IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 361 of 2014

PAMELA B. FRIENDLY	**1st CLAIMANT**
RONALD SMITH	**2nd CLAIMANT**
AND	
IAN YEARWOOD	**1st DEFENDANT**
MARGARET YEARWOOD	**2nd DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2015
3rd February
19th February

Mr. Estevan Perera for the Respondents/Claimants.
Mrs. Audrey Matura-Shepherd for the Applicants/ Defendants.

Keywords: Setting aside Default Judgment – Variation of Default Judgment - Good Explanation – Defence Counsel's General Ineffectiveness – Real Prospect of Success.

RULING

1. This is an application pursuant to Rule 13.3 to set aside a judgment properly entered in default of defence on 6th October, 2014 for the sum of $231,102. Bze. As such the Defendants are required to:

"(a) apply to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) give a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be; and

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

2. These requirements are compendious in nature see ***Belize Telecommunications Limited v Belize Telecom Limited et al Civil Appeal No. 13 of 2007***. To properly consider the first two, the circumstances of this case demand that a sequence of events be given:

2014

22nd July – Claim Form and other requisite documents served.
27th July – Defendants send written instructions responding to each paragraph in the claim form to Counsel via e-mail.
29th July – Defendants inform Counsel that they are scheduled to leave the state. Counsel advises that he will sign the defence in their absence.
31st July – Both Defendants depart the state.
19th August – Deadline for filing defence.
21st August – Acknowledgment of service filed.
24th August – Defendants return to state and make effort to contact Counsel without success.
26th August – While on business in Belize City Defendants arrange to meet with Counsel. Counsel assures them all is well with this particular claim but they find out no filings had been done in another claim.
12th September 2014 – Second Defendant by e-mail requests an update of all legal matters – no response from Counsel.
6th October – Default judgment entered, and served on Counsel for the Defendants (service in issue).
29th October to 31st October – Second Defendant hospitalized surgery related to birth of a child.
7th & 10th November – Second Defendant again e-mails Counsel requesting an update and expressing concern about his lack of communication among other issues.
14th November – Supreme Court Marshall attempts to serve a Writ of Execution and second Defendant learns of default judgment. Makes attempts to contact Counsel – all unsuccessful.
17th November – Defendants contact new Attorney, attend Registry to view file and sees default judgment for the first time. Again try to contact original Counsel to get case file no success.

18th November – Eventually makes contact with original counsel and receive court file at 8:00 p.m.
21st November – Application filed by new Counsel to have default judgment set aside.

Service of the default judgment and delay:

3. The Claimants have, in an affidavit filed by a law clerk of the representing firm, stated that the judgment was served on Defendant's counsel on the same day it was entered. That clerk however, did not serve the document. There is no affidavit of service to this effect filed and the Defendants say they are uncertain that the judgment was served as purported, hence giving them notice of same. The issue of service goes mainly towards procedure and this court could find no reason to doubt that the document was in fact served. Further, even if that was the deemed date of 'finding out" rather than the 7th November as the Defendants assert, it makes little difference to the issue of delay raised. The Defendants to my mind have passed the first hurdle as there was no significant delay either way. I will therefore only discuss the other two requirements in any detail.

A good explanation:

4. The Defendant's entire explanation rests on their then representing Counsel's ineffectiveness and general failure to attend to their matter as requested. The learning on this is clear. It is not a good explanation for failure to file a defence. The Belize Court of Appeal decision in ***Franco Nasi v David Richards Civil Appeal No. 4 of 2011*** makes no bones about this. Justice Hafiz-Bertram states at paragraph 21 and 22:

> *"21. Learned Counsel relied on the case of **Evan Tillett v Elwyn McFadzean**, Belize Supreme Court Claim No. 613 of 2007 in which Hon. Justice Sir John Muria stated:*

> *...there was clearly a lack of diligence on the part of the Defendant's former attorney to deal with the defendant's case as shown by the affidavit evidence. I have to say that lack of diligence or tardiness on the part of the attorneys cannot be "a good explanation for failure to file a defence under Rule 13.3(1) (b) of the CPR.*
>
> *22. I agree with Ms Espat's argument as the evidence before the learned Registrar clearly shows that there was a lack of diligence on the part of the attorney for Mr. Richards and as such the Learned Registrar erred in accepting the reasons given as good explanation for not filing the defence."*

5. Further, even when one looks at the Defendants' affidavits one quickly realizes that they too have been less than vigilant and their account of what transpired is not entirely consistent. They were served with the claim and the stipulated documents which include notes on the procedure and timeline for filings. They have never denied knowing that the defence was to be filed during their period of absence from the state. And they most certainly could not; as why then would the issue of Counsel's assurance that he could sign that defence for them ever have arisen.

6. Having returned to the state and on meeting Counsel at his office on the 26th August, 2014 why didn't they request to see the filed defence. Moreover, what does the second Defendant mean when in correspondence to Counsel on 7th November, 2014 she writes *"We wrote defence for these two claims and we have yet to see the final paperwork. This is our future you are talking about. Simply put are you working on our cases? An urgent response is needed."* This court prefers to believe the contents of this e-mail rather than the Defendants' affidavit as to the real condition of the instant claim as at 7th November, 2014.

7. The Defendants suspected that a defence had not been filed. I say this not only because the second Defendant questions whether Counsel is working, but she refers to the final paperwork, not the filed document. Further more the second Defendant, is at that time, also aware that there were gaps in the instructions they sent to Counsel on 27th July. The instructing document is attached as Exhibit M.Y. 7 and it clearly shows where the Defendants ask Counsel to speak with them on certain paragraphs and even indicate where more research needed to be done or more information was required or where they could not properly respond as they were unsure.

8. There is no evidence before the court of them ever meeting with or providing any further information to Counsel. Yet, they say now that they were satisfied that Counsel had done what ought to have been done. That he could have prepared and signed a defence for them, while (maintaining the timeline), from the incomplete information they had provided. They assert that they were not worried about the status of this particular case as they had been assured by Counsel that all was well. I find this proposition impalatable. This court is of the view that the Defendants were aware of the precise status of their matter. Their Counsel had not attended to it as perhaps he should have but neither did they. In any event they have failed on this limb.

Real Prospect of Success:

9. Having so found, the court need not enquire into this matter any further. However, perusal of the proposed defence they provided reveals that they would not have passed the third test either. In ***Swain v Hillman [2001] 1 All ER 91 at 92j*** Lord Wolf MR states: *"The words "no real prospect of succeeding"*

do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

10. A simple analysis of the statements presented shows that the Defendants have admitted the agreement between the second Claimant and their good selves. They deny ever contracting with the first Claimant but that really does not change the complexion of the matter sufficient to show much more than a merely arguable defence.

11. They have admitted that in accordance with an agreement they made with the second Claimant, the second Claimant did purchase the concerned vehicles and they were purchased for Barefoot Rentals Limited. They also admit that the vehicles were never registered in the name of Barefoot Rentals Limited as agreed, but remain, even now, in their personal names or that of a business name registered by them. They have therefore admitted the breach.

12. They further state that the golf cars were purchased by the second Claimant for shares in Barefoot Rentals Limited. They claim shares were indeed transferred to the second Claimant as agreed, but among the many, many documents provided, there was no evidence of this transfer at all. In fact, they exhibited a share certificate listing only the two Defendants as shareholders. Moreover, in the same instructing document they sent to their original Counsel on 27th July, 2014, one reads in reference to Barefoot Rentals Limited, at paragraph 7a: "(Defendants should attach record of distribution of shares showing only two shareholders being the two

Defendants on that date)." There is never any mention of shares being transferred to the second Defendant.

13. Counsel for the Defendants during submissions attempted to raise the issue of the business holding the vehicles on trust for the Company. This was not pleaded in the draft defence, nor was it stated in any of the affidavits supporting the application. It was therefore not considered. The court could find nothing that would indicate that this case had a real prospect of success.

14. As a desperate final attempt Counsel for the Defendants made an oral application for variation of the default judgment so that the vehicles could be appraised as at the date of the filing of the claim and that the appraised figure be inserted as the sum adjudged. She grounded her application on the overriding objective. The CPR at Rule 13.3 (2) does allow for a variation in circumstances where the court has the power to set aside. In these proceedings the court is only allowed to set aside if the applicant surmounts the three hurdles. It therefore stands to reason that the court may only consider a variation if the three hurdles have likewise been overcome. Having already found that they have not, I dismiss both applications with costs to the Claimants to be assessed if not agreed.

15. The court is compelled to comment on the affidavit filed by the Applicants on the 10th February, 2015. This affidavit, signed by the second Defendant, was filed, with neither an application or permission, after the hearing in this matter had concluded. The court, having reserved its judgment, allowed either party the opportunity to file submissions if they deemed it necessary. What was intended or expected by filing this affidavit is unclear but the

court neither read nor considered its contents and refers to it only because of the anomaly in procedure and the serious concerns it evoked. It is not a practice ever expected to be adopted again.

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SONYA YOUNG
JUDGE OF THE SUPREME COURT