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

CLAIM NO. 453 OF 2010

	(ANGEL TORRES	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(BASILIA WESTBY	**FIRST DEFENDANT**
	(JEFFERSON WESTBY	**SECOND DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Agnes Segura-Gillett of Arnold and Company for the Claimant/ Respondent

Ms. Stevanni Duncan of Barrow and Williams for the Defendants/Applicants

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D E C I S I O N

1. This is an Application by the First and Second Defendants to set aside the Default Judgment entered against them and to seek leave of the court to file a Defence.

2. By Claim Form dated 23rd June 2010, the Claimant brought this action against the Defendants seeking the following relief:

i) Specific performance of an agreement dated the 16th day of March 2008;

ii) Damages for breach of contract in lieu of or in addition to specific performance;

iii) Alternatively, damages for fraudulent and/or negligent misrepresentation;

iv) Costs;

v) Interest;

vi) Any other relief.

3. In his statement of claim, the Claimant Angel Torres alleged that by an agreement in writing, the Westby family agreed to sell to him an 18 acre parcel of land located at Mile 57, Northern Highway, Orange Walk District. He further alleges that two agreements were executed by the First and the Second Defendant, Basilia Westby and Jefferson Westby Jr., respectively, regarding negotiations for the sale of this property to him. The land belonged to the estate of Jefferson Westby Sr. and the

Second Defendant was appointed the Administrator of his late father's estate on November 7th, 2008. The Claimant Angel Torres claims that the agreed purchase price was $147,000.00 BZ with a down payment of $15,000.00 and monthly installment payments to be made payable to Belize Bank Ltd., which held a Charge over the entire Parcel No. 543. He states that he made the down payment in February 2008 and he has since been making monthly payments of $1,663.07 every month. Angel Torres contends that the date fixed for the completion of sale was March 2009, but that the Defendants have failed to complete the sale and they have indicated that they no longer wish to honor the agreement. Mr. Torres continues to make monthly payments toward the purchase price and stands ready and willing to complete the purchase of the property. It is on this basis that he has brought this claim seeking the relief set out above.

4. This Claim was served on the Defendants on June 26th 2010 and on July 12th, 2010 both Defendants filed their Acknowledgment of Service forms. They failed to file a Defence in the requisite period, and as a result, Judgment in Default was entered against the Second Defendant on July 28th, 2010. It is by this application that the Defendants now asks the court to set aside that default judgment.

5. The first argument raised by Learned Counsel for the Applicant/Defendant Ms. Duncan is that this claim should have been brought by a Fixed Date Claim and not by ordinary claim, since the relief sought is possession of land. She argues that specific performance of the contract is an equitable remedy which amounts to a claim for possession of land. She refers to Civil Procedure Rule 8.1 (5) (a) and submits that use of the ordinary claim form in this matter is inherently flawed and an abuse of the process of the court.

Rule 8.1(5) *"Form 2(fixed date claim form) must be used –*

(a) in proceedings for possession of land."

She further submits that Civil Procedure Rule 12.2 specifically precludes default judgments in Fixed Date Claims:

Rule 12.2 *"A claimant may not obtain default judgment where the claim-*

(a) is a fixed date claim;"

Ms. Duncan referred to a judgment of the Eastern Caribbean Supreme Court in Claim No. 0004 of 2012 ***Leontius Robinson v. Edgar Davis***. In that case, Joseph J. of the High Court of St. Vincent and the

Grenadines held that proceedings had been correctly instituted by way of fixed date claim form and not by ordinary claim in a matter seeking return of a sum paid as part payment for a piece of land, or, in the alternative, execution of a deed of conveyance which would give a right to possession of land.

On this basis, Ms. Duncan argues that the default judgment should be set aside.

6. In the alternative, Ms. Duncan contends that the method used to obtain default judgment in this case was wrong. In this case, default judgment was obtained as an administrative exercise by the Registrar pursuant to a Request for Entry for Judgment in Default Form filed by the Claimant. She argues that where equitable relief is sought it is important that the court has some input in the decision to enter default judgment. In this regard, Ms. Duncan submits that an application ought to have been made for the court to consider whether it should grant specific performance and if so, to what extent. She refers to CPR 12.10(5) and CPR 12.10(2) which reads as follows:

Rule 12.10(4) "*Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.*

(5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and Rule 11.15 does not apply."

7. Ms. Duncan further submits that CPR 12.10 (4) and (5) mandates that the court must have some input before granting a default judgment.

8. On the question of delay in filing the application to set aside default judgment, Ms. Duncan argues that the length of the delay in this case was reasonable. She also argues that it is only upon receiving notice of the contempt application (which exhibits the default judgment) filed on the 30th of July, 2012 that Mr. Westby became aware of the fact that default judgment had been entered against him.

She states that Mr. Westby had been given expert advice by a lawyer to just do nothing in relation to the claim. She cites ***Dipcon Engineering v. Gregory Bowen et.al.*** Privy Council Appeal No. 79 of 2002 where the Privy Council held that the reason advanced by the

Minister of Works for failing to file a defence in time (that he was not properly advised and represented by his solicitor at that time who was also solicitor for the Attorney General) was not a sound reason.

In addition, Ms. Duncan submits that Mr. Westby was in a dire position financially.

Ms. Duncan argues that Mr. Westby as a lay person relied on the advice of his attorney and in following that professional advice did nothing to answer the claim.

9. Ms. Duncan argues that the Defendants have a real prospect of successfully defending the claim and she refers to the draft defense submitted on behalf of the Defendant Jefferson Westby. The Defence avers that the agreement which the Claimant seeks to get enforced contravenes section 14 of the Land Utilization Act. She further argues that the Jefferson Westby is not a party to the second agreement dated 16th May 2008. And finally she submits that it would be in furtherance of the overriding objective if the court would set aside the default judgment and allow Mr. Westby to file his defence in answer to this claim.

Claimant's Arguments Against the Application to Set Aside Default Judgment

10. Mrs. Agnes Segura Gillett in response to the Defendant's arguments, states that the Civil Procedure Rules provide two ways in which a default judgment can be set aside under Rule 13.2 and Rule 13.3. She states that Rule 13.2 does not apply in this case. On the question of delay, Mrs. Gillett argues that the Defendant/Applicant did not apply to set aside as soon as reasonably practicable. She refers to an affidavit of Ellis Arnold, S. C., which exhibits an e-mail dated August 20th, 2010 sent by Jefferson Westby Jr. and she argues that the correspondence refers to the order setting aside the default judgment. It is therefore not true that the Defendant Jefferson Westby first learnt of the order in September 2012. Mrs. Gillett argues that in that e-mail the Defendant/Applicant asked for 6 months to 1 year to prepare a Defence, and that this shows that he did not consider the court process to be a matter of urgency. She referred to the case of ***Earl Hodge v Albion Hodge*** Claim No. BV1 HCV 2007/00098 where the Eastern Caribbean Supreme Court held that a delay of 13 days in filing an application to set aside a default judgment was unreasonable. Mrs. Gillett submits that in the present case, there is nothing exceptional to warrant the court setting aside the default judgment after such a delay

(whether it is 9 months as per the Defendant's affidavit or 2 years as per Mr. Arnold's affidavit). The length of time to file the application to set aside the default judgment is too long.

11. Mrs. Gillett further submits that the Defendant allowed the process to take its course because he knew there was no prospect of successfully defending this claim. She cites Claim No. 613 of 2007 ***Evan Tillett v. Evelyn McFadzean*** where Muria J held that lack of due diligence and tardiness are not good reasons for failure to file a defence.

12. Mrs. Gillett also argues that there has been no proof of impecuniosity on the part of the Defendant. She further alleges that the defence must have a real prospect of success and that the draft defence filed is a grasp at straws and does not amount to a proper defence in that the Applicant/Defendant does not deny that two agreements for the sale of this land were entered into by the Westby family. She also states that the point raised about the Land Utilization Act is irrelevant because the Act merely states that the Applicant cannot sell the land without getting prior approval from the Ministry of Natural Resources.

13. Mrs. Gillett submits that reliance on the doctrine of estoppel would bar the Applicant/Defendant from reneging on his obligations under the agreement. The Claimant continues to bear the full brunt of the mortgage in the hope of getting a portion of the property sold to him. He has been induced by the Defendant and he has acted to his detriment. The Defendant/Applicant has acknowledged the existence of the agreement to sell, but he is now seeking to change the terms of that agreement.

14. It is further contended on behalf of the Claimant that the test in setting aside a default judgment is whether the defense has a real prospect of success and must be "*something other than a merely arguable case*" Earl Hodge Int'l Finance case. In this regard, Mrs. Gillett submits that the first paragraph of the defence amounts to an admission:

> *"Save that the Second Defendant admits there is an Agreement in Writing dated the 14th day of February 2008 (Agreement 1) to sell to the Claimant an 18 acre parcel of land located at Mile 57, Northern Highway, Orange Walk District, being a portion of Parcel No 543 situated in the Ann Gabourel Registration Section, the Second Defendant denies paragraph 1 of the Statement of Claim."*

15. On the point argued by Ms. Duncan that the Claim should have been brought by way of Fixed Date Claim and not by ordinary claim, Mrs. Gillett argues that the claim is for specific performance of an agreement and that a number of obligations arise under that agreement. It is not merely a claim seeking delivery of possession to the buyer. The claim was properly brought by ordinary claim.

16. In answer to the submission that the default judgment should have been obtained by way of a formal application as per Rule 12.10(4) and not by an administrative exercise, Mrs. Gillett argues that while it may have been better for the Claimant to proceed by way of application, to have the court enter the terms of the default judgment and assess whether the Claimant would be entitled to default judgment, there is no prejudice to the Defendant. This would be merely a procedural misstep which does not warrant the setting aside of a default judgment, since the court can always vary he terms of the default judgment.

17. Mrs. Segura-Gillett submits that once the three pre-conditions for setting aside a default judgment are not met, the Court has no discretion to set aside.

18. I fully agree with the submissions advanced by Mrs. Segura-Gillett on behalf of the Claimants on this application. I agree that this is in essence a claim for specific performance and, in the alternative, damages for breach of contract. While delivery of possession is indeed a component of the relief sought, it is not a claim for possession *simpliciter*. I therefore find that the matter was properly brought before the court by way of ordinary claim, and not by way of fixed date claim.

19. I agree that Rule 13.2 of the CPR does not apply in this case as this is not a judgment that has been wrongly entered. The factors for the court to consider when exercising its discretion whether to grant an application to strike out judgment in default are clearly set out in Section 13.3 of the CPR:

> Rule 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 -*
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> *(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;*
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> *(b) gives a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and*

(c) has a real prospect of successfully defending the claim."

20. Having examined the Draft Defence submitted, I find that there is no reasonable prospect of the Defence succeeding. The Defendant has acknowledged in paragraph 1 of his Draft Defence that the Agreement dated 14th February, 2008 on which the Claimant bases his claim does in fact exist. The Claimant, for his part, has been dutifully abiding by this agreement by paying the mortgage every month since 2008. I find that the draft defence appears to be a mere grasp at straws and it does not have a reasonable prospect of success.

21. I also find that the delay in filing a defence has been unreasonable. While the court is well aware of the difficulties faced by many litigants in raising the requisite funds to properly bring or defending claims, I find the delay of Mr. Westby Jr. of two years in this case to be excessive. I agree with Mrs. Segura-Gillett's submission that there is nothing exceptional that would warrant the court exercising its discretion in favor of Mr. Westby in this matter. Having found that two of the three limbs of Rule 13.3(1) of the CPR have not been satisfied, the Defendant's application fails.

22. I therefore find no basis on which this application can be granted. The application to strike out the judgment in default is refused.

23. Costs awarded to the Claimant to be paid by the Defendant to be assessed or agreed.

Dated this 17th day of January, 2014

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Michelle Arana
Supreme Court Judge