

COMMONWEALTH OF THE BAHAMS
IN THE SUPREME COURT
Commercial Division
2021/CLE/GEN 00961

B E T W E E N

DUPUCH & TURNQUEST
(a firm)

Claimant

AND

REVEREND MITCHELL JONES
As pastor of
ANNEX BAPTIST CHURCH

Defendant

Before: The Honourable Madam Justice Camille Darville Gomez
Appearances: Mrs Caryl Lashley and Mr Laurell Hanchell for the Claimant
Mrs Raquell Hall Jones for the Defendant
Hearing Date: May 7, 2024

Judgment in default of defence – Civil Procedure Rules, 2022, Part 12 – setting aside judgement in default – CPR, Part 13 – whether or not default judgment wrongly entered– whether it must be set aside or may be set aside – CPR, Part 13.2

RULING

Darville Gomez, J

[1.] The Claimant, a law firm commenced this action against the Defendant for failure to pay its taxed costs representing legal fees rendered in action No. 1248 of 1989 and for fraud arising from a dishonoured check written in favour of the Claimant. The Defendant has denied the claim. The Defendant has alleged that the Claimant brought the same action against the Defendant and others in 2017 before the Honourable Justice Ian R. Winder (as he then was) which was dismissed. In

the instant action the Defendant has alleged that he has been singled out from the other parties wholly connected to the Claimant's claim.

- [2.] The instant action was commenced prior to the coming into force of the Civil Procedure Rules, 2022 (the "CPR"). However, in accordance with the transitional provisions at Part 2(1)(b), they do apply to the instant action.
- [3.] The Defendant has applied by a document entitled "Interlocutory Application" filed on August 23, 2023 for the following:
- (i) That the Writ of Summons filed on August 30, 2021, Statement of Claim filed on July 22, 2022 and Judgement in Default of Defence filed on August 8, 2023 against the Defendant be struck out pursuant to Order 18 rule 19(1) and Order 19 rule 9 of the Rules of the Supreme Court on the grounds that it discloses no reasonable cause of action; or that it is scandalous, frivolous and vexatious; or that it is an abuse of the process of the Court.
 - (ii) That the Defendant's Affidavit in Support and Supplemental Affidavit has addressed and answered the Claimant's Statement of Claim.
 - (iii) That the Court may, on such terms as it thinks just, strike out and/or set aside or vary any judgment entered in pursuance of the Writ of Summons filed herein.
 - (iv) That the Claimant do pay the costs of this application.
- [4.] It is supported by an Affidavit of the Defendant filed on August 25, 2023 and April 8, 2022.
- [5.] The Claimant has objected to the application being heard unless the said Judgment in Default of Defence has been set aside.
- [6.] A default judgment is a judgment obtained without a trial and not on the merits. It may be obtained where there has been a failure to file an acknowledgment of service and or Defence. **Part 12.4(b) and Part 12.5(b) and (c) of the CPR.**
- [7.] For the ease of determining this issue, I have set out below a chronology of the pleadings and their filing dates.

	PLEADING	FILING DATE
1.	Writ of Summons	August 30, 2021
2.	Notice of Appearance	March 23, 2022
3.	Conditional Memorandum of Appearance	March 23, 2022
4.	Summons to strike out the Writ of Summons	April 7, 2022
5.	Affidavit of the Defendant	April 8, 2022

6.	Statement of Claim	July 22, 2022
7.	Affidavit of Service of the Statement of Claim	September 22, 2022
8.	Affidavit in Support - Defendant)	April 25, 2023
9.	Affidavit of Search of Larell Hanchell for the Plaintiff	August 8, 2023
10.	Judgment in Default of Defence	August 8, 2023
11.	Affidavit of Frederica McCartney for the Plaintiff	August 8, 2023
12.	Affidavit of Service of Plaintiff's default of judgment documents	August 11, 2023
13.	Interlocutory Application on behalf of the Defendant	August 23, 2023
14.	Affidavit of the Defendant	August 25, 2023
15.	Defence	August 25, 2023
16.	Affidavit of the Defendant	January 19, 2023

- [8.] At the outset it is apparent that both parties were delinquent in their filings. The Writ of Summons was filed in August, 2021 and almost twelve months later in July, 2022 the Statement of Claim was filed. Similarly, while the Defendant applied to strike out the Writ of Summons almost eight months after it had been filed viz., in April, 2022, it took him over twelve months after the Statement of Claim had been filed, to file a Defence in August, 2023. However, the Claimant has sought to address its lack of promptitude.
- [9.] The Claimant submitted that service of the Writ of Summons was regular because it was served less than a year after it had been filed.
- [10.] Additionally, the Claimant sought to explain its delay in its filings because the Defendant had filed a Summons to strike out the entire claim filed on April 7, 2022 and therefore, it was unable to take any further steps until the said strike out Summons had been heard. It was noted by the Claimant that this strike out Summons was not served on it.
- [11.] Finally, the Claimant asserted that it did not file its Judgment in Default of Defence until the said strike out Summons had expired (which they submitted was over one year) and instead of applying to have it restored, the Defendant issued an Interlocutory Application for the same relief. Therefore, since the Defendant has failed to file a Defence or move the Court on its original Summons, it was the submission of the Claimant that the Judgment entered was regular.
- [12.] The Defendant submitted:

- (i) That the judgment in default of defence be struck out and or set aside pursuant to Order 18 Rule 19 and Order 19 rule 9 of the Rules of the Supreme Court and without costs having regard to the hardship likely to be suffered by the Defendant.
- (ii) The filing of the documents in this matter are irregular based on the fact that both parties were guilty of delay. There is merit for defence on the basis of what has been pleaded in the Affidavit of Mitchel Jones.

[13.] It is obvious to the Court from a review of the pleadings that the Judgment in Default of Defence was entered after the time limit for filing a defence had expired. Therefore, the default judgment was properly entered, viz., in accordance with Part 12.5 of the CPR.

[14.] Pursuant to Part 13.2 of the CPR, the Court must set aside a default judgment if it was wrongly entered under Part 12 of the CPR, otherwise, pursuant to Part 13.3, the Court may set aside or vary a default judgement subject to three conditions. (my emphasis added)

[15.] In view of my findings at paragraph 13, the instant action falls within the latter category.

[16.] Therefore, for the purpose of setting aside the default judgment the Court may only set aside if the defendant satisfies these three conditions: (i) applies to the court as soon as reasonably practicable after finding out that judgment had been entered; (ii) gives a good explanation for the failure to file an acknowledgement of service or defence, and (iii) has a real prospect of successfully defending the claim. In **Kenrick Thomas v RBTT Bank Caribbean Ltd. (Formerly Caribbean Banking Ltd)** (St. Vincent and The Grenadines) (Civil Appeal No 3 of 2005) Barrow J, (as he then was) stated:

“The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no discretion to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that.”

[17.] Similarly, in **Hyman v Matthews** (Jamaica)(Applications 72 and 80 of 2006)(SCC 64/2003) Harrison JA stated as follows:

“The provisions of Part 13.3 are different from their English counterpart. In the U.K. the rules state that “the court may set aside a judgment....if” whereas in Jamaica the rules state “only if”. The word “only” makes a big difference. One should therefore be careful in relying on English authorities. In considering whether to set aside a judgment entered under Part 12, the judge has no residual discretion if any of the conditions are not satisfied.”

[18.] The Bahamas’ CPR, 2022 Part 13.3 which addresses the circumstances where the court may set aside or vary default judgments is identical to that of St. Vincent and the Grenadines and Jamaica because it contains the words “only if”.

[19.] Therefore, having determined that the Judgment in Default of Defence was properly entered, I have considered the evidence and the submissions of the Defendant and I am satisfied that the three conditions for it to be set aside have been met: (i) the Defendant applied within two weeks of service of the default judgment (ii) the Defendant had filed to strike out the action prior to

service of the Statement of Claim and again thereafter but due to an oversight had failed to set the application down; and (iii) that there was a previous action identical to the instant application commenced by the Claimant in 2017 which had been dismissed. I find therefore, that the Defendant does have a reasonable prospect of success when I consider the similarity of the relief claimed in the instant action and the previous claim commenced in 2017.

[20.] Accordingly, I will set aside the default judgement entered on August 8, 2023.

[21.] I will hear the parties on the issue of costs.

Dated this 31st day of July, A. D., 2024

A handwritten signature in cursive script, appearing to read "Camille Darville Gomez".

Camille Darville Gomez
Justice