

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
Common Law and Equity Division
2019/CLE/gen/01250**

B E T W E E N

CITY HOLDINGS LIMITED

Plaintiff

AND

ARNOLD FORBES

Defendant

Before: Deputy Registrar Tooté

Appearances: Christina Davis-Justin for the Plaintiff
Clinton C. Clarke for the Defendant

Hearing Date: 2nd February 2023

RULING

Toote, Deputy Registrar

- [1.] This ruling is in response to the Defendant's Summons filed 25th May, 2021 to set aside the renewal of the Plaintiff's Judgment in Default of Defence dated 29th October, 2020.
- [2.] On 29th August 2019, the Plaintiff commenced this action against the Defendant asserting breach of contract of a lease agreement dated 1st November 2006 and renewed on 1st November 2009.
- [3.] The specially indorsed writ of summons was served on the Defendant on 9th September 2019. A Memorandum of Appearance and Notice of Appearance was subsequently filed by the Defendant on 16th October 2019.
- [4.] On 13th November 2019, the Plaintiff erroneously filed a Judgement in Default of Appearance which was served on 15 November 2019. This is where the contention exist.
- [5.] The Plaintiff subsequently filed a Judgement in Default of Defence on 29th of October 2020 for the liquidated sum of \$301,010.50.

[6.] On 15th April 2020, the Plaintiff filed an Order of Examination to examine the means of the Defendant as a Judgment Creditor. The examination was scheduled to be heard on 22 November 2022, however the hearing was adjourned due to the non-appearance of the Defendant.

[7.] On the 16th December 2022 the matter continued with the appearance of the Defendant's Counsel who notified the court of its summons filed 25th May 2021 to set aside the aforementioned Judgment in Default. The Defendant argued that the same is irregular and premature. In this vein, Counsel for the Defendant submits that the Order of Examination ought not to be allowed because it would prejudice the Defendant as the defect has not been cured.

[8.] The hearing of submissions resumed on 15 February 2023. The Plaintiff submitted to the court that the Defendant must demonstrate whether any irreparable damage was done to the Defendant as a result of the premature filing of the Default Judgment of Appearance. Counsel further argued that the defect was in fact cured with the filing of the Judgment in Default of Defence. According to the Plaintiff, this is a delay attempt on behalf of the Defendant to unduly deny payments owed to City Holdings Ltd.

[9.] On the other hand, Counsel for the Defendant, Mr. Clinton Clarke contends that the Defendant has a good and arguable defence being that the lease agreement which initiated this matter is between the Plaintiff and Del Sol Ltd., a duly incorporated entity and not the Defendant. He claims that the Defendant is merely a Surety to the lease and his obligation does not arise until judgment is made out against the original party to the lease agreement.

[10.] In this regard, the Defendant submits that the court ought to determine the substantive merit of the case as to whether the Defendant is jointly and severally liable.

Decision

[11.] Having regard to the rules of court, I am satisfied that the filing of the judgment in default of appearance was indeed irregular. However, the issue now becomes whether or not the irregularity nullified the filing of the regular judgment in default of defence?

[12.] In **Hanna and another v Lausten** [2018] 1 BHS J. No. 172, the Court of Appeal determined the general rule, which allows a litigant to have an irregular judgment set aside *ex debito justitiae*, was no longer automatic.

[13.] In order to obtain a successful application to set aside a judgment in default, it is necessary for the Defendant to show: (1) that the judgment was irregularly obtained; and (2) if regularly obtained, that there is a meritorious defence.

[14.] Mr. Clarke highlights the point that the filing of the judgment in default of appearance despite an appearance being entered creates a defect which was not cured. Therefore the filing of the judgment in default of defence is irregular.

[15.] By **Order 2 rule 2(1)** of the Rules of the Supreme Court:

“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.”
(Underline mine)

[16.] According to the aforementioned rule, in order to allow the setting aside of a judgment that was irregularly obtained, the court must be satisfied that the application was (1) made within a reasonable time and (2) made before the party applying has taken any fresh step after becoming aware of the irregularity.

Within a reasonable time

[17.] The Plaintiff in this action initiated proceedings against the Defendant for breach of contract seeking *inter alia* liquidated damages. The Defendant having been duly served with a specially indorsed writ of summons, failed to file a defence despite having entered an appearance after the prescribed time of the rules.

[18.] The time of filing between the irregular judgment in default of appearance on 13 November 2019 and the filing of the regularly obtained judgment in default of defence on 29th October 2020 is 11 months.

[19.] Then some 7 months later, the Defendant filed a summons seeking to set aside both default judgments. What seems peculiar about the Defendant’s summons is that it lacks the necessary elements pursuant to Order 2 rule 2(2) which states:

“An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion”

[20.] The Defendant’s summons filed 25th May 2021 appears to be in breach of the aforementioned rule. The summons does not set out the specific irregularity on which the Defendant seeks to have the judgment set aside. The only ground of objection in the summons is that “the Defendant has a good and arguable Defence and Counterclaim”.

[21.] In light of the foregoing facts, I am expressly prohibited by Order 2 rule 2 from setting aside the judgment in default on the ground of irregularity due firstly to the delay which I consider to be unreasonable having regard to the fact that the Defendant is Counsel and Attorney and well aware of the time sensitive nature of the rules of court. By virtue of the Arnold Forbes Affidavit filed 15 December 2022, the Defendant attributes the delay to

attempts to negotiate matters amicably rather than engage in litigation. The failure to adhere to the rules of court as a result of ongoing negotiations has already been addressed by the Court of Appeal in the decision of **Michael Wilson & Partners v Sinclair** (SCCivApp No. 40 of 2007) wherein **Conteh JA** said at paragraph 25:

“The time stipulation is a requirement of the law and is clearly stated in the sub-rule reproduced at paragraph 7 above. In short, parties cannot, whether unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation or proceedings.”

[22.] As a result of the Defendant’s failure to specifically state the irregularity on which he seeks to have the judgment set aside, I am further prohibited from allowing his application to succeed. The requirement to specifically set out the ground of irregularity being relied on is a condition precedent to a successful application.

Good and arguable Defence

[23.] The lease agreement dated 1st November 2006 seems to be the subject of the parties’ contention. The issue appears to be outstanding rents owed to which the Plaintiff contends that the Defendant is jointly and severally liable in his capacity as Surety to the agreement.

[24.] Pursuant to clause 3 of the lease agreement, the obligation of the Surety is:

“The Surety in consideration of the demise herein contained having been made at his request hereby covenants with the Landlord that the Tenant shall pay the rents hereby reserved on the days and in the manner aforesaid and shall duly perform and observe all the covenants herein contained and that in case of default in such payment of rents or performance or observance of covenants as aforesaid to an extent which would permit the Landlord to re-enter under the terms hereof and terminate the demise hereby created the Surety will pay and made good to the Landlord all loss damages costs and expenses thereby arising or incurred by the Landlord...”

[25.] The essence of the Defendant’s position by virtue of an Affidavit sworn by Arnold Forbes filed 15 December 2022 in support, alleges that the Defendant is not a proper party to the proceedings and if the Court sets aside the judgment and leave is granted to file a defence and counterclaim, he intends to claim a set-off for repairs, upkeep and maintenance attributable by the Plaintiff.

[26.] Having reviewed this matter, I am not inclined to accept the Defendant’s position that he has a good and arguable defence for several reasons. Firstly, the Defendant has not proffered a draft defence objecting to the outstanding rents owed or that the terminology

of clause 3 in the lease agreement is not binding or applicable to him. Secondly, the Arnold Forbes affidavit did not demonstrate any good or arguable defence.

[27.] In the absence of a draft defence and counterclaim, I do not find merit in setting aside the Default judgment and allowing the matter to proceed to trial. Furthermore, the Defendant having failed to successfully establish the necessary elements to satisfy this court that the irregularity is still valid, I am prohibited from acceding to his application.

[28.] In light of the foregoing, the Defendant's Setting Aside Application is dismissed with fixed cost of \$5,000.00 awarded to the Plaintiff.

Dated the 19th day of March A.D., 2024

**Renaldo Tooté
Deputy Registrar**