

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. 27 of 2014

BETWEEN

:

BARGAIN BOX (Fiji) LTD a limited liability
Company duly incorporated in Fiji and having its
registered office at Kashmir, Lautoka

PLAINTIFF

AND

:

AMAR DEO trading as **DEO'S EZY BUY** of Nasea,
Labasa

DEFENDANT

Appearances:

Mr. A Sen of Maqbool & Co for the Plaintiff

Mr. Sharma of Samusamuvodere Sharma Law for the Defendant.

Date of Hearing : 1st July 2015

Date of Ruling : 21 January 2016

RULING

Introduction

1. The defendant by motion dated the 10 December 2014 applies to the Court for the setting aside of the default judgment obtained by the plaintiff on the 6 August 2014. The application was supported by the Defendant's affidavit which states that he was not served with the statement of claim and therefore was unable to acknowledge service thereof or file a defence.

2. The defendant further stated that he was only aware of the claim when he was served with a Bankruptcy Notice and then discovered that there was a default judgement obtained against him.
3. The defendant states further that the claim against him by the defendant arose out of a verbal agreement entered into between the parties on the 24 May 2012. The agreement was in relation to the supply of goods and that the plaintiff stopped the supply of goods without any good reason. The defendant further states that there are tri-able issues and that he has a good defence on the merit and further that the plaintiff would not be prejudiced by the setting aside.
4. The application is opposed by the plaintiff who filed an affidavit sworn by one of the directors of the company one Rita Roy on the 20 May 2015. Although the deponent states in the affidavit that she is one of the directors of the defendant company and that she is authorised to swear the affidavit on its behalf there was no evidence annexed to the affidavit to prove that she is one of the directors of the company or that she is authorised to swear the affidavit on its behalf. It follows that the Court will not consider the affidavit as a true reflection of the defendant's position but will accept the fact that it opposes the application to set aside the default judgment. Neither will I consider the reply to the affidavit sworn by the defendant and base the Court's ruling on the merit of the application.

Determination

5. The first issue to look into in any setting aside application is whether the default judgment was regular or irregular. If the default judgment was obtained irregularly then it follows that the defendant has a right to have the judgment set aside. A default judgment entered irregularly would for example be a default judgment obtained where the writ or claim was not served on the defendant or where the claim was un-liquidated but without proof of the claim default judgment was obtained. In these instances default judgment would be set aside as of right.

6. In this matter the claim is for a liquidated amount, it is for a particular sum of money owed or due to the plaintiff for goods sold to the defendant on a current account as at the month of February 2014. The claim is also in respect of interest which is agreed at the rate of 13% from the 1st March 2014. It is clear then that there was an agreement between the parties for the supply of goods the cost of which had accumulated to a considerable sum by the time of the issuing of the writ. The terms of the agreement or when it was entered into is unclear from the claim. The defendant states in his affidavit in support that there was an agreement but that this was an oral agreement and that the rate of interest claimed was not the one agreed upon. This in itself does not make a default judgment irregular by reason that it is not liquidated since its amount can be calculated and changed as a mere matter of arithmetic; *see para 2 of rule 1*. A liquidated amount is said to be an amount which could be ascertained by calculation or fixed by any scale of charges or other positive data it is said to be liquidated or made clear (*see Odgers at 44*).
7. Apart from the above the first point raised by the defendant was that he was not served with the claim and therefore he was unable to file a defence. However the Court file includes an affidavit of service which clearly shows that the defendant was served on the 14th day of June 2014 at James Madhavan St Labasa. This claim of non-service is therefore incorrect.
8. Subsequent to that however there was an acknowledgement of service filed ten days later on behalf of the defendant by the plaintiff's counsel. It is unusual that a plaintiff's counsel would take the time to ensure that the defendant acknowledges service of a writ. In the scheme of things the plaintiff must ensure that the writ is served together with an acknowledgement of service form and if there is no acknowledgement of service or defence filed within the prescribed time he proceeds to obtain default judgment. The prescribed time is fourteen days (Order 12 rule 4) from the date of service of the writ. The acknowledgement of service form informs the plaintiff of what action the defendant wishes to take in respect of the writ, that is, whether he/she wishes to defend it or not or whether he/she intends to apply for a stay of execution if a default judgment was obtained against him/her.

9. The acknowledgment of service filed on behalf of the defendant by the plaintiff states that he does not wish to defend the proceedings and wishes to apply for a stay of execution of the default judgment. The acknowledgement of service shows that it was filed by the plaintiff's solicitors but the question is, are they acknowledging service on behalf of the defendant? An acknowledgement of service must also indicate the defendant's address for service which now shows that the defendant's address for service is the same as the plaintiff's.
10. In my view the implication of acknowledging service on behalf of a defendant by the plaintiff's counsel is that the plaintiff's counsel is putting itself in position of a conflict of interest. The conflict is in its acceptance of the defendant's acknowledgement of the fact that it does not wish to defend the matter. Obviously it is in the interest of the plaintiff that the defendant does not defend the matter. The plaintiff will benefit from an uncontested action. Therefore it should not be seen to promote its own interest by helping the defendant acknowledge that he/she does not wish to defend the writ. The position may have been different had the defendant chose to defend the matter but the conflict arises in another manner.
11. The very fact that the plaintiff's counsel files the acknowledgment of service on behalf of the defendant raises a further conflict arising from his duty to be neutral and act only for one party in any proceedings. The plaintiff's counsel is now seen to act for both parties by the mere fact that it gives the defendant's address for service as that of the plaintiff's. In this and also in respect of the conflict referred to above it could be safe to say that the filing of the acknowledgement of service by the plaintiff's counsel is irregular.
12. Under Order 2 rule 1 the Court has a wide discretion on correcting the irregularity if it appears that the other party has not suffered any prejudice as a direct consequence of the irregularity. I am of the view that the defendant is prejudiced by the conflict which resulted in position of benefit to the plaintiff.
13. The effect of the above irregularity is fatal. The White Book, 1999 version paragraph 12/3/5 states that some common irregularities are almost always

fatal. This paragraph further states that after the service on the writ and the acknowledgment of service form:-

(b). *the defendant must:*

(i). *sign the form properly and legibly;*

(ii). *Return it to the correct court office, **not to the plaintiff's Solicitor.** (emphasis mine)*

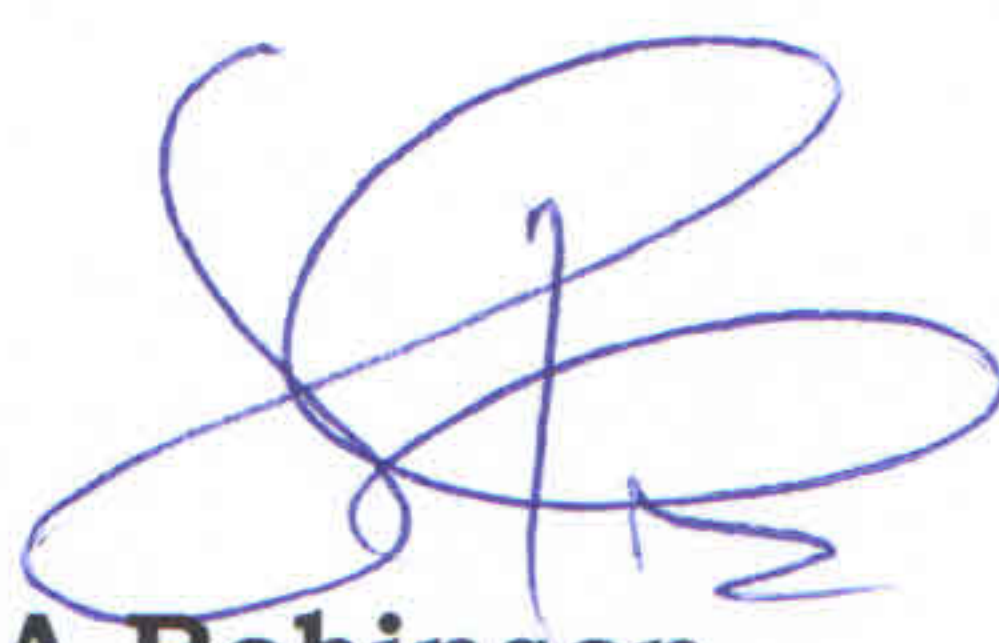
14. The White Book is clear that the acknowledgement of service form should not be returned to the plaintiff's solicitor. This so because of the conflict of interest referred to above which benefits the plaintiff at the detriment or prejudice to the defendant.
15. The above paragraph further states that such irregularities may not be fatal if the party responsible moves expeditiously to put matters right. The plaintiff in this matter did not move to correct the irregularity but moved to obtain default judgment. The circumstances of this matter is unusual and the irregularity did not come to light until much later, it was not raised in any of the affidavit evidence but was noticed on further perusal of the file.
16. In my view the Court need not go any further by considering other aspects of the principles of setting aside the default judgement I am satisfied that the conflict of interest that has arisen is sufficient to set aside the default judgment. It is uncertain whether the practice of filing an acknowledgement of service by the solicitors for the plaintiff is common but the Solicitors for the plaintiff's vast experience should at least prevent them from possible conflicts. The matter could also raise some issues in equity, the plaintiff may be estopped from obtaining default judgement under these circumstances.
17. There does not appear to be any ruling or decisions in which irregularity as a result of the filing of the acknowledgement of service by the Counsel for the plaintiff that had been determined previously, although I am of the view given

the directions in the White Book that such a practice is sufficient to set aside the default judgement in this matter.

Conclusion

18. For the above reasons I am of the view that the acknowledgement of service is irregular and that the irregularity is fatal. It follows that the default judgment obtained on the 6th August 2014 must be set aside as of right. The defendant still has to file a defence within the prescribed period and to be able to move the matter the Court makes the following orders:-

- (i). That the default judgment of 6 August 2014 is set aside;
- (ii). That the defendant file and serve a statement of defence within the prescribed time and that is 14 days from the date of this order;
- (iii) That costs be in the cause; and
- (iv) That the matter be further called before the Master on the 12 February 2016.


H A Robinson
Master
High Court, Labasa



21 January 2016