COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2023/CLE/gen/00045

IN THE MATTER OF a Construction Agreement dated 22nd day of February A.D., 2022 between the Plaintiff and the Defendant

IN THE MATTER OF a Performance Agreement dated 24th day of March A.D., 2022 between the First Plaintiff and the Defendant

IN THE MATTER OF an Indemnity Agreement dated 1st day of July A.D., 2022

B E T W E E N

JON GARY SNELL

AND

VALENTINA SNELL (NEE DEZELEBOVA)

Claimants

AND

HUGH GORDON CASH
(Trading as North Eleuthera Builders)

Defendant

Before:	Deputy Registrar Mr. Renaldo Toote
Appearances:	Erica D. Munroe for the Claimants Ian Cargill Jr. for the Defendant
Hearing dates:	16 July 2024

RULING

Toote, Deputy Registrar

[1.] This is a decision to set aside the Claimant's default judgment filed on 9 March 2023.

Background

[2.] By way of background facts, on 22 February 2022 the Claimants agreed for the Defendant to effect renovation repairs on their property situated on West Bay Street, in New Providence for an agreed sum of $601,000.00. The date of completion appeared to have been agreed as 31 August 2022.

[3.] The Claimants allege that the Defendant breached the contractual agreement by failing to complete the said project within the agreed time and to date has refused to complete the same. The Claimants further allege that the Defendant negligently misrepresented to the Claimants that he and/or his agents had the necessary skills and competence to perform the renovations to the Claimants' standard. As a result, the Claimants suffered loss and damages due to the Defendant's incomplete and defective work.

[4.] Hence, the Claimants commenced these proceedings against the Defendant by way of Generally Endorsed Writ of Summons filed on 20 January 2023 and duly served on 11 February 2023. With no appearance having been entered by the Defendant, an interlocutory judgment in default of appearance was subsequently filed on 9 March 2023.

[5.] It is important to note that the Rules of the Supreme Court, 1978 were repealed on the 1 March 2023 and the Supreme Court Civil Procedure Rules, 2022 came into effect on the same date. The default judgment was therefore entered after the Supreme Court Civil Procedure Rules, 2022 came into effect.

[6.] On 14 November 2023, the Claimants filed a Notice of Application for an order to attend court and to have the Defendant examined. The same was served on the Defendant on 8 April 2024, and he later on 15 May 2024 appeared before Deputy Registrar Turner and confirmed that he was indebted to the Claimants but not for the claimed sum.

[7.] During the examination, the Court allowed for an adjournment at the request of the Defendant to seek legal representation. He subsequently issued an Acknowledgement of Service filed on 25 June 2024. This was followed by a Notice of Application on 12 July 2024 seeking to set aside the aforementioned judgment in default due to procedural irregularities.

[8.] Counsel for the Claimants objected to the Defendant's application based on its lateness in the stage of the proceedings and on the basis that fresh steps were taken after the judgment in default was entered.

[9.] For clarity and the avoidance of doubt, these proceedings are governed by the Supreme Court Civil Procedure Rules, 2022 ("CPR"). Pursuant to Practice Direction No. 9 of 2023, section 2, paragraphs 2.1 and 2.2 state that if no trial date was fixed in this matter prior to the commencement of the CPR, then any rules as it relates to the Rules of the Supreme Court 1978 fell away.

[10.] 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].**

[11.] In this regard, the issue concerning the lateness and stage of the Defendant's application is of no effect as Order 2 rule 2 of the RSC is repealed with no savings clause under the CPR. For the ease of reference, Order 2 rule 2 states:

> **(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.**

[12.] On this determination, and after considering the overriding objective, the Court allowed the Defendant's application to proceed.

Issues

[13.] The substantive issue before the Court is (i) whether or not the Claimants' interlocutory judgment was irregularly entered and, if so, (ii) whether or not the Court ought to set aside the Claimants' interlocutory judgment and allow the Defendant an opportunity to file its defence.

[14.] Counsel for the Defendant submits that the Claimants' interlocutory default judgment was irregularly entered for failure to adhere to the procedures of the CPR, specifically Part 12.4.

[15.] Inasmuch as it is relevant, Part 12.4 states:

"The claimant may enter judgment for failure to file an acknowledgment of service if-

(a) Evidence has been filed proving service of the claim form and statement of claim on the defendant."

[16.] The Defendant further submits that, pursuant to the CPR, a default judgment cannot be properly entered unless both the claim form and statement of claim have been served on the Defendant, which they allege was not done in its totality. The Defendant acknowledges the fact that the Writ of Summons was duly served, however the Writ by default is generally endorsed and lacks a Statement of Claim.

[17.] In response to this, the Claimants' Counsel cited Part 8.2(1) (a), which provides that:

A claim form may be issued and served without the statement of claim, affidavit or other document required by rule 8.1(2)(b) or (c) only if the –

(a) Claimant has included in the claim form, all the information required by rules 8.6, 8.7, 8.8 and 8.9; or
(b) The Court gives permission

[18.] The Claimants submit that, pursuant to Part 8.2(1) (a), all of the required information under the rules are contained in the Writ, and therefore it ought to be treated as a claim form.

[19.] I agree that the manner in which the generally endorsed Writ was drafted is such that it ought to be treated as a claim form, however, it is necessary to ensure that the same is compliant with Part 8.2(1).

[20.] Having reviewed the Claimants' Writ, I am not satisfied that the form is compliant with Part 8.6 (5) and more importantly Part 8.7(5) of the rules, which states:

The statement of claim must include a certificate of truth in accordance with Part 3.8

[21.] Inasmuch as it is relevant, Part 3.8 dictates:

(1) Every statement of case must be verified by a statement of truth.

[22.] The necessity of Part 3.8 is qualified by Part 3.9, which holds:

The court may strike out any statement of case which has not been verified by a statement of truth.

[23.] According to Part 2.1 a statement of case is defined as (a) **a claim form**, statement of claim, defence, counterclaim, additional claim form or defence and a relief.

[24.] In the Eastern Caribbean case of **Niguel Streete v Caricom Management Services et al** Claim No. AXA HCV 2009/0014 (delivered 11 March 2009), *Michel, J.* held that a failure to file and serve a claim form without a statement of claim or affidavit or other document required by EC 8.1 led to the claim form being struck out.

[25.] Similarly, in the Jamaican decision of **Dorothy Vendryes v Dr. Richard Keane and Karene Keane** [2011] JMCA Civ 15, the Jamaican Court of Appeal considered the consequences of the Claimants' failure to serve on the Defendant, the documents required pursuant to the rules. The Court of Appeal determined that where the claimant has obtained a default judgment and had not served all of the forms or information required by the rules that the judgment ought to be set aside as a matter of right.

[26.] What is even more persuasive, the Bahamian Supreme Court contemplated matters such as this arising during the transition period from the RSC 1978 to the CPR 2022. In bridging this *lacunae*, paragraph 3.2 of Practice Direction 9 of 2023 allows a litigant to file ***any additional material*** which is required for the application to be properly considered where the CPR applies. (Emphasis mine).

[27.] Practice Direction 9 of 2023 provides where relevant:

> 3. Interlocutory applications filed prior to the commencement date but which have not been heard by the Court
>
> 3.1 Where the Rules apply…
>
> **3.2 The Court in managing the hearing of the interlocutory application may permit the parties to file any additional material which may be required for the application to be properly considered where the Rules now apply.**

[28.] For these reasons, the judgment is irregular. The Claimants prior to filing the judgment ought to have complied with Practice Direction 9 of 2023 in providing additional material to the Court to cure the irregularity and ensure compliance. And, if for any reason I am wrong, I am further satisfied that the Claimant erroneously entered judgment against the Defendant for a liquidated sum where the general indorsement is for an unliquidated demand, as correctly argued by Counsel for the Defendant.

[29.] The indorsement states:

THE PLAINITFFS' CLAIM as against the Defendant is as a result of damages incurred relative to a Construction Agreement dated the 22nd February, 2022 between the parties wherein the Defendant was contracted by the Plaintiffs to carry out renovations to their property #955 West Bay Street situated in the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas in particular to the main house and the guest cottage for the sum of $601,000.00 which was inclusive of materials (with the exclusion of paragraph (3) of the Construction Agreement) and labour with said renovations to be completed on or before the 21st August, 2022.

The First Plaintiff and the Defendant also executed a Performance Agreement on the 24th March, 2022 which changed the completion date to on or before the 31st August, 2022 and further advised that for any delay in completion by the Defendant, the sum of $5,000.00 would be deducted from the Defendant per week and/or if the Defendant were to complete the renovations within the requisite time, he would receive a bonus in the amount of one (1) months rental value of the Plaintiffs property. Further on the 1st July, 2022 the Defendant executed an Indemnity Agreement wherein he agreed to indemnify one of his agents and to replace any items and/or personal property belonging to the Plaintiffs that became damaged, lost or stolen from the Plaintiffs property because of his agents.

During the period of the contract, the Defendant received from the Plaintiffs in total a sum of $522,965.29 but failed to honour the various agreements and fundamentally breached the terms of the said agreements and have refused to complete the renovations on the Plaintiffs property and is in breach of the various contractual agreements. The Defendant negligently mispresented to the Plaintiffs that he and/or his agents had the necessary skill and competence to carry out the renovations on the Plaintiffs property and have not only produced defective work resulting in the Plaintiffs having to hire others to rectify the defects but have also destroyed, stolen and damaged some of the fixtures, materials and personal property of the Plaintiffs all of which has caused the Plaintiffs to suffer loss and damage as a result of the Defendant's and/or his agents action.

AND THE PLAINTIFF CLAIMS:-

i) Damages for Breach of Contracts;
ii) Damages for defective workmanship & performance & costs to correct the defects in the sum of $85,000.00;
iii) Damages for Negligent Misrepresentation;
iv) Damages for loss of use of property;
v) Damages for loss of rental income;
vi) Damages for delay in completing renovations to date in the sum of $105,000.00;
vii) Damages for the cost of replacement of lost, damaged and stolen property of the Plaintiffs in the sum of $30,000.00

viii) Consequential Damages;
ix) Special Damages;
x) General Damages;
xi) Specific Performance or damages in lieu of it in the sum of $300,000.00;
xii) Interest thereon pursuant to the Civil Procedure (Award of Interest) Act, 1992;
xiii) Cost; and
xiv) Any further or other relief as the as the honourable court deems just."

[30.] On the face of the indorsement, the judgment which was entered as against the Defendant is irregular. The indorsement does not contain any quantified special damages which amounted to $520,000.00. The Claimants entered judgment in a liquidated amount with respect to a claim which was clearly unliquidated in nature. All of the damages cited in the indorsement must be specifically proven and assessed by the Court to ascertain their validity. The sum of $520,000.00 is a sum which the Claimants unilaterally assessed, as there is no reference to any professional assessment. This could therefore not form any basis of a liquidated claim. **See Bahamas Court of Appeal in DKS Motors Limited et al v. The International Sewing Center Limited**, Civil Appeal 98 of 1999.

[31.] The Court's power to set aside or vary a Judgement in Default is governed by Part 13 of the CPR. Having regard to the reasons mentioned above, I will exercise my discretion pursuant to Part 13.3 to set aside and discharge the Claimants Default Judgment.

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

[32.] I accept that the Defendant applied to the Court as soon as reasonably practicable after finding out that judgment had been entered against him. By virtue of his affidavit, the Defendant deposes that he has no recollection of ever being served with the default judgment and that he found out after his counsel conducted a cause list search on 24 May 2024. This is consistent with the fact that there is no evidence of service of the interlocutory judgment on the Defendant.

Gives a good explanation for failure to file an acknowledgement of service or a defence as the case may be

[33.] In the decision of **North Bimini Bay Condominiums Ltd. v Myron Saunders** (unreported) 2020/CLE/gen/00950 *Fraser, J.* held:

> "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."

[34.] The learned Justice supported her position with the authority of **Manolakaki v Constantmides** (2003) EWHC 401 where it was held:

> "…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."

[35.] Based on the Defendant's affidavit evidence, I accept that he did not appreciate the significance of a Writ of Summons being served on him. According to his evidence, the First Claimant came to his house in Eleuthera and informed him that he need not to worry about the Claim, as he [the Claimant] was not interested in pursuing it or taking it to Court.

The Draft Defence has a Real Prospect of Success

[36.] In the Jamaican Supreme Court case of **Saunders v Green** 2005 HCV 2868 ("Green"), *Sykes, 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."

[37.] The Defendant exhibited a draft Defence to his Affidavit in his application. While the brevity of the claim form presents challenges, there are serious issues to be tried between the parties and the Defendant's prospects of disputing at least some aspects of the Claimants' claim are not fanciful.

Conclusion

[38.] In these circumstances, the Court must adhere to the overriding objective of the CPR which provides for the parties to be placed on an equal footing. As such, the Court therefore Orders that:

i. The Claimant's default judgment filed on 19 April 2023 is hereby set aside;
ii. The Defendant's acknowledgement of Service filed on 25 June 2024 is hereby validated;
iii. the Claimant shall within 14 days from the date of this ruling file and serve a Statement of Claim and satisfy all requirements pursuant to part 8.6 and 8.7 of the CPR;
iv. the Defendant is herein given liberty to file and serve its Defence within 14 days thereafter upon the receipt of the statement of claim.

Cost

[39.] The Defendant seeks cost pursuant to its aforementioned notice of application as the general rule is for the unsuccessful party to pay the costs of the successful party. However, the Court has a wide discretion in relation to costs. When applying the general rule, the Court has to consider all of the circumstances surrounding the matter before determining whether or not it should make an order as to cost.

[40.] In keeping with the overriding objective of the CPR, which is to deal with cases justly, I am of the view that having regard to the circumstances of this case, there should be no order as to costs.

[41.] In **Tyson Strachan v Anthony Simon et al** (unreported) 863 of 2021 *Fraser, Snr. J.* highlighted the discretionary powers of the court when deciding the issue of cost and emphasised that any departure from the general rule must be justified.

[42.] The Defendant has by his own admission in his draft defence exhibited to his Affidavit accepted that there was a breach of the agreement to complete certain works. In light of this partial admission of the facts coupled with the Claimants irregularity, I am of the considered opinion that the Court ought to exercise its discretion and make no order as to cost.

Dated the 10th day of September, 2024

Renaldo Toote
Registrar
(Acting)