

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE A.D. 2021

CLAIM No. CV796 of 2021

BETWEEN:

AHMAD HARMOUCH

Claimant/Respondent

and

HELAL MIAH

Defendant/Applicant

Appearances:

Mr. Lynden N. Jones for the Claimant/Respondent

Mr. Estevan Perera for the Defendant/Applicant

2024: November 21;

November 26.

RULING

Civil Practice and Procedure – Setting Aside Default Judgment – Claim for Some Other Remedy – Form 7 Request Used for Judgment – Whether Irregular Judgment Entered – CPR 12.10(4) and (5) – Whether Default Judgment to be Set Aside as of Right – Costs.

- [1] **ALEXANDER, J.:** This ruling relates to an application filed on the 14th May 2024 to set aside the default judgment entered against the applicant on the 14th July 2022 (“the judgment”). The applicant asked the court to set aside the judgment because it was irregularly entered. It ought not to have been requested by way of a Form 7 and the court office had no authority to issue the judgment, as an administrative exercise.

- [2] The claim was for a specified sum of BZ\$100,000.00 for outstanding rent owed, a monetary penalty of BZ\$100,000.00 and counting for non-payment of rent (i.e. effectively for damages) and an eviction order.
- [3] The respondent submitted that his claim was largely for a specified sum, as the recovery of rent and the penalty for non-payment of rent were sought in a specific sum. The eviction order did not form part of the Form 7 request for entry of judgment in default, so it was really the error of the court office to have incorporated it into the judgment. I agreed with counsel for the respondent, Mr. Jones, that it was wrong for the court office to have granted an order for eviction via a Form 7 request.
- [4] In my view, further, the court office was also wrong to have issued *any* default judgment via a Form 7 request in the circumstances of the present claim. The claim was not only for a specified sum, and even if the Form 7 request only sought the specified sum, the judgment could not be granted as an administrative exercise, given the nature of the reliefs claimed.
- [5] I am of the view further that, as drafted, this was not a claim for a part specified and part unspecified amount to be determined by the court (e.g. via assessment) and which required another step to be taken in the process to get the default judgment via a Form 7. In any event, the respondent did not “abandon” or withdraw the other remedies sought in the claim form in order to request a default judgment for only the specified sum.¹ It was clear on the pleadings that the respondent’s claim was not only for a specified sum. It included the reliefs of a monetary sum as a penalty for non-payment of rent and an order for eviction. It was, therefore, a claim for some other remedy. Before a judgment is granted on a claim for some other remedy, a judge must give judicious consideration of the claim and based on the evidence render a judgment.

¹ Rule 12.8(3) of the Civil Procedure Rules, 2005 Belize provides for a claim for an unspecified relief to be abandoned before entering default judgment for the specified sum.

- [6] Further, the arguments that the application did not satisfy Part 13 of the Civil Procedure Rules, 2005 (“CPR”), particularly as it related to the requirement to satisfy the “as soon as reasonably practicable limb” to get a judgment set aside, are misconceived. That particular submission holds no weight nor is it to be considered in a case such as the present one where the setting aside request is based on the issue of the irregularity of the judgment obtained. Once the judgment is found to have been wrongly issued, I am mandated to set it aside.
- [7] I find that the claim, as pleaded, required judicious consideration and/or oversight before judgment is entered. It is not a claim for a specified sum only. It is not a claim for a part specified and part unspecified sum that requires the taking of another step in the procedure before filing a Form 7 request. It is a claim seeking some other remedy, and the rules prescribe how this type of judgment is to be requested and dealt with. This judgment is not secured by way of a Form 7 request. It requires that an application is filed supported by affidavit evidence, which enables the matter to be placed before a judge in order for a judgment to be entered. This procedure was circumvented by the Form 7 request for a default judgment. It was the wrong procedure used.
- [8] The judgment entered by the court office on the 14th day of July 2022 in default of an acknowledgement of service is irregular and is set aside.
- [9] I will refer to the applicant as “Mr. Miah” and the respondent as “Mr. Harmouch”.

Background

- [10] I think it apt to give a brief history of the proceedings for context. On or about 9th December 2021, Mr. Harmouch filed Claim No. 796 of 2021 against Mr. Miah and served him on 21st February 2022. The reliefs sought were:
- a) \$100,000.00 BZD for 4 months’ rent owed.
 - b) \$100,000.00 BZD and counting **as Penalty for nonpayment**.
 - c) **Eviction** for breach of contract.
 - d) Costs and any other reliefs the court thinks fit. [My Emphasis].

[11] Mr. Miah did not file an acknowledgement of service within the permitted time. On 21st June 2021, Mr. Harmouch applied for entry of judgment in default, making his request by way of the prescribed Form 7. On 14th July 2022, the court office entered default judgment. The judgment is reproduced in full below:

“The above-named Defendant, **HELAL MIAH** not having filed an Acknowledgement of Service herein **IT IS THIS DAY ADJUDGED** that Judgment should be entered for the Claimant against the Defendant in the amount of **\$205,252.50** with (sic) and cost.

IT IS FURTHER ORDERED that the Defendant **HELAL MIAH** be evicted of the premises.” [Emphasis Original].

[12] The matter continued progressing before the court as a judgment summons was filed to recover the judgment debt.

The Application to Set Aside Default Judgment

[13] Mr. Miah filed the application to set aside the judgment on 14th May 2024. By that date, some one year and ten months had passed. The application was supported by two affidavits, the first affidavit was sworn on 14th May 2024 by Ms. Tara Chun, a legal assistant in the firm of Mr. Perera, counsel for Mr. Miah, and the second affidavit was sworn by Mr. Miah on 10th July 2024. In his affidavit, Mr. Miah averred simply that he has a real prospect of success in defending the claim and that he had made a payment to Mr. Harmouch sometime in September 2021. He asserted, however, that “the penalties being claimed by the Claimant are unenforceable and illegal.”

[14] Mr. Harmouch filed an affidavit in response on 17th July 2024. The parties made oral submissions to the court on 21st November 2024. At that hearing, Mr. Miah advanced that he is entitled to have the judgment set aside as of right. Counsel for Mr. Harmouch resisted that argument by stating that the rules for setting aside a judgment were not satisfied, and Mr. Harmouch was aware of the existence of the judgment for a lengthy period and had not taken any steps to set it aside. Mr. Jones conceded only that the judgment order included a judgment for eviction that was not requested in the Form 7.

Issues

[15] I have identified the issues for determination by this court as follows:

1. Whether the request for judgment using a Form 7 was proper?
2. Whether the judgment is to be set aside as of right or is governed by Rule 13?

The Rules

[16] The pertinent rules governing a judgment being set aside as of right as against a judgment that requires satisfaction of identified requirements under Part 13, before it could be set aside, are set out below.

Rule 13.2 (Setting Aside as of Right)

“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 acknowledgment 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.
- (2) The court may set aside judgment under this Rule on, or without an, application.” [My Emphasis].**

Rule 12.4 (Setting Aside on Fulfilling Specified Conditions)

“12.4 The court office, at the request of the claimant, must enter judgment for failure to file an acknowledgment of service, if –

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the period for filing an acknowledgment of service under Rule 9.3 has expired;
- (c) the defendant has not filed –
 - (i) an acknowledgment 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)”

Rule 12.8 (3) (Claim for Specified Sum)

“12.8 (3) Where a claim is partly for a specified sum and partly for an unspecified sum, the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum.

Rule 12.10 (4) and (5) (Nature of Default Judgment)

“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.

(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 evidence on affidavit** and Rule 11. 15 does not apply.” [My Emphasis]

Discussion

[17] Having set out the rules, I am to determine whether the judgment that was entered by the court office was patently and plainly wrong and to be set aside as of right.

[18] As a precursor to the discussion, it is to be noted that the rules provide two distinct mechanisms for obtaining default judgments - default judgment obtained purely by administrative entry by the court office, and claims requiring adjudication by the court (i.e. a judge) upon application supported by affidavit. Where the rules require a default judgment upon adjudication by the court, unless and until there is such a determination by the judge, there is no default judgment. As stated above, the claim is for some other remedy so requires a judgment to be issued by a judge.

[19] Given the above, it is clear that the Mr. Harmouch's arguments on the failure of Mr. Miah to satisfy the conditions presented by CPR 13.3 are not relevant or considered in disposing of the present application.

[20] The rules clearly spell out that the court's power to set aside a judgment that is wrongly entered may or may not be done by an application. In the instant case, Mr. Miah filed the application, which he supports with two affidavits and a draft defence. Mr. Miah rests his application on the fact that he is entitled to get the judgment set aside as of right under CPR 13.2(1).

Whether the Request for Judgment Using a Form 7 was Proper?

[21] This issue is a short one. Mr. Perera advances that a Form 7 request is inapplicable to a judgment for an unspecified sum of money but is restricted to a judgment for a specified sum of money only. The default judgment obtained by Mr. Harmouch was applied for using the prescribed Form 7, so it was irregularly and wrongly entered by the court office pursuant to CPR 12.4.

[22] Mr. Jones maintains that the Form 7 request was the proper procedure. The Form 7 request related to a judgment for a specified sum of money only. Mr. Harmouch did not request any other order on the Form 7. The court office erroneously inserted an order for eviction on entering the default judgment. As eviction was not requested and did not form part of the Form 7 request, so the court office can vary or amend its judgment to reflect the correct order for a specified sum of money only. Of note is that CPR 13.3(2) vests the court with the power to vary its judgment in lieu of setting it aside.

[23] It is important to start with the claim itself. Mr. Harmouch did not claim only a specified sum of money. He also sought the reliefs of an eviction order and a monetary penalty for non-payment of rent. Interestingly, this latter relief is pleaded as a continuing penalty. The rules are clear regarding when the Form 7 request can be used.

[24] CPR 12.7 provides that a Form 7 is to be used to request a default judgment. CPR 12.8 makes clear that a claim for a specified sum of money includes claims for costs and interest at a specified rate. In effect, seeking these reliefs (costs and interest) do not preclude the claim from being a claim for a specified sum of money nor do they preclude the use of the Form 7. Where the claim is for a specified sum of money, but interest is being claimed at an unspecified rate, a claimant may apply for judgment for either the specified sum claimed with statutory interest to the date of judgment, or he may apply for the judgment in the specify sum and have the interest assessed. Assessments are not administrative exercises done by the court office.

[25] The rules go further to state categorically that where the claim is partly for a specified sum and partly for an unspecified sum, the claimant must take *a further step* before he could secure judgment. The rules provide that in such instances, the claimant may *abandon* the claim for the unspecified sum and have judgment entered for the specified sum: CPR 12.8(3). This still allows for the use of the Form 7 request for the default judgment to be entered.

CPR 12.8(3)

Where a claim is partly for a specified sum and partly for an unspecified sum, the **claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum**. [My Emphasis].

CPR 12.10(1) (b)

[Default judgment] on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court.

[26] When dealing with a claim for an unspecified sum such as damages in part and a specified sum in part, it must be shown that a notice abandoning or withdrawing the claim for the unspecified relief is filed before the judgment is entered. If a Form 7 judgment is entered without the abandonment of the claim for the unspecified sum or the judgment includes the unspecified claim, it is wrongly entered. There is no evidence provided that any relief was abandoned before the judgment in issue in these proceedings was entered.

In fact, the court office acknowledged the continuing existence of the claim for an eviction by incorporating it into the judgment that was entered. However, the instant claim is different and does not require another step to be taken that would allow for the administrative judgment to be entered.

[27] In my view, the instant claim is clearly for **some other remedy**. A default judgment is not available for a claim for “some other remedy” other than under rule 12.10(4), that is by way of an application to the court. CPR 12.10(4) is clear that a default judgment for a claim for “some other remedy” shall be in such form as the court considers the claimant to be entitled, based on his statement of claim. CPR 12.10 (5) also makes clear that what is required to get such a judgment under CPR 12.10(4) is an application supported by affidavit. Upon the filing of these documents, the court will then determine the terms of the judgment. Basically, a judgment for some other remedy requires the exercise of the judicial mind in granting it.

[28] I find that, the default judgment order as entered by the court office was in terms that were in breach of CPR 12.10(4) and (5) and, therefore, also in breach of CPR 12.4. In short, because the judgment was applied for using a Form 7, and not an application supported by affidavit evidence, the default judgment was wrongly entered as an administrative process by the court office.

[29] The Form 7 request and the judgment issued pursuant to it followed the wrong procedure.

Whether the Judgment is to be Set Aside as of Right or is Governed by Rule 13?

[30] I have found that the judgment was wrongly issued and based on that finding alone, the judgment can be set aside as of right. However, in the event that I am wrong in my conclusions, I will examine the second issue on setting aside as of right.

[31] In what circumstances is a default judgment to be set aside as of right? If a default judgment is obtained without the claimant taking a requisite step in the commencement of proceedings such as proper service or the defendant can show that the correct

procedures were not followed to obtain the default judgment, the judgment can be set aside as of right.² Where a judgment is set aside as of right, a defendant would not have to satisfy the requirement of showing a defence to the claim. In the present claim, however, a draft defence was attached to the application.

[32] Mr. Perera submitted that it was an incorrect procedure used to get the judgment. CPR 13.2(1) and CPR 12.4 simply do not permit the entry of a default judgment by the court office in the terms ordered on 14th July 2022. It was procedurally wrong and must be set aside as of right. As stated above, I agree with Mr. Perera whose interpretation of the rules here I consider to be unimpeachable. I have also carefully considered the arguments raised by Mr. Jones. According to Mr. Jones, the eviction order that forms a part of the judgment was indeed wrongly entered. Mr. Jones submitted that the error was the fault of the court office, which presumably can amend its wrong order. Mr. Jones' position is that in all other material respects the judgment must stand for the specified sum, which was claimed. Respectfully, I do not share this view.

[33] A close examination of Mr. Harmouch's claim reveals that it is for recovery of monies for four months' rent in the sum of BZ\$100,000.00 plus an additional BZ\$100,000.00 and counting as penalty for non-payment of rent (i.e. effectively damages) and an eviction order. At the oral submissions, Mr. Jones advanced that the claim for the penalty for non-payment of rent was based on the contract between the parties. It is precisely because of this why judicial scrutiny is required before judgment is entered. Clearly, the claim is for "some other remedy" in addition to the specified sum. The judgment by the court office was wrongly entered, and contrary to Mr. Jones' argument, the court office has no power to correct or vary the terms of the judgment. To have secured a judgment for some other remedy, it was necessary for Mr. Harmouch to file an application supported by evidence on an affidavit for a judge to make a determination.

[34] This position was confirmed in **Lux Locations Ltd v Yida Zhang**,³ from which I quote liberally:

² Royal Trust Corporation of Canada v Dunn 6 OR 3rd 468, at pages 478-478.

³ [2023] UKPC 3.

“40. The Rules do not say that, on a claim for “some other remedy,” the court office must enter a default judgment before an application for the court to determine the terms of the judgment under rule 12.10(4) has been made. Reading rules 12.5 and 12.10 together, it is apparent that, whatever the nature of the claim, only one default judgment is envisaged, the content of which is provided for by rule 12.10. **Where the claim is for a sum of money, the form of the default judgment is prescribed by rule 12.10(1) and the court office can and should therefore proceed to enter judgment immediately. Where, on the other hand, the claim is for a remedy other than money – either an order to deliver goods or “some other remedy” - a decision of the court is needed before judgment can be entered.**

41. Rather than assisting Mr Yida’s argument, the comparison with a claim for an unspecified sum of money in the Board’s view shows why his argument is wrong. As already mentioned, on a claim for an unspecified sum of money where the conditions in rule 12.5 are satisfied, rule 12.10(1)(b) requires a default judgment to be entered for the payment of a sum of money to be decided by the court. Rule 16.2 set outs the procedure for assessing damages after such a judgment has been entered. This procedure is not part of the default process but in effect involves a trial of the issue of quantum. **By contrast, where the claim is for some other remedy, the rules do not provide for a default judgment to be entered for relief to be determined in accordance with some further procedure. Rather, rule 12.10(4) requires default judgment to be “in such form as the court considers the claimant to be entitled to on the statement of claim”. It follows that default judgment cannot be entered before a determination by the court under rule 12.10(4) has taken place.**

...

43. .. **If a claimant wishes to obtain a default judgment for both a sum of money and some other remedy, CPR rule 12.4 expressly requires an application to be made.** This situation is not expressly dealt with in the Eastern Caribbean Civil Procedure Rules, but this may be how the Rules should be interpreted. If so, then rule 12.13(b) is otiose, as a situation in which a default judgment is entered before an application under rule 12.10(4) and (5) is determined cannot arise. **However, while this represents an infelicity in the drafting of the Rules, it is not a point of sufficient weight to affect the clear meaning of rules 12.5 and 12.10.** The presence of rule 12.13(b) cannot wag the dog by creating a two-step procedure for which rules 12.5 and 12.10 do not provide.

44. **It follows that the court office was right to inform Mr. Yida’s attorneys that, because his claim was for “some other remedy,” a default judgment could not be entered other than under rule 12.10(4) on an application to the court.** But it is still necessary to consider the argument, which the Court of Appeal accepted (see para 27 above), that, in determining the terms of the judgment under rule 12.10(4), the court should not consider the merits of the claim but should treat the allegations in the statement of claim as true and conclusive of liability and should decide on that assumption what remedy is appropriate.” [My Emphasis].

[35] I find that the instant claim is for some other remedy in addition to a specified sum of money. If Mr. Harmouch wished to obtain a default judgment for both a sum of money and for some other remedy, it was necessary for him to file an application supported by evidence on an affidavit for a judge to decide the terms of the judgment. It was not the proper procedure to have used a Form 7 request when procedurally, an application supported by evidence on an affidavit was necessary to obtain judicial scrutiny.

[36] By failing to follow the proper procedure to obtain the judgment, there was no judicial scrutiny of the application to ensure that the appropriate reliefs, based on the claim and statement of claim, were granted. The failure to have the claim scrutinized by a judge resulted in the sum of BZ\$100,000.00 and counting as a penalty for non-payment of rent being granted by way of a default judgment. I agree with Mr. Perera that the law finds untenable and unenforceable damages that are unreasonably large, particularly when such damages are meant to be punitive.

[37] I find the award of BZ\$100,000.00 and counting as a penalty for non-payment of rent by way of the unscrutinized default judgment to be excessive and unenforceable. The judgment was entered in breach of the rules governing default judgments. The judgment should not have been granted by way of a Form 7 request under the hand of an administrative act by the court office. I find the judgment, which was obtained without proper judicial scrutiny, to be irregular and improper and I set it aside as of right.

Nullity Argument, as Alternative

[38] Nullity was not identified by me as an issue in this matter, but Mr. Perera did raise it in the alternative to get the judgment set aside. Given my ruling above, I do not find necessary to discuss nullity in the circumstances of this case.

Costs

[39] The general principle that costs for setting aside a default judgment would be awarded to the claimant will not be followed in this case. The judgment was wrongly obtained. I award costs to the defendant, Mr. Miah, in the sum of BZ\$3,000.00.

Disposition

[40] It is ordered as follows that:

1. The defendant's application to set aside the default judgment entered on 14th July 2022 is granted.
2. The defendant is to file and serve his defence within 28 days of today's date and/or no later than 27th December 2024.
3. The claimant is to pay the defendant's costs of the application in the sum of BZ\$3,000.00.

Martha Lynette Alexander
High Court Judge