IN THE SUPREME COURT OF BELIZE, A. D. 2015

CLAIM NO. 285 OF 2015

	(PROPRIETORS OF STRATA PLAN NO.10	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(JAMES JANMOHAMED	**DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Kareem Musa of Musa and Balderamos on behalf of the Applicant/Defendant

Mr. Fred Lumor, SC, on behalf of the Respondent/Claimant

D E C I S I O N

1. This is an application to set aside a default judgment. The Claimant is a body corporate formed under and by virtue of section 5(1) of the Strata Title Registration Act Cap. 196 of the Laws of Belize for the purpose of controlling, managing and administering the common property of Strata Plan No. 10, more particularly known as Royal Palm Villas. The Defendant is a businessman living in San Pedro Town. He is also the legal owner of five parcels of property in this strata plan. The substantive claim is for the sum of BZ $374,284.58 being the outstanding sum due from the Claimant as monthly financial

contributions towards the management, maintenance, control and administration of the common property of the development known as Royal Palm Villas. The Claim was served on the Defendant on 17th June, 2015, and the Defendant failed to file a Defence. On July 20th, 2015 the Court entered Default Judgment against the Defendant and on July 23rd, 2015, the Claimant served the Default Judgment on the Defendant. The Defendant sought and was granted several adjournments to attempt settle the matter with the Claimant. To date none of these efforts has materialized. On February 5th, 2016 the Claimant applied to the Court for the sale of one parcel of land belonging to the Defendant/Judgment Debtor. At the hearing of the application, the Court gave permission for the Claimant to enter upon the property and undertake a valuation of the property; the application for the sale of land was stood down pending completion of the valuation. The Defendant filed a formal application on 22nd March, 2016 to vary the judgment and allow payment of judgment debt by installments, inter alia, and also sought an order to set aside default judgment with liberty to file a defence and auxiliary claim. The court gave directions on July 4th, 2017 for the Applicant/Defendant to file written submissions in support of this Application by July 28th, 2017; the Respondent/Claimant was ordered to file a response to those submissions by September 18th, 2017. The Respondent/Claimant filed its submissions on December 8th, 2017. To date, the Applicant/ Defendant has not filed any submissions.

Legal Submissions on Behalf of the Respondent/Claimant

2. Mr. Lumor SC on behalf of the Respondent/Claimant argues that the principles governing the setting aside of default judgment are governed by Rule 13.3 of the Supreme Court (Civil Procedure) Rules.

> *"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 practical after finding out that judgment has 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*."

The Belize Court of Appeal in Civil Appeal No. 13 of 2007, ***Belize Telecommunications Ltd. v Belize Telecom Ltd.*** dated 13th March, 2008 per Morrison JA [para. 23] decided that all three pre-conditions in Rule 13.3(1) must be satisfied by the Defendant otherwise the court has no discretion to set aside a regularly obtained default judgment.

> *"23. There can be no question, in my view, that the appellant is plainly entitled to succeed on this ground. I agree with Mr. Plemming QC that the requirement of Rule 13.3(I) is that all three pre-conditions be satisfied before the court can exercise its discretion to set aside a regularly obtained default judgment. Stroud's Judicial Dictionary of Words and Phrases (7th edition, page 128), to which we were referred by Mr. Plemming, indicates that the word "and" has a generally cumulative sense, requiring the fulfillment of all the conditions that it joins*

together, and herein it is the antithesis of or. Although the learned editor of Stroud's does go on to make the point that "and" may sometimes, "by force of a context", be used as "or" (a point embraced by Mr. Peyrefitte), the context in which it appears in Rule 13.3(1)(b) in fact points the other way, particularly in the light of the clear statement by the rule makers that save in the case of a judgment irregularly obtained, the court may set aside a default judgment "only if" the specified conditions are satisfied on the defendant's application.

24. It may be of interest to note that this interpretation of the rule is entirely in keeping with the approach taken by the courts in both Eastern Caribbean and Jamaica with regard to identically worded rules ... "

2A - The decision of the Court of Appeal was relied upon by the Supreme Court in ***Vasquez v Belize Western Energy Ltd***. (2009) 79 WIR 161 per Legall J at p 162. The Defendant in paragraph 27 of the affidavit sworn on 21st March. 2016 in support of the Application stated:

"… I have a good reason for failure to file a Defence in that the time for filing a Defence, I was ill and unable to give instructions for the filing of the Defence arising during the time that I was observing Ramadan."

Mr. Lumor SC contends that the Defendant gave no reason why he failed to apply as soon as reasonably practical after judgment was served on him. The judgment was served on the Defendant on 23rd July, 2015. The application to set aside the judgment was made on

21st March, 2016 almost eight months after. This was inordinate delay. The Defendant made a bare assertion that –

a) He was ill and unable to give instructions for the filing of a defence;

b) He was observing Ramadan.

The Defendant did not provide any evidence to substantiate the statement that he was *"ill"*. He did not state the type of illness, period of illness, whether he was incapacitated and/or receiving medical treatment in the country or outside the country. The Defendant did not state the period of Ramadam he was observing. Ramadan does not last more than thirty days and in 2015 was from 18th June to 7th July. The Defendant filed Acknowledgement of Service on 30th June, 2015, during the period of Ramadan. The Defence was due on 15th July, 2015 also during the period of Ramadan. It is submitted that the Defendant should not be allowed to use his religious obligation as an excuse for failure to comply with the Rules. In the case of ***Vasquez v. Belize Western Energy Ltd.*** the defendant asserted that he was not aware of the claim and that the claim was not served on him. But he became aware of the judgment on 29th September, 2008 and filed the application to set aside the judgment on October 27th, 2008. The Court found that the defendant did not apply to the Court as soon as reasonably practicable. In the case of the Defendant, he filed an acknowledgment of service and indicated that he will defend the action but took no further steps in the matter. The Defendant in paragraph 27 made reference to "*communications with the Claimant through their attorneys to attempt to settle this matter amicably and was in negotiations in respect of such settlement*". The

Defendant did not say whether the Claimant agreed with him that he should avoid taking steps to make an application to the Court. Rather, all correspondence the Defendant sent to the Claimant were marked "*Without Prejudice*". The Claimant objects to the use of selected privileged materials by the Defendant which do not give the Court the full picture of attempts at negotiation. The Defendant did not show to the Court any document from the *"negotiation*" which prevented him from applying to the Court.

> *"Without prejudice communications, whether oral or in writing, which are made with the intention of seeking a settlement of litigation, are privileged from disclosure, in both the present and subsequent proceedings*…" Blackstone's Civil Practice 2017 p. 932 at para. 50.68

The Claimant submits that the Defendant also failed to give a good explanation for the failure to file a Defence. The Defendant's Application to set aside the judgment was first called up by the Court on 13th June, 2016. The Defendant repeatedly sought adjournments with a view to settling the matter. It is almost one and half years since the application was first called up. The judgment was served on 17th June, 2015. Mr. Lumor SC argues that the Defendant should not be allowed to make a mockery of the Civil Procedure Rules.

3. The Defendant is the registered proprietor of the five units but claims he sold the units. He failed to produce the land register as proof of ownership. In accordance with sections 26 and 30 of the Registered Land Act Chapter 194, the Defendant is the owner of the five units. The Agreement exhibited in the Affidavit of the Defendant is not proof under the Registered Land Act that someone else owned the units. In any event, the Court can only

determine those facts including the limitation point on evidence adduced at trial of this claim. The Claimant/Respondent prays that this Application be dismissed with costs.

Ruling

4. Having considered the submissions of the Claimant/Respondent on this long outstanding matter, and there being no submissions filed on behalf of the Defendant/Applicant in this Application as per order of the court, I find that there has been inordinate delay in applying to set aside default judgment. Having perused the draft defence attached to the application, I also agree with Mr. Lumor's position regarding proof of ownership under section 26 and 30 of the RLA that the Defendant has little prospect of success if this matter were to proceed to a full trial. I therefore refuse the application to set aside judgment in default, variation of payment of judgment debt by installments and payment of judgment debt in monthly payments and all other relief sought by the Defendant/Applicant therein. Costs awarded to the Claimant/Respondent to be paid by the Defendant/Applicant to be agreed or assessed.

Dated this Thursday, 28st day of February, 2019.

_____

Michelle Arana
Supreme Court Judge