i) the application was made as reasonably practicable after finding out the judgment has been entered; (ii) there is a good explanation for not filing an acknowledgment of service or defence; **and** (iii) he has a good prospect of success. It is important to note that these three limbs must

be satisfied conjunctively. Each must be satisfied before the Court may set aside a Judgment in Default. I shall address each limb in turn.

The Application was made as reasonably practicable after finding out the judgment has been entered

[16.] Based on Mr. Saunders' evidence, he did not appreciate the significance of a Writ of Summons being served on him. According to his evidence, he was told by the officer who served him that he only needed to "look over the writ". It is not clear if a full explanation of the implications and consequences of service was explained to Mr. Saunders. Whereas it would have been prudent of Mr. Saunders to engage counsel to review the document and provide proper advice, it would appear that he did not understand the significance of the document placed before him. However, the evidence is that he has a stamped conveyance which he states evidences his legal title to the Property.

[17.] In addition, he became cognizant of the importance of the Writ only after attempting to obtain a loan from a bank and an agent of the bank informing him of the judgment made against him. He, thereafter sought legal counsel to address the matter, thus this very application before me.

[18.] I remind myself of the following observation made in the case of **Manolakaki v Constantmides** (2003) EWHC 401:

"…even if the application was not made 'promptly', within the meaning of the Rule, if the defendant made it in sufficient time for it to be just that judgment should be set aside it should be set aside; provided the test set out in r.13.3(l)(a) [i.e. the Defendant has a real prospect of defending the claim] was met"

[19.] Furthermore, Mr. Saunders evidences that he spoke with Mr. Hank Weech (the immediate past owner of the Property) about the matter. He indicates that Mr. Hank Weech told him that he did not sell the property to Mr. Brennen prior to selling it to Mr. Saunders. Armed with this knowledge, it appears that Mr. Saunders did not give much weight to the Writ.

[20.] I am of the view that Mr. Saunders now understands the significance of the Writ and has instructed counsel to address the matter. I do note that there was a Summons filed back in 2023 in the matter (which counsel undoubtedly realized was in

a format under the old rules, thus the filing of a subsequent application). Based on the evidence before me, I am satisfied that he filed the requisite application in a reasonably practicable time frame as possible.

A good explanation for not filing an acknowledgement of service and defence

[21.] I believe this, more or less, warrants the same analysis as the first limb. It appears that Mr. Saunders did not initially appreciate the importance of the Writ. He now recognizes such and has made an application to set aside the Judgment in Default of Appearance.

[22.] Again, he spoke to the previous owner of the property who told him that he only sold the Property to Mr. Saunders. Mr. Saunders also has his conveyance which evidences his ownership of the Property. I accept this as a good explanation as to why he did not file an acknowledgment of service or a defence.

The Draft Defence has a Real Prospect of Success

[23.] In the Jamaican Supreme Court case of **Saunders v Green** 2005 HCV 2868 ("**Green**"), Skyes J made the following pronouncements:

"…real prospect is not blind or misguided exuberance. It is open to the court, where available, to look at contemporaneous documents and other material to see if the prospect is real. In ED&F Man Liquid Products v Patel the court pointed out that while a mini-trial was not to be conducted, that did not mean that a defendant was free to make any assertion and the judge must accept."

[24.] Furthermore, in the Jamaican Supreme Court case of **RBC Royal Bank of Jamaica Ltd et al v Delroy Howell** [2013] JMCC Comm. 4 Mangatal J made the following observation:

"…the law is clear that the Defendant must demonstrate that he has a real prospect of successfully defending the case, as opposed to a fanciful one, this test is designed to eliminate cases which are not fit for trial at all. **It is not meant to eliminate trial where there are issues that should be investigated at trial.** The judgment is not meant to be conducting a mini-trial on a hearing of the application to set aside a default judgment.

[Emphasis added]"

[25.] I also wish to highlight the United Kingdom Court of Appeal decision of **E D & F Man Liquid Products Ltd v Patel and Another** [2002] EWCA Civ 1550. This case was mentioned in the ***Green*** decision, but I wish to underscore the following passages from the decision:

"7 What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase "real prospect of successfully defending the claim" for the purposes of both CPR 13.3.(1) and 24.2 and, subject to the question of burden of proof, may be taken to have contemplated a similar test under each rule. It was stated by Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 92j 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 … they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success**."

8 **I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle [case] that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14. Furthermore, both CPR 13.3(1) and 24.2 have provisions whereby, for the purposes of doing justice between the parties, the court can order that judgment be set aside under 13.3.1(b) if it appears to the court that there is some other good reason to do so**,..

10 **It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial**: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. **However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable**: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England

(No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].

[Emphasis added]"

[26.] I must also bear in mind the overriding objective (Rule 1.1 of the CPR) when considering this and any other matter placed before me. **Rule 1.1 of the CPR** provides:

"1.1 The Overriding Objective.

(1) **The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost**.

(2) Dealing justly with a case includes, so far as is practicable:

(a) **ensuring that the parties are on an equal footing**;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to —

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) **ensuring that it is dealt with expeditiously and fairly**;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

[Emphasis added]"

[27.] Also, I heed the sage words of Chadwick LJ in the case of **Salfraz Hussain v Birmingham City Council, Coral George Coulson, Governors of Small Heath Grant Maintained** [2005] EWCA:

"But it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence – they must be exercised in order to further the overriding objective."

[28.] Bearing in mind the above principles, I shall now look at the Defence. I will not go into a forensic examination of the Defence. Based on a review of the Defence, this appears robust. Mr. Saunders claims that he has a conveyance confirming that he is the true title owner to the Property. Not only that, but upon reviewing the conveyances of the respective parties, there are discrepancies that the Court must investigate. I do not wish to descend into the evidence any further, particularly because there appears to be serious issues to be tried. I shall only say this – litigants must always bear in mind that, when a draft defence is proffered which tends to give good reason why a defendant has a strong case which warrants investigation, all parties should be afforded an opportunity to present their respective cases at trial and the Court should accede to a legitimate application to set aside a Judgment in Default of Appearance/Defence.

[29.] Based on the unchallenged evidence before the Court, there is clearly good reasons why the Court, bearing in mind the overriding objective of the CPR, ought to set aside the filed Judgment of Default. Justice demands it.

Exceptional Circumstances

[30.] Though this is not one of the three limbs which the Court had to consider, I have, in any event, considered if there are any exceptional circumstances in this case (such consideration permitted under Rule 13.3(2) of the CPR). I do not believe there are. In my view and moreover, the three limbs of the test to set aside a Judgment of Default are satisfied.

CONCLUSION

[31.] Based on the aforementioned principles, I exercise my powers under Part 13 of the CPR and set aside the Judgment in Default of Appearance.

[32.] I thus, make the following order:

(a) The Judgment in Default of Appearance filed herein on 30 November 2020 is hereby set aside.

(b) The Defendant shall file an Acknowledgment of Service of the Writ of Summons within fourteen (14) days from the date of this ruling. The Defendant shall also notify the Claimant of such filing and serve such notice in compliance with Rule 9.4 of the Supreme Court Civil Procedure Rules, 2022 within the aforementioned fourteen (14) day period.

(c) The Defendant shall also file and serve a Defence (in the same terms as provided in the draft Defence exhibited to the First Affidavit) within fourteen (14) days from the date of this ruling.

(d) The Claimant may file and serve any Reply to such Defence within fourteen (14) days from the date of this ruling.

(e) Should any party fail to comply with any of the terms of this Order, their pleadings shall automatically be struck out with Judgment granted in favor of the innocent party, along with reasonable costs - to be assessed if not agreed.

(f) Costs shall be in the cause.

Dated this 20th day of June 2024

Deborah E. Fraser
Senior Justice