IN THE SUPREME COURT OF BELIZE A.D. 2011

Civil Appeal No. 4 of 2011

BETWEEN: FRANCO NASI Appellant

AND

DAVID M. RICHARDS Respondent

Before: Justice Minnet Hafiz-Bertram

Ms. Nazira UC Espat of Chebat & Co. for Appellant/Claimant
Mr. Estevan Perrera of Glenn Godfrey & Co. LLP for Respondent/Defendant

On written submissions

JUDGMENT

Introduction

1. This is an appeal against the decision of the Honourable Registrar of the Supreme court contained in an Order dated the 12th day of May, 2011. The Order by the Registrar is for the default judgment dated 24th March, 2011 to be set aside. Costs was awarded to the Claimant in the sum of $1,000.00 and the Defendant was allowed to file his defense on 13th day of May, 2011. As shown in the affidavit of the Appellant, the Learned Registrar did not give any written reasons for setting aside the default judgment. The Appellant deposed that in an oral decision the learned Registrar stated that she was satisfied that the Defendant has met all the

requirements of Rule 13.3(1) of the Supreme Court (Civil Procedure) Rules 2005.

2. The grounds of appeal are:

    2. The decision is against the weight of the evidence.
    3. The learned Registrar erred in law in finding that the Respondent had satisfied the requirements for setting aside the default judgment dated the 24th day of March, 2011 as are contained in Rule 13.3(1) of the Supreme Court (Civil Procedure) Rules 2005.

Claim before the Supreme Court

3. On 13th January, 2011 the Appellant/Claimant ('Nasi') commenced Claim No. 276 of 2011 against the Respondent/Defendant ('Richards') in the Supreme Court for damages for libel and aggravated damages. The records show that Mr. Richards filed an acknowledgment of Service but failed to file a Defence within the time limit, 21st March, 2012. The application for the Default Judgment for failure to file a defence was made on the 24th March, 2012. The Order issued on 24th March, 2012 is dated 25th March, 2012 and states that "*Whereas request has been made by the Claimant for the entry of judgment against the Defendant for an amount to be decided by the Court in Default of Defence. IT IS THIS DAY ADJUDGED that the Claimant recover against the Defendant damages to be assessed by way of affidavit evidence on a date to be determined by the Registrar."*

Application to set-aside Default Judgment

4. In an application, dated the 29th March, 2011, Mr. Richards applied for the Default Judgment to be set-aside and liberty be given to him to file a defence. The grounds stated in that application are:

    1. The Defendant has filed his application as soon as reasonably practicable after finding out judgment has been entered.
    2. He has a good explanation for his failure to file a defence.
    3. He has a good prospect of successfully defending the claim.

5. The application was supported by three affidavits, two from Mr. Richards and one from Mr. Estevan Perera, attorney-at-law. Mr. Richards in his first affidavit sworn to on 29th March, 2011 deposed that he received the Claim Form and Statement of Case on 21st February, 2011 and on 2nd March he visited the office of Glenn D. Godfrey & Company LLP and requested legal assistance. He said that he was informed that it would take some time to carry out the necessary research so that an objection can be made on the jurisdiction of the claim and to prepare a defence. Further, that he had two weeks to file his defence, as the time limit for filing was 21st March, 2011.

6. At paragraph 5 of his affidavit, Mr. Richards deposed that he was also informed by his attorney that he had several trials arranged for the next two weeks and he would try to prepare everything on time. Further, that the time pose some problems since he was in San Pedro and his attorney in Belize City.

7. Mr. Richards at paragraph 6 of his affidavit deposed that on 28th March, 2011, his attorney sent him a final draft of the Defence and requested that he execute same. He was thereafter informed that default judgment was

entered on 25th March, 2011. At paragraph 7 of his affidavit, Mr. Richards deposed that, "*Therefore due to the inadvertence and the delay of my attorney's office my defence was not filed in time*." At paragraph 8 of his affidavit he deposed that he was informed by his attorney, Mr. Perera that he believes he has a good defence. The proposed defence was exhibited as **"DR 1".**

8. In his second affidavit sworn to on 13th April, 2011, Mr. Richards deposed that he had never been served with a copy of the Default judgment. He also deposed that he was presenting a copy of his revised proposed defence.

9. Mr. Estevan Perera, attorney for Mr. Richards at paragraph 3 of his affidavit deposed that he had two weeks to have the defence researched and filed and he was unable to do so since he had several matters that he was working on and a few court hearings. Further, he had a family emergency on 17th March, 2011 which kept him out of the office until 24th March, 2011.

10. Mr. Perera further deposed that upon his return to the office, he was unable to complete Mr. Richard's defence until the 25th March, 2011. On the said day he called Learned Counsel on the other side and requested an extension of time. It was then Counsel informed him that she had applied for the Default Judgment on the 24th March, 2011.

11. At paragraph 7 and 8 of his affidavit he deposed that on the 29th March, 2011, he was able to file the application to set aside the default judgment. This was five days after the date of the default judgment. Further, that the Defendant has a good defence which includes that the words and language used were not defamatory and that the claim was brought in the wrong jurisdiction.

12. This is the evidence which the Learned Registrar had before her when she made her decision. Further, according to the Appellant the following authority was brought to the attention of the Registrar:

> Belize Supreme Court **Claim No. 613 of 2007, Evan Tillett v. Elwyn McFadzean (unreported)** in which it was decided that the attorney's lack of diligence and tardiness is not a proper reason for the delay to file a defence;

Grounds of Appeal

13. Grounds 1 and 2 can be conveniently dealt with together. The grounds being that the decision is against the weight of the evidence and the learned Registrar erred in law in finding that the Respondent had satisfied all three requirements for setting aside the Default Judgment dated 24th March, 2011 as are contained in Rule 13.3(1) of the Supreme Court (Civil Procedure) Rules 2005.

The law

14. **Rule 13.3(1)** of the **Supreme Court (Civil Procedure) Rules 2005** states:

> *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.*

15. The default judgment which was set aside by the Registrar was regularly obtained. Hence, the reason Rule 13.3 (1) is applicable in this case. I agree with Learned Counsel, Ms. Nazira Espat that where a judgment is set aside pursuant to Rule 13.3(1) all three requirements must be satisfied. In the case cited by Ms. Espat, **Belize Telecommunications Limited v Belize Telecom Limited et al, Civil Appeal No. 13 of 2007** at paragraph 23, Justice Morrison stated:

I agree with Mr. Plemming QC that the requirement of Rule 13.3(1) is that all three pre-conditions be satisfied before the court can exercise its discretion to set aside a regularly obtained default judgment..

16. Ms. Espat submitted that the default judgment should not have been set aside by the Honourable Registrar as the Defendant had failed to satisfy CPR 13.3(1) (b) and 13.3(1) (c). Rule 13.3 (1) (a) is not in issue as the Defendant applied to the court five days after the default judgment was entered which is within a reasonable time. The court therefore has to consider the second and third pre-conditions to see whether the learned Registrar erred in her decision to set aside the judgment.

Did Mr. Richards give a good explanation for failure to file the defence?

17. Pursuant to Rule 13.3 (1) (b), a good explanation has to be given for failure to file the Defence within the time limit. The records show that three affidavits were filed in support of the application to set aside. The affidavit of Mr. Richards shows that due to the inadvertence and the delay of his attorney's office his defence was not filed on time. Mr. Perera, attorney for Mr. Richards, in his affidavit gave three reasons why he could not file the defence on time, namely (a) he had two weeks to

have the defence researched and filed; (b) he was unable to do so since he had several matters that he was working on and a few court hearings; (c) he had a family emergency on 17th March, 2011 which kept him out of the office until 24th March, 2011. In my view, the reasons given are not good explanation for failure to file the Defence on time and the learned Registrar was wrong in accepting them as good explanation.

18. Mr. Perrera had more than two weeks within which to file the defence after receiving same from his client. If learned Counsel had felt overwhelmed by his workload and could not finish his research on time then there are steps that he could have taken, which is to call his colleague, attorney on the other side and request an extension of time to file the defence. Likewise, the same could have been done when the unexpected family emergency occurred. The CPR 2005 allow for such extension of time. The general rule is that a defence has to be filed within 28 days after the date of service of the claim form – **Rule 10.3(1)**. Rule 10.3(4) provides that the parties may agree to extend the period for filing a defence... and **Rule 10.3 (6)** provides that the maximum total extension of time that may be agreed is 56 days. Further, Mr. Perera could have applied to the court, pursuant to **Rule 10.3(8)** for an order extending the time for filing a defence. I note from the evidence before the Registrar that Mr. Perera did call the attorney for the Appellant but, he did so after the time limit for filing the Defence had expired.

19. Mr. Perrara in his written submissions at paragraph 15 submitted the following:

> *It must be considered by the court that while Attorneys are required to put extensive time into their work, and go beyond the hours of the day for their clients, they are still in the end human beings and subject to the weaknesses of life – death*

and illness. We submit that the court should consider "family emergencies" as a good reason as preventing an attorney to act for his or her client.

20. The court does understand the weaknesses of life but recognizes that there are provisions under the CPR which can be utilized in the event of such hardship. According to Mr. Perrera he had a problem with time even before his family emergency and yet he failed to take the necessary steps to request an extension of time to do so.

21. Learned Counsel, Ms. Espat submitted that the attorney was negligent, lacked diligence and was tardy in acting on behalf of his client. Learned Counsel further submitted that inadvertence of an attorney is not a good explanation to set-aside a default judgement. Learned Counsel relied on the case of **Evan Tillett v Elwyn McFadzean**, Belize Supreme Court Claim No. 613 of 2007 in which Hon. Justice Sir John Muria stated:

> *….there was clearly a lack of diligence on the part of the Defendant's former attorney to deal with the defendant's case as shown by the affidavit evidence. I have to say that lack of diligence or tardiness on the part of the attorneys cannot be "a good explanation for failure to file a defence under Rule 13.3(1) (b) of the CPR.*

22. I agree with Ms Espat's argument as the evidence before the learned Registrar clearly shows that there was a lack of diligence on the part of the attorney for Mr. Richards and as such the Learned Registrar erred in accepting the reasons given as good explanation for not filing the defence.

Whether the Respondent had a real prospect of successfully defending the claim.

23. The learned Registrar was satisfied that Mr. Richards had a good prospect of successfully defending the claim. Mr. Perera submitted that the Defendant had submitted to the court that he had a valid and formidable defence.

24. A perusal of the records show that in the appellants statement of claim, two emails were mentioned which were sent to him by Mr. Richards. See paragraph 3 and 9 of the statement of case. The contents of the email sent to the Appellant and copied to the occupants of Royal Palm Villas are as follows:

> Mr. Nasi
> *Your story regarding why you left the last condo project never made sense. I now know why – Your perverted actions with young boys will not be tolerated in Belize. My old contact at Interpol was able to get the information that was requested by the Belizean officials, and you are one sick person. They have had you and others in the group you associated with in Canada under surveillance for over two years. A porno ring involving children is not welcome in Belize. Unless you want to spend a long time at Ladyville, you best keep your damn nose clean. The people watching you have been instructed to alert proper officials immediately. We don't need creeps like you around. DMR.*
>
> *Nasi*
> *The investigator has now spoken to the 14 year old girl you were hitting on, and the parents of the baby. They have agreed to testify against you when and if this goes to court. He also has discovered*

that you have not registered with the police. I can guarantee you that if this crap continues, you will be in handcuffs sooner rather than later. Lots of different kinds of people elect to spend a lot of time in Belize, for many different reasons. We know that some are running from the law. However, the ones that think they can be in a little CA country and get away with this crap, are in for a rude awakening. The last creep that tried this crap left Belize went to Honduras, and we saw to it that he spent 5 years in jail.

25. The Appellant in his claim said that the words contained in the emails in their natural and ordinary meaning meant and were understood to mean:

<u>First e-mail</u>

(a) the Claimant is a dishonest person;

(b) the Claimant has engaged in perverted and or sexual relations with young boys;

(c) the Claimant has engaged in a pornographic ring with children;

(d) the Claimant is currently being investigated by Belizean officials regarding his commission of criminal activities.

<u>Second e-mail</u>

(a) the Claimant is a pedophile;

(b) the Claimant has made illegal sexual advances towards young girls;

(c) the Claimant is a convicted sex offender;

(d) the Claimant has engaged in criminal conduct which will cause him to be arrested.

26. In my judgment, the affidavit evidence of Mr. Richards nor his proposed defence which was before the learned Registrar shows no real prospect of success in defending the claim. I agree with the submissions of Ms. Espat that Mr. Richards made a number of unjustified statements of the

interpretation of the defamatory emails as opposed to presenting to the court a defence that has a real prospect of success. As for the challenge on the jurisdiction of the court to hear the claim, both the Appellant and the Respondent reside in this jurisdiction and the recipients of the emails have vacation homes in Belize. As such, I see no real prospect of success on this ground. See the case of **Swain v Hilman, Times law Report, 4th November, 1999,** where the Master of the Rolls stated:

"The words "no real prospect of succeeding" did not need any amplification, they spoke for themselves. The word "real" directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success."

Conclusion

27. In my judgment, no basis has been shown by the affidavit evidence from the Respondent for setting aside the default judgment. As such, the learned Registrar erred in law in finding that Mr. Richards had satisfied all three requirements for setting aside the Default Judgment dated 24th March, 2011 as contained in **Rule 13.3(1)** of the **Supreme Court (Civil Procedure) Rules 2005.** She was correct that the first condition was satisfied but erred in her decision in finding that all three requirements were satisfied. For reasons shown above, the Respondent did not satisfy the second and third requirements. That is, there was no good explanation for the delay in filing the defence within the time limit and the respondent has not shown a real prospect of successfully defending the claim. Since the preconditions are cumulative, the learned Registrar erred in setting aside the default judgment.

Order

28. The appeal of the Claimant/Appellant is allowed. The decision of the learned Registrar to set-aside the default judgment dated 24th March, 2011, is set aside.

Costs

29. The Appellant received costs from the learned Registrar in the sum of $1,000.00 when she set-aside the default judgment. The Respondent had already paid this sum. As such, I will make no order as to costs.

Dated this 13th day of June, 2012

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Minnet Hafiz-Bertram

Supreme Court Judge