

IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 411 OF 2019

BETWEEN

**(DONALD LAVALLEE
(JANET SKUCE**

**1st CLAIMANT/ RESPONDENT
2nd CLAIMANT/RESPONDENT**

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(AND

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(CARINA TYLER

DEFENDANT/APPLICANT

BEFORE the Honourable Madam Justice Sonya Young

Written Submissions 2020:

Applicant - 1st October

Claimant - 2nd October

Applicant (Supplementary Submissions) - 21st October

Hearing and Decision 2020:

22nd October

Appearances:

Ms. Payal Ghanwani, Counsel for the Claimants.

Mr. Jose Alpuche, Counsel for the Defendants.

KEYWORDS: Civil Procedure - Application to Set Aside Default Judgment - Promptitude - Good Reason - Service by Alternate Means - Service by Notice in Newspaper in Belize - Defendant out of the Jurisdiction - Received no Notice - Claimant Aware of Other Means of Giving Effective Notice - Good Defence - Contract Law - Misrepresentation - Breach – Damages

DECISION

1. The Claimants/Respondents sought and were granted leave by the Registrar to serve the Claim Form and Statement of Claim by two (2) consecutive notices in a newspaper of wide circulation in Belize. The Defendant says she is a stranger to the proceedings as she never received any notice of the Claim. She said this was because she resides in Mexico, was in Mexico at the time of the publications and they were never brought to her attention. She says the Claim could have been served on the caretaker of the properties in contention or by email as was stated to be proper in the agreement for sale.

2. The Court originally assumed that the Defendant/Applicant had recognized and accepted that where proper service according to the rules had been proven but a defendant alleges that he has not received notice and had therefore, not entered an acknowledgement of service, the consequential Default Judgment can not be set aside under **Rule 13.2**. However, when the Defendant belatedly changed Counsel, the application was amended to seek, alternatively, the setting aside of the Default Judgment as of right.

3. Supplemental submissions were filed on the Applicant's behalf and they urged that where there was in existence a contract between the parties, which outlined a mode of service, then that is the only proper service if personal service could not be effected. Those submissions sought to rely on **Rule 5.16 (1) and (2)** and Clause 9 of the Contract.

4. Rule 5.16 states that:

‘(1) This Rule applies where a contract contains a term specifying how any proceedings under the contract should be served.(2) A claim form containing a claim in respect of a contract may be served by any method permitted by that contract.’”

Clause 9 of the Contract states:

“Notices

9. Any notices required or permitted hereunder shall be considered duly given if in writing and sent by registered or certified mail, postage prepaid to the addresses first written above OR email to all parties stated below, as follows, or at such other address or email as either party may hereinafter designate in writing:

(a)...

(b)To the Vendor:

CARINA ANDREA URSULA TYLER”

This was followed by two (2) email addresses for Ms. Tyler.

5. Counsel for the Respondent destroyed this argument in short order. She focused on the wording of the rule and the use of the permissive ‘may’ which gave a strong indication that this mode of service could not be the only alternative. The Court is in full agreement. She also raised the issue that the term ‘proceedings’ ought to be tightly construed to include only Court and arbitration proceedings and not the ordinary notices to which Clause 9 of the Contract referred.
6. The Court considered too that the Applicant’s interpretation would afford a Claimant, whose Claim was made in respect of a contract and whose contract contained a service clause, far fewer methods of service than any other Claimant. If this really was the intent of the rules, it would certainly have said this clearly. Rather, this Court is of the view that the Rule 5.16 was an enlargement of the service options

available to this particular type of Claimant. Thus, service by newspaper advertisement continued to be good service. Accordingly, the Defendant must surmount all three (3) hurdles outlined in Rule 13.3:

“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 acknowledgment of service or a defence, as the case may be; and (c) has a real prospect of successfully defending the claim.”

Promptitude

6. There is no doubt that the Applicant has applied promptly. She is accepted as being in Mexico at this time as her affidavits are all notarized there. It is common knowledge that the border between Mexico and Belize has been closed. So getting the application before the Court within three (3) weeks of becoming aware of the judgment is prompt in those specific circumstances and the Claimants accept this.

Good Explanation:

8. The Defendant says she resides in Mexico and never knew of the Claim. The Claim was published in the newspaper on the 27th September and 4th October, 2019. The Defendant says that at that time she was in Mexico. There is no other evidence from the Defendant to support this but there is the affidavit evidence of the Claimants’ process server that he had visited the Defendant’s known residence on a number of occasions and she was never there.

9. He had been informed by his colleagues that the Defendant was not within the jurisdiction that she had gone to the United States and her exact return date was unknown. He must have believed this to be true since no other attempt at locating her within the jurisdiction was made. More importantly, that was the basis on which the application was presented for service by substituted means.
10. This Court finds it imperative to state here that this is therefore, not an issue of irregular service. The documents were properly served. **Paragraph 37 of Abela and others v Baadarani [2013] UKSC 44** states, *“service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant.”* In **Manx Electricity Authority v J P Morgan, Chase Bank [2002] EWHC 867**, the Bank’s Claim that it had not received the Claim Form etc. where they had been properly served by post but pushed under the door and unknowingly hidden from sight by the carpeting, was accepted as a good reason for setting aside a Default Judgment.
11. In the case at bar, there are other reasons which cast doubt on the substituted service being effective service in the circumstances. There is no indication of any other effort being made to find the Defendant through family or friends. However, the affidavit in support of that application boldly states that the publications would be sufficient to bring the Claim form to the Defendant’s attention via her family and friends who remain within the jurisdiction. There is no indication who these family and friends are or why one of the many could not have been

- provided with a copy of the Statement of Case in the Claimants' service effort.
12. Additionally, it was not drawn to the Registrar's attention that there was an email address included for service on the Defendant in the subject agreement. Service via email would have added another layer of security for the Claim to have been brought to the Defendant's attention. It is instructive that once the Claimant received the Judgment on Assessment, the email address suddenly became quite relevant and was then used to quickly bring the terms to the attention of the Defendant and demand payment.
 13. It was not drawn to the Registrar's attention, either, that there was a caretaker at the subject property, so leaving the Claim Form etc. there would be an additional way of ensuring that the Defendant would be made aware of the proceedings. Nonetheless, it is this same caretaker who the Claimants refer to in response to this application as one of the persons who could have brought the Claim to the Defendant's attention.
 14. In fact, it is this same caretaker whose pay the Claimants also sought to recover as damages in the assessment. They were very well aware of his existence. I do agree with Counsel for the Defendant that service is not about technical games, it is about bringing the contents of the requisite document to the other party's attention.
 15. The Court also considered the efforts made by this Defendant to set aside the Default Judgment, and the speed with which she did this although she

was not in the jurisdiction. This does not seem to be a party who received notice of the Claim and simply ignored it or failed to respond. For all these reasons this Court finds that in the circumstances, the Applicant has presented a good explanation for failure to file an Acknowledgement of Service.

16. Finally, the Court considers whether she has a real prospect of successfully defending the Claim. Having considered the draft Defence and the affidavits provided by the Defendant and on her behalf, there are certain matters which stand out. Nowhere is it stated in the Statement of Claim that the Claimants knew that the Defendant did not have good title to Parcel 3460 or that the parcel number of one (1) parcel was not correctly stated in the agreement prior to paying over the deposit. For that matter, there isn't even an indication that the due diligence had even been done.
17. Then there is the issue of the payments made beyond the deposit and what precisely they related to as they were stated not to reduce the capital balance. The issue remains now whether there was indeed a misrepresentation; and if there was, what damages are the Claimants entitled to. For this reason, the Court finds that the Defendant has passed the third and final threshold and the Default Judgment entered, herein, will be set aside. The Court, in exercise of its discretion, will make such an Order.
18. The Claim Form and Statement of Claim have certainly been brought to the Defendant's attention. Nonetheless, service is to be effected on her

Attorney on or before the 28th October, 2020. She is to file an Acknowledgement of Service within 14 days and a Defence within 28 days of the date of service. The matter is thereafter listed for Case Management Conference on the 7th December, 2020 at 10:00 am. Costs shall be in the cause.

SONYA YOUNG
SUPREME COURT JUDGE