IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE, A.D. 2020

CLAIM No. CV146 of 2020

BETWEEN:

[1] GARDEN MEDICAL CENTER LTD

Claimant/Respondent

and

[1] FARREN NORMAN RUIZ d.b.a. F&R ENTERPRISE

Defendant/Applicant

Appearances:

Mr. Leeroy Banner for the Claimant/Respondent

Mr. Orson J. Elrington for the Defendant/Applicant

2024: June 11 & 27;

July 11 & 12;

October 21.

RULING

Civil Practice & Procedure – Default Judgment – Application to Set Aside Judgment – CPR 13.2.1(a) – Whether Judgment Was Wrongly Entered – Proper Service – Personal Service – Proof of Personal Service – Whether Service of the Claim Was Properly Effected CPR 5.5 – Whether Judgment Must be Set Aside as of Right Because of Irregularity of Service – Whether Default Judgment Was Entered Pursuant to Which an Assessment of Damages Was Done – Whether the Pre-Conditions Must be Satisfied Where Irregularity of Service is Shown.

[1] **ALEXANDER, J.**: Before this court is an application filed on 22nd February 2022 to set aside a default judgment entered against the applicant ("Mr. Ruiz"). The application was couched, strangely, as a request to set aside a default judgment entered on **6th May 2021** pursuant to a request for default judgment made on 24th September 2020. The application

was filed pursuant to Part 13 of the Civil Procedure Rules 2005 ("CPR"). Mr. Ruiz has claimed that he was never served with the claim form and statement of claim ("the claim" or "originating documents").

[2] The court records show that there was a written decision on the assessment of damages that was delivered by Young J on 6th May 2021. There was no default judgment order that was entered on 6th May 2021. The assessment of damages decision was not an "order" granting a default judgment and, in fact, did not mention the date on which such a default judgment order was entered. The assessment decision merely referred to a default judgment order that preceded it, by stating that the decision was being given "following a default judgment on a Claim for breach of contract".

[3] Despite combing through the court filings, however, I have found no default judgment that was entered or any other liability order on record. There was only a request for default judgment that was filed on 24th September 2020. And there was the 6th May 2021 decision on the assessment of damages. Therefore, there was an assessment of damages hearing but it was done, however, in the absence of an order granting a default judgment. It is in this context that I understand why the notice of application to set aside default judgment, filed on 22nd February 2022, referred *only* to the "request" for the default judgment and the assessment of damages decision, but not to the actual date of any order granting a default judgment.

[4] The above facts present a conundrum in the procedural progress of this matter through the system. Therefore, I grant an order setting aside the decision made in this matter, on the basis that the claim was not properly served, and secondly, that there was no default judgment entered against Mr. Ruiz that settled liability on him.

[5] Further, I find as a fact on the evidence garnered from cross-examination that there was an irregularity of service of the claim in this matter and, as a result, there is no need to examine if the threshold pre-conditions have been satisfied, discussed further below in my paragraph 39.

History of Proceedings

[6] The facts of the substantive claim are not complicated and involve simply the breach of an oral agreement by Mr. Ruiz. It is what transpired after this claim was filed that introduces a measure of procedural uncertainty in the events that unfolded. I find it convenient at this stage to set out the procedural background that gave rise to Mr. Ruiz's application to set aside a default judgment (date unknown) that was allegedly entered against him, and which led to an assessment of damages decision issued on 6th May 2021.

[7] **On 10th March 2020**, the claimant, Garden Medical Center Ltd. ("GMC") filed a claim against Mr. Ruiz for damages for breach of contract. GMC also claimed special damages in the sum of BZ$55,562, interest and costs. The claim related to a verbal agreement between the parties entered into sometime in or around 5th September 2018 whereby Mr. Ruiz had agreed to supply and deliver a Mini Vidas Blue Compact Automated Immunoassay System ("the Mini Vidas System") to GMC.

[8] GMC claimed that a material term of this agreement was that the Mini Vidas System, together with reagents and testing tools, would be delivered within 2-3 weeks of the downpayment of BZ$15,000 by GMC. GMC claimed also that it made the downpayment on 5th September 2018, but the machine was not delivered on the date as agreed nor were the reagents and testing kits provided. In further breach, it was pleaded that Mr. Ruiz, contrary to the terms of the agreement, provided a used machine rather than a new Mini Vidas System. Mr. Ruiz also breached the agreement to provide training to GMC's personnel.

[9] **On 20th March 2020**, the originating documents were allegedly personally served on the defendant, Mr. Ruiz. In an affidavit of service sworn to on 26th March 2020 by PC Kerby Reynoso #2284, the deponent, stated that the claim was served at #13 Perez St. Santa Elena Town, Cayo District, in the evening, personally on Mr. Ruiz and was properly

subscribed in accordance with the rules. Mr. Ruiz was said to have acknowledged that he was the defendant in the matter and to have accepted service.

[10] **<u>On 24th September 2020</u>**, an application was filed requesting that a judgment in default of acknowledgement of service be entered, and that an assessment of damages be done for an amount to be determined by the court. The request for judgment was made pursuant to CPR 12.4.

[11] **<u>On 6th May 2021</u>**, a written decision was given on the assessment of damages where it was ordered that:

1. Special damages are awarded to the Claimant in the sum of $21,142.41 with interest at the statutory rate of 6% from the date of judgment herein until payment in full.
2. Cost is awarded on the prescribed basis in the sum of $3,171.36.

[12] **<u>On 22nd February 2022</u>**, an application to set aside default judgment was filed under CPR 13.2, and in the alternative CPR 13.3(1). In written submissions, counsel for Mr. Ruiz, Mr. O.J. Elrington, also referred to and relied on CPR 12.4. It is this application that currently engages this court.

Affidavit of Merit

[13] Mr. Ruiz filed an affidavit in support of the application to set aside the default judgment. Mr. Ruiz's case is that he was not served with the claim and first learned of a default judgment against him from his uncle, Mr. Ernest Franco, who told him that police were looking for him. Mr. Ruiz did not attach a draft defence to his application, which counsel for GMC asserted is fatal to the judgment being set aside. I disagree.

[14] In his affidavit of merit, Mr. Ruiz gave context to the claim against him, and provided his version of the oral agreement that was entered between the parties. In effect, his affidavit answers the claim by providing an alternative version of what transpired. Mr. Ruiz admitted that he had entered into a verbal agreement with GMC to supply and deliver the Mini Vidas System to GMC. The system was to be paid for by making a downpayment of

fifty percent (50%) on invoice and paying the remaining fifty percent (50%) on delivery, by instalments.

[15] Mr. Ruiz averred that pursuant to that agreement, sometime on or about 23rd August 2018, he signed an estimate, which stated that he would receive a cheque for BZ$15,922.41 from GMC and that thereafter, GMC would pay BZ$16,800 on a one-year payment plan, via monthly instalments of BZ$1,400, for the Mini Vidas System.

[16] Mr. Ruiz stated that he delivered the Mini Vidas System in December 2019 (sic). I assumed he meant 2018, neither party having provided the date of delivery of the Mini Vidas System. However, Mr. Ruiz says that he did not receive the agreed monthly instalment payments from GMC nor was he successful in getting these payments through repeated requests. By email dated 4th July 2019, Mr. Ruiz informed GMC that he would no longer be supplying reagents, which he had been doing as a courtesy until GMC made the agreed monthly instalment payments for the Mini Vidas System.

[17] **On 24th January 2020**, Mr. Ruiz filed a claim at the Magistrates' Court requesting payment of the outstanding balance from GMC. In March 2020, he was approached by Mr. Jose Guerra, an agent of GMC, with a proposal to settle the payments out of court. Subsequently, the proceedings at the Magistrates' Court were overtaken and/or stalled by events of the COVID-19 pandemic, which was foreshadowed by the declaration of a State of Emergency on or around 2nd April 2020. Mr. Ruiz was unable to attend any subsequent hearings.

[18] **On 11th February 2022**, Mr. Ruiz says that he was informed by his uncle, Mr. Ernesto Franco, who lives in Belmopan, that the police were looking for him at his previous address. It was on this date that he says he first learned about the default judgment.

[19] **On 15th February 2022**, he retained the services of Elrington and Company to represent him in this matter. The present application was filed on 22nd February 2022.

The Legal Framework

[20] The present proceedings raise the issue of irregularity of service as the basis for setting aside the default judgment in this matter. I will proceed for convenience, by treating with this matter as if there were a default judgment order entered under Part 12 on the record. In fact, parties have proceeded, in advancing the current application and in defending it, as if such a Part 12 default judgment for failure to acknowledge service was actually entered against Mr. Ruiz, without either party furnishing a copy or providing a date of entry of the default judgment.

[21] For present purposes, I will set out CPR 13.2(1) and (2) and CPR 13.3. Of note, it is only where CPR 13.2 does not apply, a court is to have resort to CPR 13.3 (which involves the threshold pre-conditions of acting as soon as reasonably practicable, good explanation and real prospect of successfully defending the claim). I will also set out CPR 12.4 and CPR 5.1 to CPR 5.5 as these are critical rules for disposing fairly of this matter.

[22] The applicable rules on **setting aside a default judgment** are as follows:

> CPR 13.2. (1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
> (a) in the case of a failure to file an acknowledgement of service, any of the conditions in Rule 12.4 was not satisfied; or
> (b) in the case of judgment for failure to defend, any of the conditions in Rule 12.5 was not satisfied.
>
> CPR 13.2 (2) The court may set aside judgment under this Rule on, or without an, application.
>
> 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 acknowledgement of service or a defence, as the case may be; and
> (c) has a real prospect of successfully defending the claim.
> (d) in the case of a failure to file an acknowledgement of service, any of the conditions in Rule 12.4 was not satisfied

CPR 13.3 (2) Where this Rule gives the court power to set aside a judgment, the court may instead vary it.

CPR 13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence.

[23] The applicable rules on how to get a **Part 12 default judgment** are as follows:

CPR 12.4 The court office, at the request of the claimant, must entered judgment for failure to file an acknowledgement of service, if –

(a) the claimant proves service of the claim form and statement of claim;

(b) the period for filing an acknowledgement of service under Rule 9.3 has expired;

(c) the defendant has not filed –

(i) an acknowledgement of service; or

(ii) a defence to the claim or any part of it;

(d) the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it, where the only claim is for a specified sum of money, apart from costs and interest.

(e) The defendant has not satisfied in full the claim on which the claimant seeks judgment; and

(f) The claimant has permission to enter judgment (where necessary).

[24] The applicable rules on **Service** are as follows:

CPR 5.1. (1) The general rule is that a claim form must be served personally on each defendant.

CPR 5.2 (1) The general rule is that the claimant's statement of claim must be served with the claim form.

….

CPR 5.3 A claim form is served personally on an individual by handing it to, or leaving it with, the person to be served.

….

CPR 5.5 (1) Personal service of the claim form is proved by an affidavit sworn by the server stating –

(a) the date and time of service;

(b) the precise place or address at which it was served;

(c) the precise manner by which the person on whom the claim form was served was identified; and

(d) precisely how the claim form was served.

(2) Where the person served was identified by another person, there must also be filed where practicable an affidavit by that person –
(a) proving the identification of the person served; and
(b) stating how the maker of the affidavit was able to identify the person served

(3) Where the server identified the person to be served by means of a photograph or description there must also be filed an affidavit by a person–
(a) verifying the description or photograph as being of the person intended to be served; and
(b) stating how the maker of the affidavit is able to verify the description or photograph as being of the person intended to be served.

Issues

[25] The main issue, as the court finds it, is whether the "default judgment" handed down in this matter ought to be set aside as of right because GMC has failed to prove that its service of the claim was valid? To properly dispose of that broad issue, I find the corollary issues set out below must first be traversed:

1. Whether the claim form and statement of claim were served properly?
2. Whether default judgment was properly entered against the defendant, Mr. Ruiz, and the assessment should not be disturbed?
3. Whether the judgment in default of acknowledgment should be set aside?

Discussion

Issue No. 1: Whether the Claim Form and Statement of Claim were Served Properly?

[26] The question of service is central to the resolution of the present proceedings before me. The rules are clear that service of the claim must be done personally. The rules are also clear on how personal service is to be effected and provide the procedure for proof of service. The service roadmap culminates with an affidavit of service, the contents of which

are stipulated in the rules, as read then with sections 78(1) of the Supreme Court of Judicature Act (now s.83 of the Senior Courts Act. 2022).

[27] All steps taken after service must be informed or guided by the proper adherence to the procedural regime for service of these originating documents to avoid the risk of subsequent court interventions to set service aside. The need for compliance with the regime for service and the requirements to be satisfied to obtain a default judgment were emphasised in **Hugh Graham et al** v **Cecil Dillon et al**.[1] Essentially, court officers acting pursuant to the service of the claim must be satisfied that personal service was done in accordance with the rules, and not be misled into taking steps in the litigation process on the basis of improper service.

[28] In the present proceedings, the originating documents are said to have been served "personally" on Mr. Ruiz on Friday 20th March 2020 in the Cayo District by PC Reynoso. I will set out the affidavit of service filed by PC Reynoso ("the Reynoso affidavit"):

> I, **PC Kerby Reynoso, #2284**, Police Constable of San Ignacio Town, Cayo District, Belize MAKE OATH AND SAY as follows:-
>
> 1. I did on Friday the 20th day of March, 2020 at #13 Perez St., Santa Elena Town, Cayo District, in the evening, personally serve **FARREN NORMAN RUIZ** the Defendant in this claim, with a true copy of the Claim Form together with a Statement of Claim Notes for Defendant, Acknowledgement of Service, Defence and Counterclaim, in this Claim dated 10th day of March 2020 in this action, which appeared to me to have been regularly issued out of the Supreme Court Registry by delivering the same, personally to **FARREN NORMAN RUIZ**.
>
> 2. At the time of the said service the said documents were subscribed in the manner and form prescribed by the Rules of the Supreme Court.
>
> 3. The said **FARREN NORMAN RUIZ** acknowledged that he is the said Defendant in the captioned claim. [Emphasis Original].

[1] (2004) No. 27 of 2002, Jamaica Supreme Court.

[29] First, service is said to have been effected by PC Kerby Reynoso, who was then a police constable. It would help if a police officer who serves any court process in a district other than the Belize District indicates in his affidavit of service whether he was a non-commissioned officer. This is a statutory requirement, as a police officer's authority to effect service will not be presumed. In these proceedings, no evidence was led demonstrating that GMC's process server, PC Reynoso, satisfied the requirements of section 78 of the Supreme Court of Judicature Act, that as a police officer in a district other than the Belize District, he had the powers of the marshal to serve any process required by law. Section 78 of the Supreme Court of Judicature Act (now replicated in s.83 of the Senior Courts Act, 2022) provides:

> Every non-commissioned police officer stationed in a district other than the Belize District shall have all the powers of the marshal for the purposes of serving any process, or executing any judgment of the Court in its civil jurisdiction, or any other process which the law requires to be served or executed by the marshal.[2]

[30] Secondly, the Reynoso affidavit does not comply with the rules for service and its proof. The rules set out above at paragraph 24 expressly require the affiant, PC Reynoso, to provide a date and time of service, and the precise manner of how the person served was identified. PC Reynoso did specify the date on which service was effected but did not provide the time of service. Instead, the affiant refers to service being done "in the evening", which is not *per se* a "time" of service but a period within which service was effected. As the term "evening" describes a period comprising of several hours of time, the use of this term is not sufficient to satisfy the requirement in the rules for the time of service to be provided. Of note is that during the examination in chief of the affiant, he did state that service was effected at 5:10 p.m. on 20th March 2020. I am uncertain why this time was not provided in the affidavit of service, where it was most needed.

[31] In addition, the affidavit of service fails to state the "**precise manner by which the person … served was identified**." [My Emphasis]. In my judgment, this failure is fatal and renders any affidavit of service that is relied on to obtain a default judgment

---

[2] Section 78(1) of the Supreme Court of Judicature Act R.E. 2011 and section 83 of the Senior Courts Act, 2022.

unreliable. Service is the means of notifying the other side of legal proceedings being instituted against the defendant and without service, a defendant is unable to respond to the claim. Therefore, service must be properly effected for an answer to a claim to be provided. The negative impacts of improper or irregular service are demonstrated in the current case before the court.

[32] PC Reynoso provided evidence in court to wit that he had visited the residence located at #13 Perez Street, Santa Elena Town, Cayo District where he met a gentleman who came to the door and on being asked if he was Mr. Farren Norman Ruiz, the man said yes. PC Reynoso then explained the reason for his visit, specifically telling the defendant, Mr. Ruiz, that he was there to serve a civil suit from the claimant, Garden Medical Centre Claim No. 146 of 2020. PC Reynoso said in examination in chief that he then "handed" the claim to Mr. Ruiz and asked him to sign it. Mr. Ruiz refused to sign but "stayed with a copy." On clarification of service being sought, PC Reynoso explained that Mr. Ruiz took the claim and kept it. Interestingly, none of these statements were incorporated into the affidavit of service by the affiant.

[33] PC Reynoso was cross-examined on his affidavit and provided some interesting responses and admissions. PC Reynoso maintained that he had personally served the defendant, Mr. Ruiz. He admitted that he did not use, in his affidavit of service, the phrases "handed it" or "by leaving it" but, nevertheless, "the affidavit was personally served". I assume that PC Reynoso meant that the claim (not affidavit) was personally served, and, in any event, nothing turns on this slip of the tongue. During cross-examination, PC Reynoso admitted that he did not say in his affidavit of service whether he had seen or obtained a copy of Mr. Ruiz's social security card or passport or any form of identification from the person he handed the claim documents to nor did he make such an averment in his affidavit of service. He also admitted that he did not incorporate in his affidavit of service a photograph or video, nor did he say that he had explained the documents being served to the person to whom he had handed them. In fact, PC Reynoso stated in open court "I do not know the defendant".

[34] The court then asked a few questions of PC Reynoso, which are reproduced below because the responses are significant to the disposition of this application.

The Court:	Did you serve this defendant prior to this date?
PC Reynoso:	No, Your Honour, I didn't.
The Court:	Was this the first time …
PC Reynoso:	That was the first time.
The Court:	… that you were meeting him?
PC Reynoso:	Yes, Your Honour.
The Court:	You said he kept the document?
PC Reynoso:	Yes, he kept a copy of it.
The Court:	He just refused to sign?
PC Reynoso:	Yes, Your Honour, he refused to sign.
The Court:	But he kept it?
PC Reynoso:	Yes, Your Honour.
The Court:	He told you he was the defendant?
PC Reynoso:	Yes, Your Honour, he did.

[35] The exchanges in clarification between the court and PC Reynoso made it abundantly clear that **<u>PC Reynoso did not know the defendant</u>**. In fact, PC Reynoso admitted that prior to effecting personal service on Mr. Ruiz, he did not know who Mr. Ruiz was and that the hearing of the cross-examination of him on his affidavit of service was the first time he had seen Mr. Ruiz. The rules set out the procedure to be followed where a process server does not know the defendant whom he is required to serve personally. The process server must say how he identified the defendant, as the defendant in the proceedings, and/or if the defendant was pointed out to him by someone else. If the latter was the precise manner of identification of the defendant, then an affidavit attesting to this form of identification, by the person who pointed out the defendant, must be filed with the affidavit of service.

[36] The affidavit of service is deficient. It did not state the "precise manner by which the person on whom the claim form was served was identified". In fact, the affidavit of service did not say how Mr. Ruiz was identified. It also did not provide any evidence confirming the identity of Mr. Ruiz, whether by a form of identification or by an affidavit of another witness who had identified Mr. Ruiz as the defendant to PC Reynoso. The affidavit of

service simply stated that Mr. Ruiz was served personally. This is a deficient affidavit on which no Part 12 default judgment could be obtained. On this basis alone, service is deemed *irregular* and any judgment pursuant thereto must be set aside. Further, the cross-examination of PC Reynoso confirms that he did not know the defendant, Mr. Ruiz, prior to "personally" serving him and that he saw Mr. Ruiz first at court, on the date of the cross-examination.

[37] The burden of proof is on GMC and GMC has failed to satisfy me of proof of personal service on Mr. Ruiz.

[38] In the circumstances, I set aside the service in this matter as irregular. It was wrong and fails to meet the threshold to constitute personal service. I find as a fact that the evidence before me supports the case advanced by the defendant, Mr. Ruiz, that he was never served with the claim. All steps taken pursuant to this irregular service were improperly taken so the default judgment, if indeed one existed, is set aside.

[39] Given my decision in paragraphs 36 to 38, there is no need to discuss the other issues. I say only for clarification that the rules are clear that where irregularity of service of the claim is established, the court must set aside any default judgment obtained on the basis of the wrong service. CPR 13.2(1) (a) is mandatory. Consequently, there is no need to hear or consider any arguments on whether the three threshold pre-conditions for setting aside a default judgment were satisfied or not. Therefore, the submissions of Mr. Banner, GMC's counsel, that are skewed solely to these pre-conditions, are not relevant or considered in coming to my decision. For completeness, I have considered but will not follow the decisions issued in the cases of **Ephraim Usher** v **Bernaldo Jacobo Schmidt**[3] by Young J and **Michael Hannah Chebat Jr.** v **The Guardian Newspaper Limited**[4] by Goonetilleke J and **Perez** v **Banner**.[5] I find these authorities inapplicable to the present matter before me.

---

[3] Claim No, 99 of 2017, Belize.
[4] Civil Claim No. 146 of 2022.
[5] (2009) 73 WIR 74.

[40] Given the above, it is clear that personal service was not properly effected, so any default judgment secured on that basis is set aside and/or all subsequent proceedings cannot stand. I will not interrogate whether a default judgment was obtained or not, or if it was properly obtained, or even the basis on which the assessment was done. These additional issues are rendered moot by my conclusions on the first issue.

Costs

[41] On the question of cost, the general rule obtains, which is that cost usually follows the event. The successful party is Mr. Ruiz, and I grant him the cost of the application.

[42] In coming to a determination on an award of cost for the application, I considered the work done by counsel in advancing the application and that counsel is entitled to an award of reasonable cost. I find it reasonable and do award the cost of the application in the sum of BZ$3,500.

Disposition

[43] It is ordered that:

1. The service of the claim form and statement of claim was irregular, and any subsequent proceedings done pursuant to that wrong service is set aside or cannot stand.
2. The defendant is awarded cost of the application in the sum of BZ$3,500.

Martha Alexander

High Court Judge