IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO. 203 OF 2011

BETWEEN:

ATLANTIC BANK LIMITED **Claimant**

AND

CARLOS B. AZUETA **Defendant**

BEFORE: Hon. Chief Justice Kenneth Benjamin. (In Chambers).

October 15, 2013.

Appearances: Mrs. Nazira Uc Myles for the Claimant.
Mr. Mark Williams for the Defendant.

JUDGMENT

[1] By a Claim Form filed with Statement of Claim on April 1, 2011, the Claimant, Atlantic Bank Limited, brought proceedings against the defendant, Carlos B. Azueta, for the recovery of the outstanding balance in the sum of $147,307.55 plus costs of $155.00 and interest. The said sum represented indebtedness pursuant to a commercial loan in the sum of $83,100.00 granted to the Defendant on April 24, 2008 and which the defendant had failed to repay.

[2] Service of the Claim was effected by newspaper advertisements upon an application made and granted by the Registrar for substituted service by publication in a newspaper of general circulation in Belize. There was no acknowledgement of service or defence filed by the defendant.

[3] On February 15, 2013, judgment in default of acknowledgement of service was entered against the defendant in the total sum of $174,603.80 comprised of the amount claimed of $147,462.55, accrued interest of $26,886.25, court fees of $155.00 for the filing of the Claim and fixed costs of $100.00 on entering judgment.

[4] By a judgment summons issued on March 7, 2013, the Claimant sought the enforcement of the judgment in default. The defendant was served personally on April 2, 2013 and appeared before the Court in obedience to the judgment summons on April 15, 2013.

[5] By a Notice of Application dated and filed on May 16, 2013, the defendant applied for an order that the judgment in default be set aside and that the defendant be granted leave to defend the Claim as to quantum. The application was supported by an affidavit sworn to by the defendant and to which was exhibited a draft Defence. In essence, the defendant disputed the sum claimed on the basis that the breakdown provided in the Statement of Claim resulted in a discrepancy of $20,000.00..

[6] The response of the Claimant was set out in the affidavit of Stephen Chavarria wherein it was stated that there was an error in the collection fee of 20% agreed by the defendant in the signed promissory note. It was explained that the proper calculation of 20% of the outstanding balance of $119,557.18 amounted to $23,911.44 and not $3,911.44 as set out in para. 8 of the Statement of Claim. Indeed, it is arithmetically correct that the principal balance of $88,307.32 together with interest of $29,211.71, administrative fee of $480.00 and other charges of $1,558.15 aggregate the sum of $119,557.18. Further the sum of $23,911.44 does represent 20% of the said aggregate sum. In the event, it can be concluded that in all probability a genuine error was made in the omission of the figure ‘2’ resulting in an apparent shortfall of $20,000.00 in the amount stated as the legal fee.

[7] Learned Counsel for the Defendant argued that the judgment ought to be set aside under Rule 13.3(1). The said Rule reads:

> "13.3(1) - Where Rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant –
>
> (a) applied 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."

These requirements are cumulative and each condition must be satisfied before the court can exercise its discretion to set aside the judgment (see: per Barrow, JA in **Kenrick Thomas v RBTT Bank Caribbean Ltd** (Civil Appeal No. 3 of 2005 – St. Vincent and the Grenadines at para [7]; **Hyman v Matthews** SCCA 64/2003 – Jamaica Per Harrison JA).

[8] As regards the first condition in para. (a) of the Rule, it was contended that the defendant was not aware of the newspaper advertisement and he first became aware of the Claim when served with the judgment summons on April 18, 2013. This date was plainly wrong as the affidavit of service stated that he was personally served on April 2, 2013 and in any event he appeared before this court on April 15, 2013. Further, learned Counsel for the Claimant pointed out that the defendant would have known of the judgment since February 21, 2013 when he was personally served with a copy of the judgment dated February 15, 2013. This is evidenced by an affidavit of service filed with the Court.

[9] The defendant was not at all candid with the Court. In point of fact, he became aware of the judgment since February 21, 2013 and he did not seek to move the Court to set aside same until May 16, 2013. In my view, there was ample time in the intervening period of nearly three months for the quantum of the judgment to be challenged. It is fair to say that the defendant did nothing until the judgment summons came on for hearing. Even if one makes allowances for discussions with the Claimant Bank after the judgment summons was adjourned for that purpose, the defendant does not explain why he did nothing upon receiving the copy of the judgment. Rather, he set out to lull the Court into believing that he became aware of the amount of the judgment when served with the judgment summons. It is inescapable to conclude that the defendant did not act with promptitude and did not make his application as soon as reasonably practicable after he became aware of the judgment.

[10] On the face of the record, this Court is prepared to accept that the defendant only became aware of the Claim after judgment had been entered. Accordingly, he cannot be expected to tender an explanation for not having filed an acknowledgement of service. In the circumstances of this case, para. (b) of Rule 13.3(1) is rendered inapplicable.

[11] It was urged on behalf of the defendant that he has a real prospect of mounting a successful defence to the Claim as to quantum. The basis of this assertion was that given the discrepancy of $20,000.00, the Claimant Bank ought to be put to strict proof of its Claim. The answer to this was provided by opposing Counsel who adroitly pointed out that the draft Defence, while not disputing the existence of the debt, simply pleads that the judgment was overstated by $20,000.00. This anomaly has been satisfactorily explained on the evidence. It follows then that there was no realistic prospect of success based on the draft Defence exhibited.

[12] Before concluding this ruling, I wish to point out that it was observed that the sum of $155.00 representing court fees on the claim was twice added in the computation of the quantum of the judgment in default. The judgment therefore ought to be varied to correct this obvious error pursuant to Rule 13.3(2).

[13] The order of the Court is as follows:

(1) The application to set aside the judgment entered on February 15, 2013 is dismissed.

(2) The said judgment is varied to correct the error referred to in paragraph 12 herein and shall read: Judgment be entered for the Claimant in the sum of $174,448.80 together with interest.

(3) The Claimant shall be paid the costs of this application by the defendant fixed in the sum of $750.00.

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KENNETH A. BENJAMIN
Chief Justice