IN THE SUPREME COURT OF BELIZE A.D. 2019

CLAIM NO. 772 OF 2019

(JESUSITO RAMON MENDEZ CLAIMANTS
(JOE MARTIN MENDEZ
(THELMA YOLANDA BRADLEY

BETWEEN (AND

(DANETTE MENDEZ DEFENDANT

BEFORE THE HONORABLE MADAM JUSTICE MICHELLE ARANA
Oscar Sabido SC of Sabido & Co LLP for the Claimants/Respondents
Payal Gandwani of Estevan Perera & Co. LLP for the Defendant/Applicant

1. This is an Application for Judgment by the Defendant and an Application for Relief from Sanctions by the Claimants.

2. Legal Submissions on Behalf of the Defendant/Applicant

1. By fixed date claim form dated the 14th day of November 2019, the Claimants brought a claim against the Defendant seeking the following orders:

    a. Revocation of Grant of Probate No. 155/2019 dated September 17, 2019.

b. That the Court shall pronounce against the validity of the Pretend Will put forward by the Defendant dated June 3, 2013.

c. That the Court shall have the last Will of the deceased dated January 11, 2018 established.

d. That the Defendant lodge the Grant of Probate No. 155/2019 at the Court within 14 days after the service of the Claim Form herein.

e. Cost

f. Such further or other relief as this Honorable Court may deem fit to order.

2. The Defendant filed a Defence and Counterclaim dated the 10th day of January 2020 in which the claim was denied and sought the following orders:

a. A Declaration that the Invalid Will dated the 11th day of January 2018 be pronounced against as it does not comply with section 7 of the Wills Act of Belize.

b. Further or alternatively, a Declaration that the Invalid Will was obtained when the Testatrix lacked testamentary capacity and/or testamentary intent and is therefore unlawful, void and of no effect.

c. A Declaration that Grant of Probate No. 155/2019 dated the 17th day of September 2019 obtained on the legal will dated the 3rd day of June 2013 is valid.

d. Costs; and

e. Such further or other relief as the Court deems fit.

3. The Respondents' legal practitioner was duly served a copy of the Defence and Counterclaim on the 10th day of January 2020.

4. The Respondents failed to file a defence to the Counterclaim within 28 days after the date of service of the counterclaim, namely on or before the 11th day of February 2020.

5. On the 18th day of February 2020, five days before the instant matter was set for case management conference, the Respondents' attorney at law served the Defendant's attorney with a Reply and Defence to the Counterclaim dated the 17th day of February 2020. Oral objection was taken to the said Reply and Defence at the case management conference and counsel for the Defendant was given liberty to file an application in writing.

6. Accordingly, by Notice of Application dated the 20th day of March 2020 the Defendant applies to this Honorable Court for the following orders:

    a. Judgment is granted to the Counter Claimant on the counterclaim pursuant to Rule 18.12(2)(a).

    b. A Declaration that the Invalid Will dated the 11th day of January 2018 is pronounced against as it does not comply with section 7 of the Wills Act of Belize.

    c. Further or alternatively, a Declaration that the Invalid Will was obtained when the Testatrix lacked testamentary capacity and/or testamentary intent and is therefore unlawful, void and of no effect.

d. A Declaration that Grant of Probate No. 155/2019 dated the 17th day of September 2019 obtained on the legal Will dated the 3rd day of June 2013 is valid.

e. The Claim filed by the Claimant/Counter Defendant is struck out.

f. Costs of this Application and the Claim in the sum of $; and

g. Such further or other relief as the Court deems fit.

A. Law- The Civil Procedure Rules

7. The application is made pursuant to 18.12(2) of the Supreme Court (Civil Procedure) Rules 2005 ("the CPR") which provides that:

18.12 (1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

(2) The party against whom the ancillary claim is made –

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and

(b) subject to paragraph (5), if judgment under Part 12 is given against the ancillary claimant, he or she may apply to enter judgment in respect of the ancillary claim.

8. Rule 18.9(2) is also of importance as it deals with the time for filing a defence to an ancillary claim. That rule provides that *"the period for filing a defence is the period of 28 days after the date of service of the ancillary claim".*

B. Legal Submissions

9. This application poses two issues to be determined by this Honorable Court. These are:

    a. Can a judgment be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim?

b. If so, what effect does the admissions/judgment have on the entire case?

Can a judgment be entered when no defence is filed to a counterclaim within 28 days of service of the counterclaim?

10. In dealing with the first issue, the Defendant/Counter Claimant respectfully submits that in the instant case the Claimants/Counter Defendants did not file a defence to the counterclaim herein within the twenty-eight days prescribed by Rule 18.9(2) and as such is deemed to have admitted the counterclaim in accordance with Rule 18.12(2).

11. Unlike a defence to an ordinary claim which allows a defendant to file his defence out of time if no application for default judgment has been made, a counter defendant does not enjoy the same freedom.

12. Pursuant to Rule 18.12(2) of the CPR, where no defence has been filed within 28 days after service of the counterclaim, the Counter Defendant is deemed to have admitted the counterclaim. Therefore, the fact that the Counter Defendants have, in the instant case, filed a Reply and Defence to the Counterclaim after the 28 days prescribed by the rules does not make it

useable as the admission is deemed through operation of the law upon the expiration of the 28 days.

13. Support for this position can be found in the Belizean Case of ***Marva Rochez v Clifford Williams***[1] wherein Madam Justice Sonya Young in dealing with a late Defence to Counterclaim found that there was a failure to comply with the rules and the filing was, consequentially, invalid. Her Ladyship stated therein that:

> *9. A Counter Defendant has 28 days after service of the counter claim in which to file a defence - Rule 18.9(2). From the Supreme Court (Civil Procedure) Rules it is clear that a defence to a counterclaim is somewhat different to a defence to an ordinary claim form. The most glaring difference being that when no defence is filed to an ordinary claim, the claimant is entitled to apply for default judgement and if he does not, there is no sanction for filing that defence out of time. The defendant may, at anytime before the entering of a default judgement, agree to an extension with the claimant (no more than 56 days) or apply*

[1] Claim No. 179 of 2009 [TAB-1]

to the court for an extension of time – Rule 10.3(8). The matter simply will not be listed for case management until a defence is filed - Rule 27.3 or until an application is made to fix a case management conference pursuant to Rule 27.3(4).

10. On the other hand, where no defence has been filed within 28 days after service of the counterclaim, the Counter Defendant is deemed to have admitted the counterclaim in accordance with Rule 18.12(2). Part 12 (Default Judgement) does not apply - Rule 18.9(3). The Counter Defendant is then bound by any judgment or decision in the main proceedings in so far as it is relevant to any issues arising in the counterclaim. All this occurs through application of the rule and without any action from the counterclaimant. It is triggered simply by the expiration of those 28 days.

11. A Counter Defendant simply does not have the same freedom enjoyed by an ordinary defendant*. By way of comparison, neither does a defendant to a fixed date claim. A Claimant on a fixed date claim is precluded from applying for a*

default judgment by Rule 12.2(a). However, Rule 27.2(3) allows for the first hearing of the fixed date claim to be treated as a trial of the claim, if it is not defended. This is done through operation of the rule and not through any act of the Claimant. ***[emphasis added]***

14. This position was once again quoted and applied by Justice Sonya Young in the Belizean case of **Miguel Meztizo et al v Roberto Gabourel et al**[2] wherein her Ladyship went on to say as follows:

To be clear, although the admission is deemed through operation of law there is undoubtedly a need for a special judgment to be given to ensure a remedy. This entails the making of an application for judgment as the Counter-Claimant has done here. Although the proper procedure ought to have been the making of a written application pursuant to Part 11. The court also states for completion that there is nothing which precludes a Counter-Defendant from applying to extend time in which to

[2] Claim No. 668 of 2016 [Tab-2]

file a defence to a counterclaim as he is able to do in relation to a claim. Again, all in keeping with Rule 18.9(3) as earlier discussed. This court feels certain that a judgment could be entered at this stage since Rule 18.12(6) explains that:

"The court may at any time set aside or vary a judgment entered under paragraph 2 and not simply entered under paragraph (2)(b)."

15. In that case, the Counter Defendant failed to file a defence to the counterclaim within the time prescribed by the Rules. The Court held that pursuant to Rule 18.12(2)(a) the Counter Claimants were entitled to a special judgment and so granted. Judgment was entered for the Counter Claimants on the counterclaim pursuant to Rule 18.12(2)(a).

16. Consequently, in the instant case the Counter Claimant/Defendant submits that this Honorable Court can and should enter judgment for the Counter Claimant on the counterclaim at this stage pursuant to Rule 18.12(2)(a) since the Counter Claimants failed to file a defence to the counter claim within the required time frame.

If so, what effect does the admissions/judgment have on the entire case?

17. In dealing with the second issue, the Counter Claimant/Defendant submits that the deemed admissions significantly impact the claim and should result in the dismissal of the main proceedings as there would be a contradictory outcome if the claim is allowed to continue.

18. In the Trinidadian Court of Appeal Case of ***Satnarine Maharaj v The Great Northern Insurance Company Limited et al***[3], the Court stated that to determine the effect of the deemed admissions:

> ***"It is necessary for the court to carefully consider the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If there are allegations that cannot stand in view of the deemed admission the court must assess how that impacts on the claim.*** **(Claim here refers to main claim, not the counterclaim).**

[3] Civil Appeal No. P198 of 2015 [Tab 3]

23. There of course need be no connection between the claim and the counterclaim (see Rule 18.5(2). In such a case it is unlikely that the failure to defend the counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.

24. It is the position in this case that the counterclaim is intimately wrapped up with the defence. As we mentioned the allegations contained in the counterclaim are identical to those contained in the defence. In those circumstances neither party contended that the effect of admitting the counterclaim can have no impact on the claim. The appellant's position was that the claim should not have been struck out by the Judge. The appellant, however, conceded that in an appropriate case the admissions deemed to arise from the failure to defend the counterclaim can result in the dismissal of the claim. ***We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. One such case is where***

the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process."

19. In the instant case, by failing to file a defence to the counterclaim within the prescribed time, the Counter Defendants have admitted the following:

a. The Will dated the 11th day of January 2018 is invalid as the formalities required by section 7 of the Wills Act of Belize were not complied with.

b. The Invalid Will purportedly made by the Testatrix was not signed or acknowledged by the Testatrix in the presence of two witnesses, namely Osiris Moralez and Arlini L. Pacheco, present at the same time. Nor did the witnesses attest and subscribe to the Invalid Will in the presence of the Testatrix.

c. Neither of the purported witnesses were present when the Testatrix purportedly executed the Invalid Will nor was the Testatrix present when either of the witnesses executed the Invalid Will.

d. The testatrix lacked testamentary capacity, not being of sound mind, memory and understanding at the time of the purported execution of the Invalid Will.

e. At the time the will dated the 11th day of January 2018 was purportedly executed by the Testatrix she was suffering from sepsis and therefore lacked testamentary capacity.

f. The will dated the 11th day of January 2018 was drafted on the instructions of the First Counter Defendant, who is a named beneficiary in both Wills, to exclude the Counter Claimant as a beneficiary and if the Testatrix did indeed execute said Will, it was done without testamentary intent and with undue influence by the First Counter Defendant.

g. The Counter Defendants had full knowledge of the Counter Claimant's application for the Grant of Probate and the Counter Claimant did not need the Counter Defendants' permission as she was fulfilling her duties as the named executrix in the legal will dated the 3rd day of June 2013.

h. The will dated the 3rd day of June 2013 for which the Counter Claimant obtained a Grant of Probate from the Supreme Court is the only valid will of the Testatrix.

i. The Counter Claimant is entitled to a Declaration that the Invalid Will dated the 11th day of January 2018 be pronounced against as it does not comply with section 7 of the Wills Act of Belize.

j. The Counter Claimant is entitled to a Declaration that the Invalid Will was obtained when the Testatrix lacked testamentary capacity and/or testamentary intent and is therefore unlawful, void and of no effect.

k. The Counter Claimant is entitled to a Declaration that Grant of Probate No. 155/2019 dated the 17th day of September 2019 obtained on the legal Will dated the 3rd day of June 2013 is valid.

20. These admissions significantly impact the claim as the Counter Defendants/ Claimants' claim is for the revocation of the Grant of Probate obtained by the Counter Claimant/Defendant on the Will dated the 3rd day of June 2013 and for the Will dated the 11th day of January 2018 to be established. However,

the Counter Defendants have admitted that the Will dated the 11th day of January 2018 is invalid as it does not comply with the formalities and the Testatrix lacked testamentary capacity at the time of execution. Moreover, they have also admitted that the Will dated the 3rd day of June 2013 for which the Counter Claimant/Defendant obtained Grant of Probate from the Supreme Court is the only valid Will of the Testatrix.

21. Therefore, there are no issues left to be determined by this Honorable Court on the Claim and it should accordingly be struck out.

C. Conclusion

22. In light of the foregoing, the Counter Claimant/Defendant humbly prays that this Honorable Court will grant their Application for Judgment with costs to the Counter Claimant/Defendant.

23. Legal Submissions on Behalf of the Claimants/Respondents

1) **<u>The Application opposed</u>**

These legal submissions are made against the application of the Defendant/Applicant dated March 20, 2020 for judgment on the Counterclaim on the basis that pursuant to Rule 18.12(2)(a) the defaulting counter defendant who fails to file a defence within 28 days as required by Rule 18.9(2) is deemed to admit the counterclaim and is bound by any judgment or decision in the said proceedings in so far as it is relevant to any matter arising in the ancillary claim.

24. The issues that arise to be determined by the Court in this application are as follows:

(i) What are the admitted factual allegations or issues in the counterclaim

(ii) Do the admitted factual allegations or issues give an automatic right to judgment

(iii) What factual allegations or issues remain in the main Claim after the admitted factual allegations or issues in the counterclaim, have been removed.

(iv) Does the effect of the Claimant admitting the factual allegations or issues in the counterclaim lead to a contradictory outcome on the claim if it was allowed to continue.

(I) WHAT ARE THE ADMITTED FACTUAL ALLEGATIONS OR ISSUES IN THE COUNTERCLAIM

25. The Counterclaim And The Deemed Factual Allegations Admitted And the Reliefs Sought

If the Counterclaim herein would be deemed to have been admitted what are the factual allegations admitted?

(i) The Will dated January 11, 2018 was not signed by the Testatrix in the presence of Osiris Moralez and Arlini L. Pacheco both being present in the room at the same time.

(ii) Neither Osiris Moralez nor Arlini L. Pacheco attested or subscribed the Will dated January 11, 2018 in the presence of the Testatrix.

(iii) At the time the Will dated January 11, 2018 was purportedly executed by the Testatrix she was suffering from Sepsis and lacked testamentary capacity

The reliefs sought are:

(a) Declaration that the Will of January 11, 2018 be pronounced against as it does not comply with section 7 of the Wills Act

(b) A declaration that the Will was obtained when the Testatrix lacked testamentary capacity and or testamentary intent.

(II) DO THE ADMITTED FACTUAL ALLEGATIONS OR ISSUES GIVE AN AUTOMATIC RIGHT TO JUDGMENT

26. **Do Deemed Admissions in the Counterclaim Give an Automatic Right to Judgment?**

In the case of ***John Palacio and Football Federation of Belize, Claim No. 546 of 2017***, the Honourable Madame Shona Griffith stated in her judgment at paragraph 11 as follows:

"*It is found that the characterization of the effect of the deemed admission of the Counterclaim as an automatic right to judgment, moreover in the nature of default of a judgment, is misplaced.*

Where an ancillary defendant fails to file a Defence, the right afforded an ancillary Claimant is by no means considered to be automatic. The Court has to determine the effect of the deemed admissions on the Counterclaim vis-a-vis the main Claim. The approach in Satnarine Maharaj is found to be most instructive."

27. In her ruling in ***Claim 700/2016 Jose Romero v. Robert Gabourel et al*** Justice Sonya Young referred to the guidance on Rule 18.12(2)(a) and how this rule is applied in the judgment in the ***T&T Court of Appeal case of Satnarine Maharaj v. The Great Northern Insurance Co. Ltd. No. P198 of 2015*** which grappled with similar issues as to whether a special judgment could or should be issued on the counterclaim and what effect the deemed admission had on the entire case.

At paragraph 21 of her judgment Justice Sonya Young referring to the judgment of the T&T Court of Appeal in ***Satnarine v. The Great Northern Insurance Co.*** states as follows:

"The Court found that on a plain reading of their rule 18.12 (2) (a)[which is identical to Belize's rule] the defaulting Counter-Defendant is deemed to admit both the allegations and reliefs claimed in the Counterclaim. This court holds a somewhat different view. A party may admit factual allegations and those issues are removed. However, the Court must determine whether what has been admitted is sufficient to establish the claim for relief, some other relief, or no relief at all. Hence, the giving of relief as the Court considers the party is entitled to" [Emphasis ours]

28. We respectfully submit that the abovementioned somewhat different view of the Belize Court makes it clear that the giving of relief as the party is entitled to, or giving some other relief or giving no relief at all on the counterclaim is a matter entirely left to the Court's overall assessment and the relief is not automatic.

The Belize Court is of a different view than the Trinidad Court of Appeal in the said Satnarine Maharaj case which found that on a plain reading of Rule 18.12(2)(a) the defaulting Counter Defendant is deemed to admit both the allegations and reliefs claimed in the counterclaim [Emphasis ours]

Justice Sonya Young states in paragraph 21 of her judgment *"that the Counter Defendant may admit factual allegations and these are accordingly removed but the Court must still determine whether the factual allegations admitted and removed are sufficient to establish or make out the relief claimed or some other relief or no relief at all."*

29. We respectfully submit that the Court clarifies that factual allegations admitted do not automatically trigger the reliefs claimed in the Counterclaim and the Court must carefully consider the admissions and assess how those impact on the claim.

At paragraph 22 of her ruling in the said ***Claim 700 of 2016 Jose Romero v. Robert Gabourel et al*** Madam Justice Sonya Young quotes the following passages from the Satnarine Maharaj case.

"It is necessary for the Court to consider carefully the admissions and ask itself whether any of the allegations in the claim can exist consistently with the deemed admissions. If these are allegations that cannot stand in view of the deemed admissions the Court must assess how that impacts on the claim, [Claim here refers to the main claim, not the counterclaim.]"

"It is the position in this case that the Counterclaim is intimately wrapped up with the Defence as we mentioned the allegations contained in the Counterclaim are identical to those contained in the defence. In those circumstances neither party contends that the effect of admitting the counterclaim can have no impact on the claim." "One such case is where the effect of the Claimant admitting the Counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue to permit the Claimant to proceed in those circumstances would be an abuse of process."

30. Justice Sonya Young states at paragraph 23 as follows: "*The Court went on to consider what issues remained in the claim after the admitted factual allegations had been removed. They found that a simple issue of contributory*

negligence remained unresolved in the claim and the Judge had therefore erred in striking out the claim in its entirety"

(III) WHAT FACTUAL ALLEGATIONS OR ISSUES REMAIN IN THE MAIN CLAIM AFTER THE ADMITTED FACTUAL ALLEGATIONS OR ISSUES IN THE COUNTERCLAIM, HAVE BEEN REMOVED.

31. Using the test in the Satnarine Maharaj case, the question is, what are the allegations if any in the main claim which can exist consistently with the deemed factual allegations admitted.

The following facts in the main claim can exist consistently with the deemed factual admissions as follows:

(1) Attorney Michel Chebat signed as a witness to the execution by the Testatrix of her Will dated January 11, 2018.

(2) The said Will of January 11, 2018 referred to in the Claim Form and exhibited thereto shows Attorney Michel Chebat's name and signature as one of the witness on the Will.

(3) Neither the Defence or the Counterclaim deny that Attorney Michel H. Chebat signed the January 11, 2018 Will in the presence of the Testatrix at the same time as the other witness Arlini L. Pacheco.

The Claimants in the main claim, claim that the last Will of January 11, 2018 be established as the true last Will of the Testatrix as against the pretended Will of June 3, 2013.

Both the Will of January 11, 2018 and the Will of June 3, 2013 together with a copy of the Grant of Probate No. 155/2019 are exhibited to the Statement of Claim. The witnesses on the Will of January 11, 2018 are shown to be Michel H. Chebat Attorney at Law, Osiris Moralez Businessman and Arlini L. Pacheco Domestic.

The signature of the witnesses Michel H. Chebat as witness of the Testatrix's Will is not denied in the counterclaim and the fact that Michel H. Chebat signed as witness on the Testatrix's Will of January 11, 2018 can exist consistently with the deemed admissions.

The fact that the signature of Michel H. Chebat appears on the said Will next to the signature of Maria Mendez the Testatrix but above the attestation clause is inconsequential as what is important is whether the signatories intended to sign as witnesses.

32. See paragraph 32 of the judgment of the Honourable Madam Justice Sonya Young in Supreme Court ***Claim 530/2018 Carla Cadle Gillett and Karen Froyce Cadle*** wherein Justice Sonya Young refers to Williams, Mortimer and Sunnucks Executors, Administrators and Probate 16th Ed. at Pg. 133 refers to the case of Braddock (1876) 1 P.D. 433 and quotes the words of Sir James Hannen at Pg. 434: *"The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting."*

(IV) DOES THE EFFECT OF THE CLAIMANT ADMITTING THE FACTUAL ALLEGATIONS OR ISSUES IN THE COUNTERCLAIM LEAD TO A CONTRADICTORY OUTCOME ON THE CLAIM IF IT WAS ALLOWED TO CONTINUE.

33. The more important issue that remains in this claim which is a claim for Probate or for a decree for the validity of the Will is the examination of <u>one</u> or more of the witnesses to prove due execution and the admission of the factual allegations or issues in the counterclaim do not lead to a contradictory outcome of the main claim if it was allowed to continue.

Since 1858 the law is that it is not necessary to call both the attesting witnesses to prove the execution of a Will. See the case of ***Belbin v. Skeats*** a case in the ***Court of Probate 1858 1 SW and TR 148*** from which the following is taken at Pg. 149.

"I shall most unhesitatingly rule that it is not necessary to call both the attesting witnesses to prove the execution of a Will. This is purely a question of evidence and by 20 & 21 Vict C. 77 S.33 the rules of evidence observed in the Courts of Common Law are to be observed in the trial of all questions of fact. It must be governed therefore, not by the practice of the Prerogative Court but by the rules of evidence observed in the Courts of Common Law"

34. This rule of evidence is re-affirmed by the Honourable Madam Justice Shona Griffith in her judgment in the ***Claim Conrado Cuellar Jr. et al and Irma Escalante [45/2017]*** where at paragraph 20 the Court is of the view as follows:

> *Indeed in certain circumstances a Court is entitled to do so [call a witness] where a witness who may have pertinent material is absent. However, an attesting witness to a Will is the witness of the Court and he can even be cross examined by the very party calling him. The underlying principle here is that he is "the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be waived for the purposes of dispensing with proof at trial but cannot be broken. Phipson on Evidence 13 Ed. Paragraph 35-11"*

We refer to the 1985 Supreme Court Practice [The White Book] Volume 1 Page 1117 paragraph 76/1/2 which reads partly as follows:

"The attesting witnesses are witnesses of the Court, and may be cross examined by the party calling them **[*Jones v. Jones [1908 24 TLR 839].***

If a conflict arises in a probate action between the right of the Courts to

know everything that the witness to a testamentary document knows or has said, about the execution of that document, and the right of a party to claim privilege for communication passing between that witness and the party or his Solicitor, for the purpose of collecting evidence for the hearing that conflict must be resolved in favour of the Court ***[Fuld [Dec'd] [No. 2] [1965] 2 ALL ER. 657***

35. The foregoing ties in with the position held by the Honourable Madam Justice Shona Griffith in her judgment in the ***Claim 45/2017 Conrado Cuellar Jr. et al and Irma Escalante at*** paragraph 20. The Court was considering the request of the Claimants that the Court draw an adverse inference against the defence for their failure to call the attesting witness.

The Court was clear in its position that an attesting witness to a Will is the witness of the Court and he can be cross examined by the very party calling him. The Court ventured so far as to say that its own suspicion had not even been aroused. Such arousal would then have required the propounding party to prove that the Will was indeed duly executed.

36. In the Claim herein there are two Wills and the Claimants asks the Court to establish the Will of January 11, 2018 as the last true Will of the Testatrix. The witness Michel H. Chebat is available to the Court to enable the Claimants propounding the said Will to prove that the said Will was indeed duly executed.

The fact that Michel H. Chebat witnessed the Will of the Testatrix dated January 11, 2018 is not denied in the defence or the counterclaim and because there is no denial by the Defendant in the counterclaim that Michel H. Chebat witnessed the Will of the Testatrix there can be no deemed admission that Michel H. Chebat did not witness the Will of January 11, 2018.

In this case the issue arises as to whether the Testatrix had knowledge and approval when she signed her Will. This places a burden on the Claimants propounding the Will of January 11, 2018 to establish knowledge and approval. In this kind of case the Court is to be vigilant and jealous in scrutinizing all the circumstances. It is a rule which calls upon the Court not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

37. This evidence is available in the evidence of the witness Michel H. Chebat and there is nothing that precludes his evidence which is independent of any deemed admission in the counterclaim.

Michel H. Chebat as witness to the Will can assist the Court in determining whether the Court will give relief or give some relief or no relief at all based upon the Courts vigilant care and circumspection in investigating the facts of the case to be provided by this witness as to whether the Will of January 11, 2018 was duly executed by two witnesses in the presence of the Testatrix who signed in their presence and whether the Testatrix signed with unimpaired knowledge and approval. See pg. 11/28 of the Fuld case abovementioned.

The Claim may continue with the examination of one witness whose signing of the Will has not been denied in the Defence or Counterclaim- and this witness can assist the Court to determine whether the execution of the Will was in accordance with Section 7 of the Wills Act.

One Witness in the ordinary case will provide proof of testamentary capacity and due execution which would suffice to establish knowledge

and approval and admissions in the Counterclaim do not contradict the outcome of the claim on the basis that one witness is sufficient to determine the outcome of the Claim. If the Claim would be allowed to continue with the evidence of one witness, proceeding with the Claim in those circumstances would not be an abuse of the process of the Court.

RULING

38. I am grateful for the submissions made on behalf of the parties on this Application. Having considered the arguments for and against this Application, I am convinced that the submissions made on behalf of the Respondent/Claimant are to prevail. I agree with the interpretation of Rule 18. 12(2) as made by my sister judges Griffith J. and Young J. as I do not agree that the failure of the Claimant to file a Defence to the Counterclaim within the prescribed period under the CPR results in an immediate grounds for dismissal of the entire claim along with all relief sought. I agree with Justice Young that the Court must examine the claim to see which portion, if any of the claim survives the admissions made by the failure to rebut the counterclaim in time. I adopt the reasoning of Justice Young in ***Claim 700 of 2016 Jose Romero v. Robert Gabourel et al w***here Her Ladyship stated:

"that the Counter Defendant may admit factual allegations and these are accordingly removed but the Court must still determine whether the factual

allegations admitted and removed are sufficient to establish or make out the relief claimed or some other relief or no relief at all."

I agree with Mr. Sabido SC's submissions that after the removal of the admissions in the case at bar based on failure to file the requisite Defence to the Counterclaim in time, the court is still left with the question to determine the validity of the Will of in light of the signature of Michel Chebat SC's signature on the Will as an attesting witness. I therefore refuse the Application to Strike out this Claim. I will also grant the application for relief from sanctions filed by the Claimants as I find based on the affidavit in support that the application was made promptly and that the dangerous circumstances of the pandemic last March negatively affected the ability of counsel to file documents in time e.g. pandemic induced lockdown of counsel's office and inaccessibility of his staff. I therefore make the following orders: That the time for filing a Reply and a Defence to the Counterclaim be extended to November 30, 2021 and that the Reply and Defence to Counterclaim filed on February 17, 2020 do stand.

Each party to bear own costs.

Each party to bear own costs.

Dated this day of November, 2021

Michelle Arana

Chief Justice (Acting)

Supreme Court of Belize