[2018] JMSC Civ 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 00836

BETWEEN	**SCOTIA JAMAICA BUILDING SOCIETY**	**CLAIMANT**
AND	**ANDREA HENRY**	**DEFENDANT**

IN CHAMBERS

Mrs. Kerri-Ann Allen-Morgan instructed by Livingston Alexander & Levy for the Claimant

Messrs. Leonard Green and Makene Brown instructed by Chen Green & Company for the Defendant

Heard: May 11 and June 6, 2018

Civil Procedure – Setting aside default judgment – Whether the defendant has a real prospect of successfully defending claim - Rule 13.3 of the Civil Procedure Rules, 2002, (as amended 18 September 2006)

CORAM: A. NEMBHARD, J (AG.)

INTRODUCTION

[1] By way of a Notice of Application, filed on 15 May 2015, the Defendant, Andrea Henry, seeks an Order of the Court that the Default Judgment entered on 5 March 2015 be set aside.

[2] The Application is made pursuant to Rule 13.2 of the Civil Procedure Rules, 2002, (CPR), and is supported by Affidavits deposed to by Andrea Henry, filed on 15 May 2015 and 3 April 2017, respectively. Affidavits in Response have been

filed by the Claimant, Scotia Jamaica Building Society, (hereinafter referred to as "the bank"), on 14 October 2015 and 1 March 2016, respectively.

BACKGROUND

[3] On January 16, 2001, Andrea Henry borrowed from the bank, the sum of Three Million Dollars, ($3,000,000.00), pursuant to an Instrument of Mortgage, over property known as ALL THAT parcel of land part of Chatsworth, Savanna-La-Mar, in the parish of Westmoreland, and registered at Volume 781 and Folio 90 of the Register Book of Titles.

[4] It was an express term of the said mortgage that, inter alia, Andrea Henry would repay to the bank the principal sum, together with interest in the first instance at the rate of 16.90% per annum, and all other monies remaining unpaid, by equal monthly instalments of principal and interest, totalling Forty Five Thousand, Nine Hundred and Fifty Seven Dollars and Sixty Eight Cents, ($45,957.68), payable on the first day of each month, over a period of One Hundred and Eighty (180) months.

[5] Andrea Henry failed to pay her monthly instalments as agreed and as at 31 December 2007, had been in default of payment in excess of ninety (90) days. As a result, the loan facility was reclassified, as a direct consequence of which, all subsequent payments made were applied to the principal balance only.

[6] On 16 September 2011, having received only three (3) payments during that year, the mortgaged property was put up for sale.

[7] On 9 November 2011 and on the 5th, 6th and 23rd days of January 2012, respectively, Andrea Henry made four (4) payments, thereby settling the principal balance owed on the loan facility. At that time there were interest, add-on charges, interest on the add-on charges and late fees owed.

[8] A Loan Transaction History was sent to Andrea Henry showing each payment that was made, the portion of the payment that was applied to the interest and principal, respectively, and the amount remaining on the principal balance.

[9] On 20 February 2014, the bank filed suit against Andrea Henry to recover the sum of One Million Three Hundred and Eighty One Thousand Seven Hundred and Seventy Two Dollars and Seventy Nine Cents, ($1,381,772.79), representing the outstanding interest and late fees.

[10] On 11 March 2014, Andrea Henry filed an Acknowledgement of Service but failed to file a Defence.

[11] On 10 April 2014, a Request for Default Judgment and Judgment on Request for Default Judgment were filed as a result of the failure to file a Defence.

[12] On 27 October 2014, the bank obtained a Judgment on Request for Default Judgment which was served on Andrea Henry on 21 April 2015. She now seeks to set aside the Default Judgment on the basis that she has discharged her debt, as was indicated to her by the bank in a generated Statement, on which she relies as being conclusive. Alternatively, she contends that, if the Statement provided by the bank is incorrect, then it is estopped from rectifying it, the bank having accepted her final payment in 'settlement of her obligation' to it.

ISSUE

[13] Does the Defendant, Andrea Henry, have a real prospect of successfully defending the Claim?

THE LAW

[14] The power of the Court to set aside a default judgment regularly obtained is found in Part 13 of the CPR.

[15] Rule 13.3 (1) of the CPR, as amended on 18 September 2006, provides that the Court may set aside or vary a judgment entered under Part 12 if the Defendant has a real prospect of successfully defending the claim.

[16] Rule 13.3 of the CPR reads as follows:-

> *"(1) The Court may set aside or vary a judgment entered under part 12 if the Defendant has a real prospect of successfully defending the Claim.*
>
> *(2) In considering whether to set aside or vary a judgment under this rule, the Court must consider whether the Defendant has:-*
>
> > *(a) Applied to the Court as soon as is reasonably practicable after finding out that judgment has been entered;*
> >
> > *(b) Given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.*
>
> *(3) Where this rule gives the Court power to set aside a judgment, the Court may instead vary it."*
>
> *(Rule 26.1 (3) enables the Court to attach conditions to any order.)*

[17] What constitutes a real prospect of success was discussed by McDonald-Bishop J (Ag), as she then was, in the authority of **Marcia Jarrett v South East Regional Health Authority and Others,** Claim No. 2006 HCV 00816, judgment delivered 3 November 2006.

[18] McDonald-Bishop J (Ag), as she then was, is quoted as follows:-

> *"[10] The defence must be more than arguable to be such as to show a real prospect of success. This is a restatement of the principle in the case of **Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.** [1986] 2 Lloyd's Report 22. …the Court, in order to arrive at a reasoned assessment of the justice of the case, must form a provisional view of the*

> *likely outcome of the case if the judgment were set aside and the defence developed. [11] Since the test for summary judgment is in the same terms, I would adopt too the meaning ascribed to the words 'real prospect of success' in the context of summary judgment proceedings and say that the defence must have a 'real' as opposed to a 'fanciful' prospect of success and that 'real' is taken in its natural and ordinary meaning and so does not warrant any clarification or amplification.* ***Swain v Hillman and another*** *[2001] 1 All ER 91 applied. [12] From the provisions of the CPR and the relevant case law, I think it would be safe to argue that the considerations of the Court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to [the] filing of a defence and the overriding objective which should necessitate a consideration as to any prejudice that the claimant is likely to suffer if the default judgment is set aside…"*

[19] In **Sasha-Gaye Saunders v Michael Green, Wendel Hart, Arman White and Michael Bailey**, Claim No. 2005 HCV 2868, judgment delivered on 27 February 2007, Sykes J, as he then was, stated:-

> *"[21] The English rule provides two grounds for setting aside default judgments properly obtained. These two grounds are independent of each other. The first is whether there is a real prospect of success. The second is whether there is some other good reason. The rule then indicates that the court should consider whether the party has acted promptly. By contrast, the new rule in Jamaica has only one ground and that is whether there is a real prospect of successfully defending the claim. [22] In the new rule 13.3, the sole question is whether there is a real prospect of successfully defending the claim. This test of real prospect of successfully defending the claim is certainly higher than the test of an arguable defence. See –* ***ED&F Man Liquid Products v Patel***

> ***& ANR*** *[2003] C.P. Rep 51. 'Real prospect' does not mean 'some prospect'. 'Real prospect' is not blind or misguided exuberance. It is open to the Court, where available, to look at contemporaneous documents and other material to see if the prospect is real. The court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it. This, in my view, is good sense and good logic."*

[20] It is therefore clear from a reading of the authorities that the Court must conduct some evaluation of the proposed defence and decide whether it has a real prospect of success. If the defence has substantial contradictions, then, that may be an indication that the prospect of success is not real. In another case, documentary evidence may make it difficult for the defence to succeed.

[21] In the absence of some explanation for the failure to file an Acknowledgement of Service or a Defence, the prospect of successfully setting aside a properly obtained judgment should diminish somewhat.

[22] Similarly, it the application to set aside a Default Judgment is quite late, then that would have a negative impact on successfully setting aside the judgment.

[23] Moore-Bick J, in **International Finance Corporation v Utexafrica Sprl.** [2001] CLC 1361, noted the worth of a Default Judgment. He stated as follows:-

> *"A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."*

[24] Phillips J.A., in **Marlene Murray-Brown v Dunstan Harper and Winsome Harper** [2010] JMCA App 1, considered the nature of the discretion to set aside a default judgment under Rule 13.3, (as amended in 2006), of the CPR, and cited

the case of **Rahman v Rahman** (1999) LTL, judgment delivered on November 26, 1999, for the proposition that in Applications such as these, the Court should have regard to the following:-

(a) The nature of the defence;

(b) The period of delay; and

(c) Any prejudice that the Claimant was likely to suffer if the Default Judgment were to be set aside as well as the overriding objective of the CPR.

ANALYSIS

[25] How then does the Court determine whether the Defendant, Andrea Henry, has a real prospect of success in defending the Claim?

[26] Firstly, it is to be noted that Rule 13.4 of the CPR is entitled Applications to vary or set aside judgment and establishes the procedure to be followed. The Application may be made by any person who is directly affected by the entry of the judgment and must be supported by evidence on Affidavit. The Affidavit must exhibit a draft of the proposed Defence.

[27] In the instant case the Court notes that no draft Defence has been exhibited to either of the Affidavits filed in support of the Notice of Application to set aside the Default Judgment.

[28] This Court is bound by the Court of Appeal decision of **Bar John Industrial Supplies Limited v Honey Bee Fruit Juice Limited** [2011] JMCA Civ 7. In that case there was no draft Defence exhibited to the Affidavit in Support of the Application to set aside the Default Judgment. The Court upheld the decision of Master Miss Audre Lindo, as she then was, and opined that there was nothing contained in the evidence before the Court from which the learned Master could

be satisfied that the Defendant had a real prospect of successfully defending the claim. Neither could the learned Master examine the Defence which was filed out of time for this purpose.

[29] In the instant case, the Defendant, Andrea Henry, denies that she owes the sums claimed by the bank and contends that, to her knowledge, she has paid all outstanding amounts. In making this assertion, she relies on the Loan Transaction History provided by the bank.

[30] The bank, on the other hand, denies that there are any mistakes in the Loan Transaction History. The bank contends that the Loan Transaction History is not a bank statement but a record of payments made by Andrea Henry and is an indication of how those said payments are applied to her mortgage loan. The bank further contends that entries in a passbook or a statement of account are not conclusive evidence. All entries may be questioned and may be proven to be erroneous.

[31] In that regard the bank relied on the authority of **The Commercial Bank of Scotland v Rhind** (1860) 3 Macqueen 643. It was unanimously confirmed that entries in a passbook to the credit of the customer, are, when delivered to him, only prima facie evidence against the banker which may be rebutted, prout de jure, as of right.

[32] In the instant case, the bank has sought to rebut Andrea Henry's denial that the debt is owed to it, in the evidence contained in the Affidavits filed on its behalf. The bank contends that the zero figure under the "interest" and "balance" columns is not a representation that Andrea Henry has satisfied her debt. The Loan Transaction History is a representation that her last payment toward the loan was applied solely to reducing and clearing the outstanding principal amount. There were interest payments that remained outstanding.

[33] It was further submitted that a Statutory Notice was sent to Andrea Henry on 6 October 2011, via registered mail, which clearly indicated that her property would be sold if her total arrears of Two Million Two Hundred and Fifty Three Thousand Nine Hundred and Forty One Dollars and Forty Cents, ($2,253,941.40), were not settled. This, it was submitted, casts great doubt on whether the Defendant could have honestly believed that she had satisfied her total debt with three (3) payments in the amount of Two Hundred Thousand Dollars, ($200,000.00), Two Hundred and Fifty Thousand Dollars, ($250,000.00) and Three Hundred and Twenty Nine Thousand Five Hundred and Twenty Two Dollars and Sixty Three Cents, ($329,522.63), respectively.

[34] The Court agrees with the submissions of Learned Counsel Mrs. Allen-Morgan in this regard. In light of the documentary evidence provided by the bank and in particular the Statutory Notice, dated 5 October 2011, which was sent to the Defendant via registered mail on 6 October 2011, this Court is of the view that Andrea Henry has failed to establish that the debt owed to the bank has been satisfied.

[35] In the section of the said Statutory Notice, entitled Memorandum of Moneys Owing Under The Above Mortgage, the bank provides a breakdown of the principal amount outstanding as at 29 September 2011, the add-on charges as at 29 September 2011, the interest on the principal amount as at 29 September 2011, the interest on the add-on charges as at 29 September 2011 and late fees, also as at 29 September 2011.

[36] In light of that, on this ground, this Court finds that Andrea Henry has failed to establish that she has a real prospect of succeeding in defending the Claim.

[37] The Court also finds that Andrea Henry has been unable to establish the defence of estoppel, on which she also relies.

[38] There cannot be said to be any representation made by the bank to Andrea Henry that she had settled her debt. Again, the Court refers to the Statutory Notice dated 5 October 2011 which was sent to Miss Henry via registered mail on 6 October 2011.

[39] The Court also has regard to the fact that subsequent to Andrea Henry's receipt of the Loan Transaction History from the bank and subsequent to her final payment to the bank, she received further communication from the bank explaining the computation of the remaining portion of the debt.

[40] Finally, the Court finds that Andrea Henry has failed to provide a good explanation for the failure to file a Defence.

[41] It is indicated in her Affidavit filed on 3 April 2017 that "I am advised by my Attorneys-at-Law…and do verily believe that the delay of two and a half months and fifteen days respectively, for filing the Acknowledgement of Service and Defence was due to the fact that there was a need to examine the record carefully in order to prepare and file the Defence."

[42] The Court was referred to the authority of **B&J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2. There the Court observed that the Law is replete with authorities in which the conduct of counsel has not been accepted as a good explanation for a party's failure to carry out what he is obliged to do in certain circumstances.

CONCLUSION

[43] Andrea Henry has failed to establish that she has a real prospect of successfully defending the Claim and as such the Court is of the view that the Notice of Application to set aside the Default Judgment should be denied.

DISPOSITION

[44] It is hereby ordered that:-

(i) The Notice of Application filed on 15 May 2015 is denied;

(ii) Costs to the Claimant to be taxed if not sooner agreed;

(iii) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders herein.