IN THE SUPREME COURT OF BELIZE, A. D. 2016

CLAIM NO. 244 OF 2016

BETWEEN:

	(LOPEZ EQUIPMENT CO. LTD.	**CLAIMANT/RESPONDENT**
	(	
AND	**(**	
	(	
	(PASA BELIZE LTD.	**DEFENDANT/APPLICANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Denys Barrow, SC, and Ms. Naima Barrow of Barrow and Co. for the Claimant/Respondent

Mr. Nigel Ebanks and Ms. Stevanni Duncan of Barrow and Williams for the Defendant/Applicant

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D E C I S I O N

1. This is an application to set aside default judgment. On May 6th, 2016 this claim was filed by Lopez Equipment Ltd. against Pasa Belize Ltd. seeking approximately $1.699 million dollars as the price of work done and services provided by the Claimant to the Defendant. On the 7th June, 2016, default judgment was issued as the Defendant failed to file a Defence within the 28 days required by CPR 10.3. On October 4th, 2016 this Court heard the Defendant's application to set aside default judgment and granted permission to the Defendant to set aside the default

judgment and file a defence to the claim by October 18th, 2016. The Defendant again failed to file a Defence by the date ordered by the Court. On October 21st, 2017 the Claimant applied for an order that the First Default judgment stands as the Defendant had failed to file its Defence. That application was granted and Second Default judgment was issued to the Claimant on October 26th, 2016. On November 4th, 2016 the Sanction Order was perfected then served on the Defendant on November 10th, 2016. The Defendant again applied for default judgment to be set aside on October 26th, 2016. On December 5th, 2016 the Defendant amends application to set aside the Sanction Order and to stay execution of the default judgment and order. It is this second application to set aside the default judgment which is now before the court for its consideration.

Legal Arguments on behalf of the Defendant seeking to set aside Second Default Judgment

2. Mr. Nigel Ebanks on behalf of the Defendant Pasa Belize Ltd. argues that: (1) the Court ought to set aside the default judgment of October 25th, 2016; (2) set aside the Order dated 4th November, 2016; and (3) permit the Defendant to file and serve its Defence. The other relief sought by the Defendant pertains to an Interpleader Summons which will be determined by this court at a later date. Learned counsel submits that this court has the power to hear and set aside a second default judgment and he cites ***Evans v. Bartlam*** [1937] 2 All E R 646 in support thereof: *"The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its*

coercive power where that has been obtained only by a failure to follow any of the rules of procedure". He also cites ***Percival Hussey v Paul Wright*** (Claim No. 2010 HCV 00852) where the Court dealt with a second application to set aside default judgment. In that case the Court confirmed that it had the inherent jurisdiction to set aside or vary any order, including a second or subsequent application to set aside default judgment.

3. Mr. Ebanks further argues that the test for setting aside a default judgment has not changed. The Court must feel satisfied that the application to set aside was made as soon as reasonably practicable after finding out that judgment was entered; there has to be a good explanation for failing to file a Defence and the Applicant must have a real prospect of successfully defending the Claim. He contends that in this case, the Defendant applied as soon as reasonably practicable after finding out about the default judgment. Referring to the affidavit of Keli Guzman, he states that the default judgment was entered on October 25th, 2016; the Defendant learnt of the judgment on that same day and the application to set aside was filed on the following day, on October 26th, 2016.

4. Mr. Ebanks says that there is a good explanation for failing to file a Defence. He states that the failure was not the fault of the Defendant. The Defence was ready (as it had previously been served on the other party on 8th June, 2016 as per affidavit of Keli Guzman para. 21). The failure was "*an inadvertent omission on the part of the attorneys-at law for the Defendant brought about by an unintentional oversight on account of volume of work*". The time lapsed unbeknownst to the attorneys until the

perfected order setting aside the previous default judgment had been received from the court on the 25th October, 2016. On October 25th, 2016 the Attorneys for the Defendant in haste sought to file a Defence but found out that default judgment had already been entered that very day, Mr. Ebanks submits that failure to file was not due to any indifference on the part of the Defendant. He relies on ***Sylmord Trade Inc v. Inteco Beteiliguns AG*** BVIHCMAP2013/0003 Eastern Caribbean Court of Appeal, where the Court of Appeal accepted that the circumstances which can suffice as a good explanation are not exhaustive and that there was no definition for the term "*good explanation*". In the court below the learned trial judge, in the absence of a definition, sought to explain what could be a good explanation as anything that is not reflective of indifference by the party. Bannister J (Acting) said*: "… an account of what has happened since the proceedings were served which satisfied the Court that the reason for the failure to acknowledge service or serve a defence is something other ran mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations because each is capable* of *explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered".*

Mr. Ebanks argues that while the Court of Appeal on the facts of ***Sylmord*** upheld the learned trial judge's finding that the appellant had made a conscious decision not to take certain steps and to consciously ignore the proceedings in the BVI, in the case

at bar there has been no such conscious decision on the part of the Defendant, and the failure to file a defence was due to innocent forgetfulness or oversight.

5. Mr. Ebanks further argues that the Defendant has a real prospect of successfully defending the claim. While the Defendant in its proposed Defence admits a fraction of the claim, to the amount of US$102,286.41, all other matters are vehemently disputed on the basis that some of the Claimant's invoices have already been paid, or that the Claimant did not do some of the work claimed under some of the invoices and the Defendant puts the Claimant to strict proof thereof. While the Claimant seeks to persuade the Court by the Affidavit of Alex Lopez that on account of alleged admissions of debt the Defendant does not have a real prospect of success on its Defence, the Affidavits of Pablo Ayala and Reynaldo Rodriguez on behalf of the Defendant explains these matters; there is no admission of debt. Mr. Ebanks submits that the Defendant has a strong counterclaim whereby it seeks relief of US$1,004,322.84 against the Claimant for the value of the Contract with the Government of Belize which it lost on account of non-performance by the Claimant being US$500,000 for the forfeited portion of the retention fund by the GOB on account of non-performance of the Claimant; and the balance of the advance repayment of US$188,770.65. He therefore submits that the default judgment ought to be set aside since the Defendant has satisfied the three limbs as required under the Civil Procedure Rules.

6. In conclusion, Mr. Ebanks argues that the overriding objective would lean in favour of the court exercising its discretion to set aside the default judgment. As there has

been no judgment on the merits, there would be no prejudice to the Claimant. By contrast, there would be severe prejudice to the Defendant if the default judgment were not set aside as the sum of the judgment is no small figure. The Defendant very much wants an opportunity to be heard by the court and in all the circumstances have demonstrated a genuine and real interest in defending this claim. He also argues that the judgment of November 4th was irregularly obtained as the court was not properly moved by application with supporting affidavit to grant the order; as that order is in the terms of an unless order it is in violation of CPR 26.4 which can only be obtained upon application supported by affidavit. Seeking two orders of the court in respect of the same matter is an abuse of process where one is administrative and the other is judicial. There is no provision in the CPR for an order to be resurrected once it has been set side, and if so, this ought only to be done upon notice to the other side. For all these reasons, Mr. Ebanks urges this court to set aside the Second Default Judgment.

Legal Arguments on behalf of the Claimant opposing the setting aside of the Second Default Judgment

7. Mr. Barrow, SC, argues on behalf of the Claimant that the Defendant has not sought to set aside the First Default judgment which has been restored by the force of the Sanctions Order. The Claimant opposes both applications on the following grounds:

    a) Having allowed judgment in default of Defence to be entered, on its present second application under r 13.3 to set aside, the Defendant must satisfy the mandatory conditions laid down. These include showing that it has a good

explanation for its failure, a second time, to file a Defence in time, and it showing it has a real prospect of successfully defending the claim. He submits that the Defendant has clearly failed to do so.

b) By the Sanctions Order the court ordered a sanction to take effect by way of restoring the First Default judgment. The judgment became the Sanction. The Defendant's only recourse against sanction, Mr. Barrow argues, is to apply for relief from sanction pursuant to CPR 26.8. The Defendant has deliberately and calculatedly sought to evade this rule because it knows it cannot satisfy the mandatory conditions. The Defendant's evasion of this rule is really an acknowledgment by the Defendant that it is not entitled to relief from sanctions.

c) Rule 26.1(u) which the Defendant seeks to invoke to obtain relief from sanctions, confers a general power on the court as a part of managing cases and furthering the overriding objective. That general power cannot be relied on as overriding the specific rule prescribing mandatory conditions obtaining relief from sanctions.

8. Mr. Barrow, SC, says that on October 4th, 2016 this Court ordered that the First Default Judgment be set aside and granted the Defendant an extension of time for service of a defence until October 18th, 2016. While the order did not state that the filing of the defence within the time prescribed was a condition of the order setting aside the default judgment, CPR 13.5 establishes that the setting aside of a default judgment is conditional upon the Defendant filing and serving a defence by a

specified date. This is stated to be the general rule, meaning that it operates and takes effect unless the court orders otherwise. The Defendant, having failed to file its Defence in the additional time given, breached the conditions of the order setting aside the First Default judgment and lost the benefit of that order.

In consequence of the Defendant's default, the First Default judgment was restored and given new force by the Sanctions Order. Mr. Barrow argues that as a consequence of the Defendant's default, the First Default judgment was restored and given new force by the Sanctions Order. Previous to this, the first Default Judgment had ceased to have effect as a default judgment because it had been set aside by order of the court. Presently, having been ordered by the court, this judgment has now gained existence as a sanction that the court has imposed by order. This order was perfected on 4th November, 2016 and constitutes a solemn order of the court. The First Default judgment was the sanction imposed by the court and not simply by the rules, for the Defendant's failure to comply with the order of 4th October, 2016. He relies on ***Attorney General v Universal Projects Ltd*** [2011] UKPC 13.

9. Mr. Barrow, SC, submits that the Defendant's application to set aside the Sanctions Order of December 5th, 2016 is not made pursuant to Rule 28.6 of the CPR and that this is because the Defendant recognizes that it cannot satisfy the mandatory conditions imposed by that rule on applications for relief from sanctions. The application made pursuant to Rule 26.1(u) to set aside the Sanctions Order is misconceived. It is settled law that a party seeking relief from sanctions must apply

pursuant to CPR 26.8 ***Attorney General v. Matthews*** [2011] UKPC 38. The Defendant has yet to make an application for relief from sanctions pursuant to Rule 26.8. The principle stated by Lord Dyson in ***AG v. Universal Projects Ltd***. [2011] UKPC 37 is fully applicable to the Defendant's attempt to rely on a general rule to produce a different outcome from that which would result from the application of the specifically applicable rule. As a matter of principle and good sense the court will not permit a Defendant who has not applied for relief from sanctions (because it recognizes its inability to satisfy the mandatory conditions laid down by the governing rule) to rely on an inconsistent provision. The Defendant cannot evade the mandatory condition of showing that it has a good explanation for the failure to comply with the court's order and has generally complied with all other relevant rules. Mr. Barrow also argues that if there is any doubt as to whether the Defendant's attorney's "*oversight*" amounts to a good explanation, ***Mitchell v. News Group Newspaper Ltd.*** 2013 EWCA 1537 makes clear that the mere overlooking of a deadline by an attorney, even if on account of pressures of other work, is not a good reason for failure to comply with a court order.

10. Mr. Barrow, SC, contends that the Claimant reserves its right to argue that the Second Default Judgment is also a Sanction Judgment and not a straight default judgment. This follows from the fact that it was entered for failure of the Defendant to comply with an order of the court that specified when the Defence should have been filed. However, even on the footing that it is to be regarded as a regular default judgment, in order to get the Second Default Judgment set aside, the Defendant

must satisfy the pre-conditions stated in Rule 13.3. These include proving to the court that there is a good explanation for failure to file a defence and that the Defendant has a real prospect of successfully defending the claim. Both these criteria in CPR 13.3 must be satisfied as in ***Kenrick Thomas v RBTT Bank Caribbean Ltd.*** (St. Vincent and the Grenadines Civil Appeal No. 3 of 2005). Inadvertence and oversight of a lawyer having conduct of the defence is not a good explanation for the failure to file the defence. The courts are now clear that the lawyer must know not to take on more work than she can handle, or that she must get assistance from others in the firm or other firms.

11. Secondly, since the first application to set aside the first default judgment, affidavit evidence has been filed together with exhibits and, coupled with the Defendant's draft Defence exhibited, prove by the Defendant's own admissions that the Defendant owes at least a large portion of the money that the Claimant claims. This clearly shows that the Defendant has no real prospect of successfully defending the claim. The Defendant's case is really a claim to a set off based on a counterclaim. Mr. Barrow, SC, submits that nothing stops the Defendant from bringing the same counterclaim as a separate claim, if it chooses to do so. But the Defendant's counterclaim cannot operate to limit the Claimant's rights to the benefit of its judgments. The Defendant, by its own circumstances, has lost the right to defend against the Claimant's claim and therefore has also lost the facility of asserting its counterclaim as a defence. It must now, if it chooses to pursue the supposed counterclaim, pursue its claim against the Claimant as a separate claim. He therefore

asks the court to refuse the Defendant's applications to set aside the Second Default Judgment and the Sanctions Order. He also asks for costs of this protracted application by the Defendant.

Ruling

12. I am grateful to both counsel for their detailed and skillful arguments which have been of great assistance to the court in determining this application to set aside this default judgment. The Civil Procedure Rules of Belize clearly set out the circumstances under which a default judgment is to be set aside and requirements to be satisfied for relief from sanctions:

> 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 -*
>
> > *(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."*
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> Rule 13.5 *"If judgment is set aside under Rule 13.3, the general rule is that the order must be conditional upon the defendant filing and serving a defence by a specified date".*
>
> *Rule 26.7 (1) "Where the court makes an order or gives directions, the court must wherever practicable also specify the consequences of failure to comply.*
>
> > *(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the Rule, direction or order*

has effect unless the party in default applies for and obtains relief from the sanction, and Rule 26.9 does not apply."

Rule 26.8 sets out what the court must consider in determining an application from relief from sanctions as follows:

26.8 (1) "An application for relief from any sanction imposed for a failure to comply with any Rule, order or direction must be -

a) made promptly; and

b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that -

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

3) In considering whether to grant relief, the court must have regard to -

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or his legal practitioner;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief from sanctions unless exceptional circumstances are shown."

The Defendant applied to set aside the second default judgment on October 26th, 2016 one day after that default judgment was issued. I find that to be prompt action on the part of the Defendant. However, I also find that that is where compliance by the Defendant with the requirements of Rule 13.3 began and ended. Despite the very able arguments of Mr. Ebanks on behalf of the Defendant, I am not persuaded that the second limb of Rule 13.3 has been satisfied; I am not convinced that "*an inadvertent omission on the part of the attorneys-at-law for the Defendant brought about by an unintentional oversight on account of volume of work*" is a good explanation for the failure to file a Defence. I heard substantive arguments for and against the application to set aside the first default judgment on October 4th, 2016 and granted the Defendant an extension of time until October 18th, 2016 to apply to set aside this first default judgment. The deadline set by the court of October 18th, 2016 came and went, and ten days later there was still no compliance by the Defendant with the order of the court. One would have thought that the same considerations now being urged upon this court (the importance to the Defendant of having his day in court, the sizeable sum of money being claimed by the Claimant, the opportunity to prove the Defendant's counterclaim) would have prompted the attorneys for the Defendant to move post haste to the Supreme Court Registry

to file their Defence, perhaps on the very day that permission was granted to them to do so, especially since according to their own arguments, the Defence had been ready since June 2016. I fully agree with Mr. Ebanks' submission that this is not the usual course of behavior of attorneys in this firm, and that it is completely out of character from their long standing stellar record before these courts which has been founded on the diligence and efficiency with which they normally conduct their duties. However, I find the conduct of this particular case (as conceded by Mr. Ebanks in his oral arguments) to be extremely "*messy*", I find it to be less than satisfactory and far short of what is required by the Civil Procedure Rules. As Mr. Barrow, SC, has rightly submitted, the court must be vigilant in dispensing fairness to **both** sides. It is my view that it is in ensuring that there is strict compliance with the Civil Procedure Rules by both parties which guarantees that that fairness will take place thereby fulfilling the overriding objective of the rules, i. e., enabling the court to deal with cases justly. The history of this case shows that the Claimant has complied with the orders of the Court and with the Civil Procedure Rules; the Claimant is therefore entitled to the benefit of the default judgment and the sanctions order.

As Lord Dyson said in ***AG v Universal Projects Ltd.*** **"***Rule 13.3 and Rule 26.7 are dealing with different situations. Rule 13.3 is dealing with the setting aside of a default judgment where it has been entered in the circumstances specified in Part 12 ie where there has been a failure to enter an appearance or file a defence as required by the rules. Rule 26.7 is dealing with applications for relief from any*

sanction, including any sanction for non- compliance with a rule, practice direction or court order where the sanction has been imposed by the rule or court order. The distinction is important".

In relation to the final limb of Rule 13.3, I find that the Defendant has also failed to satisfy that requirement, i.e., that the Defendant has a reasonable prospect of success. Having looked at the affidavits filed by the Claimant and Defendant on this application, I agree with Mr. Barrow SC's submission that what is being sought by the Defendant is essentially a set off of its counterclaim against the amount claimed by the Claimant. I agree with the Claimant's submissions that a substantial sum of the amount claim has been admitted, and therefore there is not a reasonable prospect that the Defence will succeed. I take note of the fact and I give due consideration to the point made by the Claimant that denial of this application to set aside this default judgment in no way affects the right of the Defendant to pursue a separate claim if it chooses to do so. I do agree with Mr. Barrow, SC, that the Defendant's non-compliance with the order of the court and with the rules has resulted in the Defendant's inability to pursue its counterclaim in this particular claim.

In relation to the sanctions order dated November 4th, 2016, I find that the requirements of Rule 26.8 have not been fulfilled by the Defendant, with the exception of 26.8(2)(a) in that I am satisfied that the Defendant's failure to comply was not intentional. However, I am not convinced that the explanation

offered by the Defendant as to unintentional oversight due to excessive amounts sof work is a good explanation under Rule 26.8(2)(b). I am also not convinced, given the history of less than efficient manner in which the case has been conducted to date by the Defendant, that there has been general compliance with the orders and directions and rules of the court as required by 26.8(2)(c).

The rationale for requiring strict compliance with the Civil Procedure Rules was articulated by Lord Dyson in ***AG v Universal Projects Ltd*** as follows:

> *"There are several answers to the argument that, if rule 26.7 applies to default judgments, it produces disproportionate and unjust results. First, as explained by the Court of Appeal in Attorney General of Trinidad and Tobago v Regis (Civ App No 79 of 2011) (unreported) 13 June 2011, there is an element of judgment inherent in an assessment of whether the conditions set out in rule 26.7(3) have been satisfied. Secondly, in so far as the conditions are regarded as draconian, they serve the purpose of improving the efficiency of litigation. Thirdly, as already pointed out, Gobin J could unquestionably have imposed the sanction of debarring the Defendant from defending in default of serving the defence by 13 March. If she had taken that course, there can be no doubt that the Defendant would have been obliged to apply for relief under r. 26.7. In effect, there is no difference between an order which debars a Defendant from defending if he does not serve a defence by a certain date, and an order giving the Claimant permission to apply for judgment if the Defendant*

does not serve a defence by that date. Fourthly, there are ways in which a defaulting party can escape from the draconian consequences of his default. In the present case, for example, the Defendant could have applied for a further short extension of time for service of the defence before 16 March. For these reasons, the Board has concluded that the application to set aside the default judgment was an application for relief from sanctions within the meaning of r 26.7."

For these reasons, the application to set aside both the Sanctions Order dated November 4th, 2016 and the Second Default Judgment dated October 25th, 2016 is refused. Costs awarded to the Claimant to be paid by the Defendant to be agreed or assessed.

Dated this 27th day of January, 2017

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Michelle Arana
Supreme Court Judge