IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 567 OF 2013

BETWEEN:

VIRIATO ANTONIO MATUS	**CLAIMANT**
AND	
JOSE ANTONIO ORELLANA	**1ST DEFENDANT**
GIOVANNI VALDEZ	**2ND DEFENDANT**

CLAIM NO. 568 OF 2013

BETWEEN:

JULIO ALBERTO CASTELLANOS	**CLAIMANT**
AND	
JOSE ANTONIO ORELLANA	**1ST DEFENDANT**
GIOVANNI VALDEZ	**2ND DEFENDANT**

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

January 28 and February 4, 2014.

Appearances: Mrs. Nazira Myles for the Claimants.
Mr. Anthony Sylvestre for the 1st Defendant.
Mr. Leo Bradley for the 2nd Defendant.

JUDGMENT

[1] The second Defendant in each matter made an application by Notice of Application filed on January 15, 2014 to set aside the judgment in default entered against him in each Claim. The applications were practically identical and the Court therefore elected to hear them together.

[2] The Claim Form and Statement of Claim in each matter was filed on October 30, 2013. Service was effected on Giovanni Valdez, the second Defendant, on Tuesday, November 12, 2013 as evidenced by the affidavit of service filed in each matter. The 2nd Defendant filed an acknowledgment of service on November 20, 2013 indicating an intention to defend each Claim. The Defence was due to be filed on or before December 11, 2013 but none was filed. No application was made for an extension of time nor was any consent to an extension sought from Counsel for the Claimant as is permissible by Rule 10.3(4) of the Supreme Court (Civil Procedure) Rules, 2005. This state of affairs existed until December 31, 2013 when the Claimant requested entry of judgment in default of defence pursuant to Rule 12.5. Judgment in default in both matters was entered on January 8, 2014.

[3] The grounds stated in the application to set aside default judgment are stated to be as follows:

> "1. The Second Defendant has filed this application as soon as reasonably practicable after finding out that default judgment has been entered;
>
> 2. It has a good explanation for its failure to file a Defence within the prescribed time;
>
> 3. It has a real prospect of successfully defending the Claim."

It is fair to say that these grounds mirror the criteria set out under Rule 13.3(1) as prerequisites for the Court to exercise its discretion to set aside a judgment entered in default. The settled learning is that the defendant applicant must satisfy the Court as to each of the three conditions. Rule 13.3(1) 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) applies 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."

[4] The significance of the language of Rule 13.3(1) was explained by Harrison, JA in **Hyman v Matthews** (Jamaica) (Applications 72 and 80 of 2006) (SCCA 64/2003) in this way in respect of the identical Jamaican Rule:-

> "The provisions of Part 13.3 are different from their English Counterpart. In the UK, 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. ... In considering whether to set aside judgment entered under Part 12, the judge has no residual discretion if any of the conditions are not satisfied."

According to the dictum of Barrow, JA in **Kenrick Thomas v RBTT Bank Caribbean Ltd** (St. Vincent and the Grenadines) (Civil Appeal No. 3 of 2005), (at para. [7]): "The appellant submitted that this provision [Rule 13.3] specifies three conjunctive pre-conditions for setting aside. The submission is sound. "Only if" can only mean that if the three matters are not present then the court may not set aside a default judgment."

[5] The foregoing authorities are in respect of identical provisions in Jamaica and St. Vincent and the Grenadines. In Belize, the Supreme Court and the Court of Appeal have adopted the same interpretation in the respective cases of **Maggie Perez v Lionel Banner** – Claim No. 262 of 2008 (Hafiz, J) and **Belize Telecommunications Ltd v**

Belize Telecom Ltd (Civil Appeal No. 13 of 2007). This Court is bound by the approach of the Court of Appeal.

[6] The evidence relied upon in support of the application was the affidavit sworn to by the second Defendant. It was deposed that having become aware of the default judgment on January 10, 2014, (two days after its entry), the application to set aside same was filed on January 15, 2014. Learned Counsel for the Claimant did not dispute that this time-line satisfied that condition as to the application being filed as soon as reasonably practicable after finding out about the default judgment. In his submission, learned Counsel for the 2nd Defendant informed the Court that on January 9, 2014 in the course of a telephone conversation made for the purpose of seeking consent to an extension of time it was revealed that judgment had been entered. The application was lodged within three working days and I therefore do accept that the application was made well within the bounds of what would be considered as soon as reasonably practicable.

[7] The affidavit of the 2nd Defendant exhibited a Defence dated December 20, 2013 as well as a Police Report. The combined effect of both documents forms the basis of the contention that the 1st Defendant was responsible for the collision between their respective vehicles. Again, learned Counsel for the Claimant did not take issue with the 2nd Defendant having a real prospect of successfully defending the Claim. Suffice it to say that if the averment in the draft Defence can be established at trial, the 2nd Defendant would have a real chance of defending the Claim.

[8] The thrust of the Claimant's objection to the application to set aside the default judgment was a challenge to the probity of the explanation given by the 2nd Defendant for his failure to file the Defence as prescribed by the Rules. In his affidavit, the 2nd Defendant stated that he was handed the Claim Form on or around November 14, 2013. This date is incorrect as the affidavit of service sworn to by PC 764 Alberto Coc gave the date of service as November 12, 2013. The acknowledgement of service signed by the 2nd Defendant himself admits to being served on November 13, 2013. Learned Counsel for the Claimant generously relied on the latter date of November 13

for the purpose of computing the time for filing of the Defence. The affidavit went on to state that the 2nd Defendant did not read the contents of the Claim "until a few days later" at which time he made contact with his Attorney-at-Law.

[9] In paragraph 4 of the affidavit, the 2nd Defendant averred that he handed the Claim Form over to his lawyer in late December with instructions to defend the matter. However, the retainer was not paid until the last week or late December. Learned Counsel for the Claimant observed that the acknowledgement of service was filed on November 20, 2013 which suggested that the documents were in the hands of his lawyer at least before that date and not in late December as deposed to.

[10] The affidavit contained a statement that in late December a case management hearing was held and at that hearing he was represented by another Attorney-at-Law at the request of his Counsel who was abroad. The Court was informed by learned Counsel for the Claimant that this was inaccurate as the 1st Defendant's Attorney-at-Law held papers for him. She went on to highlight that although the time for the filing of the Defence was due to expire on the next day, no application was made to the Court at case management conference for an extension of time. Further, it was not until January 9, 2014 that an attempt was made to seek consent to an extension of time.

[11] The Court's record can confirm that the 2nd Defendant was represented by Mr. Anthony Sylvestre who held papers for Mr. Leo Bradley. Taking the absence of the Attorney-at-Law from the country at face value, it was submitted that this did not deter the rendering of instructions given the availability of electronic means of communication. In this regard, the Court was taken to the comments of Sykes, J in **Andrew Robertson v Toyojam Ltd et al** – Claim No. 2006 HCV 2311 (Jamaica), in rejecting an explanation that the parties were abroad for extended periods. Learned Counsel in her submissions also cited the judgment of Hafiz J (as she then was) in the case of **Francis Nasi v David M. Richards** – Civil Appeal No. 4 of 2012 where Her Ladyship concluded that there was a lack of diligence on the part of the Attorney-at-Law for the applicant by not invoking the provisions of the Rules in the face of stated family emergencies. The affidavit went on to state that the 2nd Defendant's Attorney-at-Law returned to the

country in early January, 2014 at which time contact was made with opposing Counsel for the Claimant.

[12] The factual picture presented by the 2nd Defendant is fraught with discrepancies. First of all, he must have at least instructed Counsel and handed over the Claim Form and documents with which he had been served not later than the date of the acknowledgement of service which bears Mr. Bradley's signature. Secondly, the Defence exhibited bears the signature of Mr. Bradley at a date when Mr. Bradley is alleged to be abroad. Even assuming for argument that the Defence was signed on December 30, 2012, there is no reason given as to why it was not filed when the 2nd Defendant said that he had by then retained or paid a deposit to his Attorney-at-Law.

[13] As I see it, there is not a clear, far less a good explanation, as to why the Defence was not filed on time. It is pertinent to note as learned Counsel for the Claimant argued, that the judgment was not entered between December 11, when the time expired and December 30. During that time there was no attempt made to seek an extension from the Claimant's Attorney-at-Law or from the Court. This is against the background of the 2nd Claimant's admission that he had read the contents of the Claim Form. The "Notes to the Defendant" served along with the Claim Form set out in bold letters the consequence of judgment being entered without any warning if nothing was done.

[14] The evidence before the Court falls far short of the requirement of a good explanation for the failure to file a Defence. Accordingly, the 2nd Defendant has not satisfied all three conditions set put in Rule 13.3(1) and the application to set aside judgment is dismissed. The costs of the application shall be the costs of the Claimant in the cause to be quantified by assessment if not agreed.

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KENNETH A. BENJAMIN
Chief Justice