IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV0847 of 2003

BETWEEN	**VERONICA MARKS**	**1ST CLAIMANT**
AND	**NICHOLAS A. BROWN**	**2ND CLAIMANT**
AND	**LOXLEY THOMPSON**	**1ST DEFENDANT**
AND	**ERNEST ALLEN**	**2ND DEFENDANT**
AND	**N & N INVESTMENT LTD.**	**3RD DEFENDANT**

Mr. H. Charles Johnson for the Claimants
Miss Carol Vassall for the 1st Defendant
Mr. Linton Gordon instructed by Frater Ennis and Gordon for 2nd and 3rd Defendant

Application to set aside Judgment in default of Defence
Application to strike out statement of case

10th, 18th, 27th January, 24th February, 6th and 22nd March 2006

Brooks J.

The claimants Veronica Marks and Nicholas Brown have had their real property, situated in St. Ann, sold by the mortgagee thereof under powers of sale contained in a mortgage. Mr. Loxley Thompson was the mortgagee. The claimants have sued him, the purchaser N & N Investment Ltd, and its principal Ernest Allen. The Claimants allege that the sale was illegal. Their claim is that the Defendants pay damages to compensate them for financial loss incurred.

When the claim came on for case management the Defendants made two applications; Mr. Thompson applied to set aside a default judgment against him and the 2nd and 3rd defendants applied to strike out the claim as against them. I shall deal with each application in turn.

Mr. Thompson's application:

The court's file reveals that the judgment in default of defence was entered on 30th December 2004. Miss Vassall, on Mr. Thompson's behalf, acknowledges that the formal document was served on his attorneys-at-law on 29th June, 2005. The application to set aside the judgment was however not filed until 8th November, 2005.

For this application the main issue to be determined is whether Mr. Thompson has complied with the requirements of rule 13.3 (1) of the Civil Procedure Rules. Miss Vassall spent a significant amount of time on the merits of Mr. Thompson's case. The court however anxiously considered the matter of whether the application to set aside was made as soon as was reasonably practicable after discovery that the default judgment had been entered. The requirements of the rule are such that unless the defendant clears this first hurdle there is no need to consider the merits of the defence.

Rule 13.3 (1) stipulates:

> "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 has 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."(emphasis supplied)

It is now well established that the court has no discretion to set aside the default judgment unless the defendant meets all aspects of the triple test laid down by rule 13.3 (1). See *Caribbean Depot Ltd. v. International Seasoning & Spice Ltd.* SCCA 48/2004 (delivered 7th June 2004).

The affidavits filed in support of the application all concentrated on the reason for the failure to file the defence in time, the demerits of the Claimants' case and the merits of Mr. Thompson's defence. The issue of delay is only addressed in the context of the failure to file a defence in time. For instance, at paragraph 12 of Mr. Thompson's affidavit sworn to on 14th November, 2005, he deposed:

> "That the delay in filing the defence results from the tardiness of instructing Counsel and not from me but from the Attorney-at-Law having carriage of sale in this matter."

The affidavit of Carol Marcia Vassall sworn to on January 28, 2005 contained a paragraph with very similar terms. Is this explanation sufficient to allow for the discretion of the court to be exercised?

Mr. Johnson, on behalf of the Claimants, submitted that the rule had not been satisfied at all, as the application was not made promptly. He submitted that the length of the delay precluded allowing the appropriate application of the term "as soon as reasonably practicable". He continued to say that the explanation given was "not plausible given the circumstances and the urgency of the matter."

Although there is no explanation for the delay in applying to set aside the default judgment, the fact situation should perhaps also be considered. Mr. Thompson at paragraph 2 of his Supplemental Affidavit sworn to on 17th November 2005, deposed that the reason for being unable to file the Defence previously was that "all the information concerning the sale was not provided to my Attorneys-at-Law...". During her submissions, Miss Vassall, in seeking to explain the delay in applying to set aside, submitted:

> "We can only produce information to set aside if we have it. We complained that the information was not available from the attorney having carriage of sale."

Should the court extend the reason for failure to file a defence on time, in order to seek to explain the delay in filing the application to set aside? I think not. Although there may well be situations when the same explanation will apply to both the default in filing the defence and the delay in applying to set aside the default judgment, the latter does not necessarily follow the former. It is for Mr. Thompson to satisfy the court as to the merits of his application and not for the court to devise a method for bringing the application within the terms of the applicable rule. Mr. Thompson has not provided any evidence to meet this first aspect of the three-part requirement and therefore his application must be refused.

The 2nd and 3rd Defendants' application:

The thrust of the application by these Defendants is summarized in Mr. Gordon's submission on their behalf that "the claim as set out discloses no cause of action although it names a cause of action". Rule 26.3 (1) (c) of the Civil Procedure Rules permits the court to strike out a party's statement of case or a part thereof if the court finds that the statement of case "discloses no reasonable grounds for bringing or defending a claim".

It is now necessary to outline some of the details of the Claimants' particulars of Claim as it refers to the 2nd and 3rd Defendants. It is common ground that the Claimants were the registered proprietors of the property in question. The Claimants further allege, although it is disputed by the 2nd Defendant, that he was their tenant and that he occupied the property as such. After averring that the 3rd Defendant, acting through one of its

directors, the 2nd Defendant, purchased the subject property from Mr. Thompson without notifying the Claimants, the relevant part of the Claimants' pleading is as follows:

> "8. The 2nd Defendant approached the 1st Claimant and expressed his wishes to purchase the property of the 1st Claimant and persuaded the 1st Claimant to sell the property to him since he was in occupation as a tenant and badly needed the property. He promised to pay the 1st Claimant a certain sum of money by a certain time. Before any agreement was reached as to price and time of sale the 2nd Defendant entered into a contract of sale with the 1st Defendant while still negotiating with the 1st Claimant and without notifying the 1st Claimant that he was in negotiation with the 1st Defendant to purchase the property in an effort to deceive the 1st Claimant, and at all material times the 1st Defendant knew or ought to have known that the 2nd Defendant was a tenant in occupation of the property of the 1st Claimant and the 2nd Defendant at all material times knew or ought to have known that the 1st Claimant and the 1st Defendant had a mortgage agreement on the property he was then occupying. Both the 1st and 2nd Defendant conspired to deceive the 1st Claimant in order to fraudulently deprive her of her property. The 1st Defendant subsequently foreclose (sic) on the mortgage between himself and the 1st Claimant and sold the Property to the 3rd Defendant of which the 2nd Defendant is the Managing Director."

No particulars of fraud or of conspiracy were pleaded, but it is important to note that the 3rd Defendant has been registered as the proprietor of the subject property.

In Bullen and Leake and Jacob's *Precedents of Pleadings*, 12th Ed. at page 452 the learned authors cite the appropriate rule as follows:

> "Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v. Mutual Society* (1880) 5 App. Cas. 685 at 697, 701, 709).

The learned authors of *Clerk and Lindsell on Torts* 15th Ed., in dealing with the issue of conspiracy to injure, opine that the "tort requires an agreement, combination, understanding, or concert to injure, involving two or more persons" (para. 15-22). At para. 15-24 the learned authors emphasize that with such torts, the major aspect to be

considered is the distinction "between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any...just cause". They continue by citing the words of Lord Cave L.C. in *Sorrell v. Smith* [1925] A.C. 700, 711-712:

> "(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. 2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."

In applying these principles to the claimant's pleadings quoted above, it is critical to note that the property was sold to the 2nd and 3rd Defendants at a public auction. This auction was advertised on three occasions between January 24, and February 21, 2002 in a major nationally circulated newspaper. This fact, in my view, undermines the base of the Claimants' claim. The pleadings concerning the fact of placing the property up for public auction, or indeed the attendance of, and participation in, such an auction, do not disclose the element of dishonesty required for fraud. They do not reveal a combination to injure, though it is clear that the respective interests of Mr. Thompson and the 3rd Defendant are advanced by the transaction.

The 1st Claimant in her various affidavits sworn to in this matter deposed to the following circumstances:

1. The 2nd Defendant was her tenant at the subject property, knew of the difficulties that she was experiencing with it and yet failed to inform her that he had entered into an agreement to purchase the property;

2. The auctioneer was someone whom she knew well, who operated his business place in close proximity to hers, and yet failed to inform her of the property being put up for auction.
3. Mr. Thompson knew at all times where to locate her (she was a tenant of his) and yet failed to inform her of his decision to sell the property at public auction.

These factors, neither by themselves nor in combination, are sufficient to supply the element of dishonesty or the intent to injure required for the Claimants to succeed. The fact that the parties may all have previous knowledge of each other, (a not unusual situation in a small town such as Ocho Rios where these parties are located) does not supply the requisite elements.

Though there may be questions raised as to whether the power of sale had been properly exercised, that is not an issue for the 2nd and 3rd Defendants. Section 106 of the Registration of Titles Act states that a purchaser from a mortgagee exercising powers of sale contained in a mortgage is not bound to see or inquire whether the mortgagor is in default or whether the mortgagee has followed the requirements of the statute in respect of the exercise of the power of sale. The Claimants must look to Mr. Thompson for their remedy in any such circumstance. Section 108 of that Act stipulates that a purchaser who secures the register of a transfer of the interest of the mortgagor "shall be deemed a transferee of such land". The reason for this is that honest purchasers must be able to deal with mortgagees in the confidence that the transaction will not be set aside. The section is also aimed at inspiring confidence in the register, as a purchaser, so registered

may well have entered into other transactions concerning the property and thus unconnected third parties may be prejudiced by a setting aside of the transfer.

Based on these reasons I find that the Claimants' statement of case discloses no reasonable grounds for bringing the action against the 2nd and 3rd Defendants and should therefore be struck out.

Conclusion

The orders of the court are therefore as follows:

The 1st Defendant's application to set aside the default judgment is refused.

Costs of the application to the Claimants in the sum of $24,000.00, which costs are to be paid before the hearing of any fresh application by the 1st Defendant.

The Claimants' statement of case as against the 2nd and 3rd Defendants is hereby struck out.

The Claimants are to pay the costs of the 2nd and 3rd Defendants which are to be taxed if not agreed.