

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2020/CLE/GEN/00058

BETWEEN

FIDELITY BANK (BAHAMAS) LIMITED

Plaintiff

AND

WHITTIA DARRIEN FORBES (nee ADDERLEY)

Defendant

Before: DEPUTY REGISTRAR *EDMUND TURNER*

Appearances: Mrs. Tara Glasgow and Mr. Trevor Lightbourne for
the Plaintiff; and
Ms. Yvette C. Rahming and Gabrielle
Rahming for the Defendant

Hearing Dates: 26th April 2022, 12th April 2022, 3rd May 2022, 1st
July 2022.

J U D G M E N T

Deputy Registrar EDMUND TURNER:

1. Due to there being an arguable defense on the balance of probabilities, the Judgement in Default of Defense entered on 23rd November 2021 is set aside and leave is granted pursuant to Order 18 rule 2 and Order 3 rule 4 of the Rules of Supreme Court for an extension of time for the Plaintiff to file and serve on the Defendant a Defense to Counterclaim. Also, due to the fact that the 'legal foundation' on which the Bill of Costs filed on 12th November 2021 was taxed, being flawed, i.e. considering items for taxing contrary to Order 19 rule 8 of the Rules of Supreme Court, the Certificate of Taxation entered herein on 11th May 2022 be set aside, and there be an extension of time prescribed under the RSC for review of the decision of the Deputy Registrar.

Brief Facts and Chronological History

2. The Plaintiffs filed a Specially Indorsed Writ of Summons in this matter on 15th January 2020. Thereafter the following chronological sequence seeks to explain why the Deputy Registrar is currently seeking to rule on an issue re setting aside a Judgement in Default of Defense, as well as a Certificate of Taxation, i.e.:-

Filing Date

Relevant History

15th January 2020

Specially Indorsed Writ filed;

7th July 2021

Plaintiff files for Judgment in Default of Defence;

23rd March 2021

Deputy Registrar Misievich enters Judgement in Default of Defence for Plaintiffs;

23rd July 2021

Defendants file Summons to set aside Judgment in Default on grounds of irregularity;

8th October 2021

Affidavit in Support filed;

21st October 2021

Justice Braithwaite sets aside Deputy Registrar Misievich's Judgment in Default. Leave given to enter Defence and Counterclaim;

4th November 2021

Defence and Counterclaim filed;

10th November 2021

Amended Defence and Counterclaim filed;

12th November 2021

Bill of Costs filed re application to set aside Judgment in Default of Defence filed on 7th July 2021;

23 rd November 2021	Judgment in Default of Defense entered by Counsel for the Defense;
26 th April 2022	Taxation of Bill of Costs of Defendant;
11 th May 2022	Certificate of Taxation signed of on by Deputy Registrar;
9 th June 2022	Notice of Change of Attorney filed by current Counsel for Plaintiff;
10 th June 2022	Summons filed to set aside Judgment in Default filed by the Defence on 23 rd November 2021;
21 st June	Summons filed to set aside Certificate of Taxation;

Arguments of the Plaintiff re issue of setting aside Judgement in Default of Defence to Counterclaim filed 23rd November 2021 by the Defendant

3. Please note that the aforementioned document filed on 23rd November 2021 is improperly named 'Judgement in Default of Defence,' and ought to have been named '**Judgement in Default of Defense to Counterclaim.**' As a result, those unfamiliar to the facts at hand can be easily confused.
4. The Plaintiff must serve a 'DEFENCE TO COUNTERCLAIM,' where a 'COUNTERCLAIM,' is served on him. In this matter, the last paragraph of the Defendant's Summons dated 23rd July 2021 is incorrect in that a request is made by Counsel for the Defendant for leave to file a '**Defence and Counterclaim,**' when according to the rules, leave could only have been granted for a '**Counterclaim.**'
5. In making reference to the 1978 Rules of Supreme Court, please note, i.e.:-

'Default of Defence to Counterclaim, Order 19, rule 8'

'A defendant who counterclaims against a plaintiff shall be treated for the purposes of Rules 2 to 7 as if he were a Plaintiff who had made against a defendant the claim made in the counterclaim and, accordingly, where the plaintiff or any other party against whom the counterclaim is made fails to serve a defence to counterclaim, those Rules shall apply as if the counterclaim were a statement of claim...'

6. As a result, the Order granted by Justice Braithwaite on 1st November 2021, and dated 12th October 2021, is flawed, as the same cannot be granted according to law, considering paragraphs 4 and 5 above. However, in the event the aforementioned argument is not accepted, the following paragraphs must also be considered.
7. Counsel for the Plaintiff argues that the Court has jurisdiction to set aside what ought to be the Judgement in Default of Defence to Counterclaim and to grant an extension of time in which to file and serve a Defence to the Defendant's Counterclaim. It is the view of the Court that the Judgment in Default can be set aside for irregularity, and if the former is not accepted, on the grounds that the Plaintiff, who seeks to Defend the Defendant's Counterclaim has an arguable defense on the balance of probabilities, i.e. greater than 50%.
8. Considering the facts at hand, it can be technically argued that Order 13 rule 7(1) has not been complied with, i.e. there is no indorsement re acceptance of service of the Writ of Summons. Judgment shall not be entered against a Defendant unless:-
(b). 'the Plaintiff produces the writ indorsed by the Defendant's Solicitor with a statement that he accepts service of the Writ on the defendant's behalf...'
9. Upon perusal of the Court's file, the same has yet to take place to date and neither party has produced the same. Of course there is the relevant fact that the current Plaintiff's, not being the original Counsel with carriage of the matter, were deprived of the contents of the original file in this matter. As a result, it is possible that the original indorsed Writ of Summons can still be on the file being held by original Counsel in the matter.

10. However, of significance is the argument of Counsel for the Defense, who made reference to the Privy Council case of Texan Management Ltd. et al v. Pacific Electric Wire & Cable Company Limited [2009]UKPC Case Ref 46, where at page 9, para 31, Lord Collins notes, i.e.:

'31. Except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right...'

11. Considering the above, the non-compliance with Order 13 rule 7(1) in itself does invalidate any step in the proceeds as the purposive construction of the same is to ensure that the a party that is subject to a Writ of Summons acknowledges receipt of the same. In addition, and in applying the aforementioned case of Texan Management Ltd. et al v. Pacific Electric Wire & Cable Company Limited [2009]UKPC that 'Except where the consequence of failure to comply with a rule has been specified...where an error, the failure does not invalidate a step.' **Order 19 rule 8** specifically specifies that a Plaintiff must serve a 'DEFENCE TO COUNTERCLAIM,' where a 'COUNTERCLAIM,' is served on him. The Counterclaim being the prelude to the Defence to Counterclaim, a 'must' and essential 'and if absent, is detrimental to a party's case.

12. On the other hand, it can be argued that the Plaintiff has an arguable Defense to the Counterclaim at hand. Reference is made to the case of Evans and Bartlam [1937] 2All ER 646 to 650, where it is seen at page 650 per *Lord Atkin*, i.e.:

'where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defense...'

13. Considering the Defendant's Counterclaim is under several heads, it is argued by Counsel for the Plaintiff that any arguable defense to any of the said claims by the Plaintiff, will have the result of setting aside the Judgement in Default of Defense. The provisional view of Counsel for the Plaintiff is that there is an arguable defense on the balance of probabilities, i.e. greater than 50% based on five (5) main facts, i.e.:-

- a. A person employed is protected from termination on the grounds of Pregnancy, but the person is not protected from termination just because they are pregnant;
 - b. The Defendant admits in their Counterclaim that she was on probation when she was terminated;
 - c. The reason the Defendant's employment was terminated was because of her behavior, and her inability to be a team player;
 - d. Irrespective of what the Defendant believes, the Bank has no obligation to give a reason for termination as the Defendant was not summarily dismissed.
 - e. The Defendant's Counterclaim seeks damages for wrongful dismissal, and unfair dismissal. The Defendant argues that in the Counterclaim the Defendant admits the referenced dates of admission to employment and the fact that the Defendant fell short of the requisite duration of work to be entitled to maternity leave, i.e. she did not work for twelve (12) months. The Defendant is not entitled to wrongful dismissal as she did not work for six (16) months. She is not entitled to a basic award for unfair dismissal because she did not work for twelve (12) months.
14. The Defendant's Counterclaim fails to particularize the necessary elements to claim a compensatory award for unfair dismissal.
 15. Based on the above, and pursuant to **Order 19** rule 9, and 8 of the Rules of The Supreme Court and the inherent jurisdiction of the Court, the Judgement in Default of Defense entered herein on 23rd November 2021 is set aside.
 16. Also, pursuant to **Order 18** rule 2, and **Order 3** rule 4 of the Rules of The Supreme Court, and under the inherent jurisdiction of the Court, the extension of time sought by the Plaintiffs to file and serve a Defence to Counterclaim is granted. The same is to be filed by Friday 29th July 2022 and served accordingly, the relevant Order is to be prepared by Counsel for the Plaintiff.
 17. Costs for the said application will be costs in the cause.

Application to set aside Certificate of Taxation

18. The Court is of the view that the Certificate of Taxation granted in this matter ought to be sent back for a review due to an error in the law. First we shall consider the legal perspective of the Defence, then that of the Plaintiff, and finally the Court's perspective.
19. Counsel for the Defendant argues that it is seen in the Rules of Supreme Court, O. 59 r 31 (2), i.e.:-

“(2) An application under this rule for review of the Registrar’s decision may be made at any time Within 14 days after that decision...Provided that no application under this rule for review of a decision in respect of any item may be made after the signing of the Registrar’s certificate dealing finally with that item.”

20. It is argued by Counsel for the Defendant that as seen in the authority of Thorne v. Thorne [1979] 3 All ER 164. In this case, it is seen that a Court has power to set aside a certificate of taxation in proper circumstances, i.e.:-
- a. Where the certificate was obtained by fraud;
 - b. Was granted in circumstances that were contrary to natural justice;
 - c. Where there is a mistake in the vital details; or
 - d. Where there is an error; and
 - e. A delay of a short period.

21. In addition, it is also agreed re Counsel of the Defendant's view that pursuant to section 82 of the Evidence Act, Chapter 65, i.e.:-

“ 82 (1) Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

- (2). When a person is bound to prove the existence of any fact the burden of proving shall lie on the person.**

22. Counsel for the Plaintiff has not provided the vital evidence needed to discharge its burden of establishing that there was a suitable reason for the non-compliance with **Order 59 rule 31(2)** of the Rules of The Supreme Court.
23. The matter at hand is unique in that for the Plaintiff, there were at least two prior Counsel with carriage of this matter on behalf of the Plaintiff. It is seen in the affidavit of Ms. Campbell at para 21 and 23 that, i.e.:-

‘the Plaintiff’s previous attorney appears to have inadvertently and mistakenly not filed the documents necessary to seek a review of the taxation proceedings within the time prescribed in Order 59 rule 31 of the RSC.’

24. It is agreed that Counsel for the Plaintiff is correct in asserting that ‘the fact that something was not done is not sufficient to prove it was a mistake or there was some neglect.’ In fact it is further argued that the Plaintiff has not made out a strong case by proffering a proper reason for the bank’s non-compliance as the evidence provided does not state the nature of the alleged mistake.
25. However, considering the fact that the said bill was predominantly in relation to the Defendant’s application to set aside a Judgment in Default and the drafting of a Defence and Counterclaim (Reference can be made to the Bill of Costs filed on 12th November 2021, in particular, item 28). Here it can be seen that the consideration of, and Ordering of the filing of a ‘Defence and Counterclaim,’ itself is in itself goes to the foundation of the legality of the Bill of Costs itself.
26. In considering the arguments of the Plaintiff, it is generally argued that the Certificate of Taxation be set aside and a review of the bill of costs ought to take place. Counsel for the Plaintiff’s view is that the Honourable Court has jurisdiction to set aside the Certificate of Taxation and extend the time limited to conduct a review. In particular, reference is made to Order 3, rule 5 of RSC, and the fact that the purpose of the same being placed early in the rules to enable it to cover all matters that follow within the same.

27. The Plaintiff also submits that the effect leads to a procedural issue and not one of substance. Reference is made to the Privy Council case of Texan Management Ltd. v. Pacific Electric Wire and Cable Co. Ltd. [2009]UKPC 46, in particular per *Lord Collins* at para 1, i.e.

:-

‘It has often been said that, in the pursuit of justice, procedure is a servant and not a master.’

para 31. Except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings.

28. Please also note that the Court has no issue re the fees charged by the Senior Counsel for the Defendant, considering the current times, as well as the fact that the frequently referenced Memorandum prepared by Brian Simms in November of 2006 is antiquated and outdated. Senior Counsel for the Plaintiff, who is clearly QC material, may be of a different view, however, the important reality is to factor in the current times and circumstances in which we find ourselves today.

29. Considering the above, the Certificate of Taxation entered herein on 11th May 2022 is set aside, and an extension of time is granted under the Rules of Supreme Court, for review of the decision of the Deputy Registrar.

30. Regarding both applications, costs will be costs in the cause.



Edmund Von Turner

Deputy Registrar

12th August 2022