IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 409 OF 2022

BETWEEN:

[1] SUSAN FLAHERTY

[2] ROBERT FLAHERTY

[3] DANIEL FLAHERTY

Claimants/Respondents

And

[1] AMIGOS DEL MAR
DBA Amigos Del Mar Dive Shop

Defendant/Applicant

Appearances

Mr. Eamon Courtenay, SC, Ms. Iliana Swift for the Claimants/Respondents

Mr. Andrew Marshalleck, SC, Mr. Estevan Perera for the Defendant/Applicant

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2024 April 18;

September 24

Catchwords:

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT

DECISION

[1.] **Nabie J**.: This is an application to set aside a judgment in default of the failure to file an acknowledgment of service. This application raises several issues as it is not just a regular claim that was filed, rather it was a claim seeking to enforce a foreign judgment. The respondents are seeking to enforce a judgment made in Massachusetts against the applicant that was awarded against it as damages emanating from personal injuries sustained by the 1st respondent while scuba diving with the applicant off shore San Pedro, Ambergris Caye. I have decided to allow the application for the reasons set out below.

[2.] The claim form and statement of case were filed on 6th July 2022 for the following reliefs:

(a) Payment of the principal sum of $14,976,645.44 as a debt due and owing from the Defendant;

(b) Payment of Interest awarded from the 21st May 2019 to the 23rd February 2022, at the rate of 12% on past damages of US$777,115.00, through the date of the entry of judgment, and post judgment interest from the date of the entry of judgment as particularized therein in the sum of BZ $580,472.96;

(c) Interest Pursuant to sections 165 and 166 of the Supreme Court of Judicature Act;

(d) Costs; and

(e) Such other relief as the Court deems just.

[3.] The claim form was served on the applicant on 16th July 2022.

[4.] On the 28th July 2022, the respondents applied for entry of judgment in default as the applicant failed to file an acknowledgement of service within the prescribed time. On the 8th August 2022 the applicant's attorneys made an application for an

extension of time to acknowledge service and file a defence as well as an application that the Court lacked jurisdiction to entertain the claim.

[5.] The Court Office listed the application for a hearing.

[6.] On the 11th January 2023, Shoman J. refused to hear the applicant's applications. However the judge ordered that default judgment be entered "with terms to be determined".

[7.] The matter was re-assigned to Chabot J. upon the departure of Shoman J.

[8.] On 12th day of October 2023, Chabot J. ordered as follows:

"(1) The terms of the default judgment dated 11th January 2023 are the following:

a. The defendant shall pay the claimants the principal sum of US$7,488,322.72 as debt due and owing;

b. The defendant shall pay the claimants interest from the 21st May 2019 to the 23rd February 2022, at the rate of 12% on past damages of US$777,115.00;

c. The defendant shall pay the claimants post-judgment interest calculated pursuant to 28 USC§ 1961 (a) from 23rd February 2022 to the date of this ruling;

d. The defendant shall pay the claimants interest from the date of this ruling pursuant to sections 175 and 176 of the Senior Courts Act.

(2) Costs are awarded to the claimants in an amount to be agreed or assessed."

[9.] On 2nd November 2023, the applicant filed to set aside the judgment in default seeking the following orders:

"1. Judgment entered and perfected on 12th October 2023 which crystallized Order made on 11 January, 2023, in default of filing of an acknowledgment of service within the time permitted, be set aside.

2. That the period for filing defence be extended.

3. Costs of this application be costs in the cause."

[10.] On the said 2nd November 2023, the applicant filed a notice of appeal, leave to appeal and for a stay of execution. There was a hearing before the Honourable President. It was decided that this application be heard first in the circumstances.

[11.] The order made by Shoman J. was for "terms to be determined". I find it necessary to set out the Supreme Court Rules (CPR) relevant to default judgment in this jurisdiction.

Notably, the CPR provides:

"12.10 (1) Default Judgment –

(a) on a claim for a specified sum of money, shall be judgment for payment of that amount or, where part has been paid, the amount certified by the claimant as outstanding-

(i) (where the defendant has applied for time to pay under Part 14) at the time and rate ordered by the court; or

(ii) (in all other cases) at the time and rate specified in the request for judgment,

(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court,

…………

12.10 (4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.

12.10 (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by the evidence on affidavit and Rule 11.15 does not apply.

16.2 (1) An application for a default judgment to be entered under Rule 12.10(1)(b) must state -

(a) whether the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment; or

(c) that the claimant is not yet in a position to prove the amount of the damages.

(2) Unless the application states that the claimant is not in position to prove the amount of damages, the court office must fix a date for the assessment of damages and give the claimant at least 14 days' notice of the date, time and place fixed for the hearing.

(3) A claimant who is not in position to prove damages must state the period of time that will elapse before this can be done.

(4) The Court office must then fix a period within which the assessment of damages will take place and a date on which a listing questionnaire shall be sent to the claimant."

"2.4 'Claim for a specified sum of money' means -

(a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract;"

The Orders made by Shoman J. and Chabot J.

[12.] Submissions were made by the applicant on the nature of the order and the approach of the judges previously assigned to this matter. The applicant had put it this way:

> "*The terms of the Shoman J order are not contemplated by the rules and led to unusual an awkward proceedings to determine the terms of the Default Judgment by Chabot J."*

As compelling as that submission is, I agree with Counsel for the respondents on his submission that I am to confine my deliberations to the application before me. However in doing so, I must consider one aspect of the applicant's submissions, that being, which court ordered the default judgment or when did the default judgment take effect.

[13.] The Judicial Committee of the Privy Council in **Lux Locations Ltd v Yida Zhang**[1] provides guidance on this the concept of "terms to be determined". Lord Leggatt stated as follows:

> *"42…..a judgment whose terms remain to be determined by the court is not a coherent concept. If the terms of the judgment are to be determined by the Courts. There can be no judgment until the Court has decided on its terms. A judgment which has no terms is an empty concept as a book with no pages or a football or cricket with no players."*

[14.] I therefore disagree with the submissions of the respondent that the applicant's application is misplaced as there is no application to set aside Justice Shoman's order. I am guided by the dicta of Lord Leggatt in **Lux Locations**. There can be default judgment created by the order of Shoman J. dated 11th January, 2023. I agree with the applicant that the Shoman J. Order is 'empty'. The Chabot J. Order thus was a completion of the Shoman J. Order and made it whole.

[15.] I am therefore satisfied and find that the default judgment took effect on the order of Justice Chabot. Under CPR 12.10 (4) and 12.10(5), there can be no judgment until the terms are to be determined. On the application before me I do not find it necessary to review the approach of the judges previously assigned to this matter. I find that the application to set aside was correctly made after the decision of Chabot J.

APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT

[16.] By notice of application dated the 2nd November 2023, the applicant is seeking to set aside the default judgment entered and perfected on 12th October 2023 which crystallised the Order made on 11th January 2023 in default of filing an acknowledgment of service. This is supported by the affidavits of Jose Paz.

[1] [2023]UKPC 3

[17.] CPR 13.2 is not applicable in these circumstances. Therefore 13.3(1) would have to be considered. The CPR provides with respect to setting aside default judgments:

> "CPR 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 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."

[18.] It is well established that all three (3) limbs of CPR 13.3(1) must be satisfied to enable a court to consider whether to set aside a default judgment.

As soon as reasonably practicable

[19.] Earlier I accepted the submissions of the applicant that the Shoman J. order was incomplete or inchoate. They further submitted that the determination of the terms of the default judgment was not until 12th October 2023 when the order was entered and perfected. However Chabot J delivered her decision on 29th September 2023. The wording of the rule is "*as soon as reasonably practicable after finding out that the judgment had been entered".* Accordingly, the applicant was aware that of Chabot J. order since 29th September 2023. However, this Court takes judicial notice of the fact that there are processes to be followed, the judgment in my view was not "entered" at that time, that is, 29th September 2023 but on the 12th October 2023. In accordance with the rule I find that the period to be considered wherein the applicant is to act as soon as reasonably practicable began on 12th October 2023. By notice of application filed on 2nd November 2023 by the applicant moved the court to set aside the default judgment. This is more or less a period of three (3) weeks.

[20.] I find that a period of three (3) weeks satisfies the rule as it not an inordinately protracted or lengthy period in which to file such an application to set aside. The applicant relied on the authority of **Pierre and Gordon[2] v Prevatt** where Boodoosingh J. (as he then was) found that a defendant who filed an application to set aside six (6) after being served with the default judgment had acted as soon as reasonably possible. The court stated in that matter that it is important that the facts relied on are set out for the court to consider all the circumstances.

[21.] Notably, the CPR does not prescribe a time limit or gives guidance on a definition of the words" as soon as reasonably practicable". Therefore, it is my view that it is within the discretion of this Court based on the evidence before me to make a finding that the defendant has acted as soon as reasonably practicable.

[22.] In my view, there has been no considerable delay on the part of the applicant in applying to have the default judgment set aside. Three (3) weeks in all the circumstances is a reasonable time to have instructed their attorneys at law to file same and act on their behalf. For the sake of clarity I did take into consideration the fact that the applicant would have been aware of the order when it was made by Chabot J. on 29th September 2023. The notice of application to set aside was filed about five (5) weeks after that date. I am of the view that five (5) weeks was also not a lengthy period to file the application to set aside the default judgment.

Good Explanation for not filing Acknowledgement of Service

[23.] The second limb is whether there is a good explanation for not filing the acknowledgment of service.

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[2] CV 2008-02193

[24.] The evidence is that the applicant was served with the proceedings on 16th July 2022. The applicant then made contact with an attorney at law, Mr. Bradley and sent the documents to him on 27th July 2022. The applicant and Mr. Bradley had communication between the dates 25th July to 8th August 2022. On 5th August 2022, Mr. Bradley indicated that that he could not deal with the claim, this was the first time that this was made clear to the applicant. The applicant thereafter retained new attorneys on 8th August 2022.The new attorneys immediately filed an application for an extension of time and disputed jurisdiction of the claim.

[25.] In the Court of Appeal decision in the matter of **Bernaldo Jacobo Schmidt v Ephriam Usher** Civil Appeal No. 14 of 2017, the Court of Appeal found that the shortcomings of an attorney may amount to a good explanation. It was stated:

> "Timelines in conducting litigation must be observed by a litigant, but an attorney's error can be a good reason for missing a deadline and applying for an extension of time to appeal. However, the applicant must show that the delay was substantially due to the conduct of the attorney and litigants must show some degree of vigilance in protecting their own interest. Failing to make at least periodic enquires with an attorney can result in the court being of the view that the attorney's conduct may have contributed to the delay, but it was not the substantial reason."

[26.] I accept the applicant's uncontroverted evidence as outlined above. The evidence which is before me demonstrates that upon being served on 16th July, 2022 the applicant was diligent. I have found no evidence of indifference. The delay in the filing of the acknowledgement was the fault of his attorney at law over whom, given the circumstances the applicant had no control. However, upon learning of the attorney's inability to represent them the applicant acted quickly by retaining a new attorney at law.

[27.] In the circumstances I find that the explanation satisfies the rule in other words it is a good one. The failure to file was clearly out of the applicant's control due to the actions of the first attorney. I also do not find that the applicant's actions amount to any indifference on his part.

Real Prospect of Success

[28.] Does the applicant have a real prospect of successfully defending the claim? This Court is mindful that the applicant ought to have a realistic prospect of success in defending the claim as filed by the respondent. This concept of real means that there isn't the existence of some fanciful defence: **Swain v Hillman** [2001] 1 All ER 91 at 92.

[29.] In **Vincent v Vincent**[3] **t**he Court at paragraph 8 of the judgment relied on authorities to define the term.

> "8. This term was defined by Moosai J in JOHN v MAHABIR (John Mahabir HCA No.866 of 2005) et al as, "realistic prospect of success means that the defendant has to have a case which is better than merely arguable (International Finance Corporation v Utexafrica Sprl (2001) CLC 1361 and ED&F Man Liquid Products Ltd v Patel(2003) EWCA Civ 472). The Defendant is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable: White Book 2007 Vol 1 Tara 24.2.3. In determining whether the Defendant has a realistic prospect of success, **The court is not required to conduct a microscopic assessment of the evidence not a mini trial**. In *Royal Brampton Hospital NHS Trust v Hammond*, The Times, May 11, 2011, CA. it was held when deciding whether a defence had a real prospect of success, the court should not apply the same standard that would be applicable at trial, namely the balance of probabilities. **Instead, the court should also consider the evidence that could reasonably be expected to be available at trial.**"

[3] CV 1217 of 2008 (Trinidad and Tobago)

[30.] This matter concerns the recognition and enforcement of a judgment in Belize that was obtained in the United States of America (Massachusetts). The applicant has raised several defences to the statement of claim including jurisdiction in that the proper jurisdiction for the personal injury claim was that of Belize. I do not agree with the respondent that this is a matter only for the court in Massachusetts. I am of the view that jurisdiction is a live issue in this claim, in the sense that jurisdiction must be determined by private international law principles. There is also the issue of whether the recognition and enforcement of the US judgment is automatic and whether or not there is discretion to be exercised by the Belizean Courts regarding foreign judgments such as the one in which the respondent wishes to enforce in this case.

[31.] I have had sight of the draft defence which is annexed to the affidavit of Jose Paz and I am of the view that said defence raises a number of triable issues, these are:

a) Whether the proper jurisdiction for the personal injury claim was that of Belize.
b) Whether the foreign judgment is impeached and should not be enforced.
c) Whether the actual amount of the award was rational having regard to the different levels of awards for personal injuries and the substantive law in Belize.

[32.] I therefore find that the applicant has a realistic prospect of success in defending the claim as set out in the draft defence. The defences that are raised on its behalf are not fanciful but real issues which arise on the claim of the respondent.

[33.] The order of Chabot J. is therefore set aside accordingly. Further, following the guidance of **Lux Locations**, the order of Shoman J. is also set aside.

[34.] I have considered all the circumstances of this claim in particular the default judgment and the events which occurred before the matter came before this Court. I therefore order that each party should bear its own costs.

Disposition:

It is hereby ordered:

1. The default judgment dated 12th October, 2023 (the Order of Chabot J. dated 12th October 2023 and the Order of Shoman J. dated 11th January 2023) is set aside.
2. The applicant is granted an extension of time to file and serve its acknowledgement of service on or before 1st October 2024.
3. The applicant is granted an extension of time to file and serve its defence on or before 8th October 2024.
4. A case management conference is fixed for 4th November 2024.
5. Each party to bear its own costs.

NADINE NABIE

HIGH COURT JUDGE