IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CIVIL ACTION NO. HBC 92 OF 2014

IN THE MATTER of an appeal from a Decision and/or Order and/or Judgment/ Ruling of Honourable Master Jude Nanayakarra dated the 21 April, 2014.

BETWEEN : SUNIL PRASAD MISHRA t/a SUPER CONSTRUCTION & INTERIORS of 21 Goundar Road, Martintar, Nadi.

APPELLANT
(ORIGINAL DEFENDANT)

A N D : VINENDRA PRASAD of 47 Wylie Road, Papatoetoe, Manukau, New Zealand.

RESPONDENT
ORIGINAL PLAINTIFF

Appearances : Ms B. Kinivuai for the defendant/appellant
Ms A.B. Swamy with Ms Vreetika for the plaintiff/respondent
Date of Hearing : 05 September 2018
Date of Submissions: 05 September 2018 (by both parties)
Date of Judgment : 05 November 2018

JUDGMENT

Introduction

[01] This is an appeal against a decision of the Learned Master (*'the Master'*) dated 21 April 2016 (*'the decision'*). By his decision, the Master dismissed an application for setting aside a judgment in default of pleadings.

[02] At the hearing, I had the benefit of oral arguments of both parties. In addition, I have the written submissions filed by both parties.

The Background

[03] On 9 July 2014, Mr Vinendra Prasad, the plaintiff/respondent (*'the plaintiff'*) issued a writ of summons endorsed with statement of claim against Mr Sunil Prasad Mishra t/a Super Construction & Interiors, the defendant/appellant (*'the defendant'*) claiming judgment in the sum of $69,800.00 with interest and costs. The claim arose out of a written agreement made on 17 July 2009 between the plaintiff and the defendant. By the agreement, it was agreed that the defendant would purchase 4 vehicles registration numbers FE 434, EU 086, EN 024, FF754 (*'the vehicles'*) from the plaintiff on credit in the total sum of $89,000.00 and made a deposit of $19,200.00 sometime in July 2009. The defendant defaulted in the payment of the balance sum of $69,800.00. The plaintiff demanded the payment. The defendant refused to pay.

[04] On 30 June 2014, the writ of summons was personally served on the defendant at his registered office at 21 Goundar Road, Martintar. The plaintiff filed affidavit of service on 30 July 2014.

[05] The defendant neither filed acknowledgment of service nor statement of defence within the time permitted by the High Court Rules 1988, as amended (*'HCR'*).

[06] The plaintiff entered judgment by default against the defendant in the sum of $69, 800.00 together with interest at the rate of 13.5% per annum on the judgment sum and costs. The judgment in default was made on the ground that no notice of intention to defend having been filed.

[07] On 7 August 2015, the defendant filed a summons in conjunction with the supporting affidavit (*'the setting aside application'*) and sought the following orders:

> a) *AN ORDER that the judgment in default entered against the defendant on 3 December 2014 be wholly set aside unconditionally;*
>
> b) *AN ORDER that the execution of default judgment entered against the defendant be stayed pending the determination of this application;*
>
> c) *AN ORDER that leave be given to the defendant to file its acknowledgement of service and the statement of defence;*
>
> d) *ANY OTHER ORDERS the Court deem just and equitable.*

[08] The defendant made his setting aside application under the HCR, O 19, R 9.

[09] Having heard the setting aside application, the Master dismissed the defendant's setting aside application on a technical ground that the defendant should have filed his application under O 13, R 10 and not under O 19, R 9 of the HCR.

[10] The defendant appeals the Master's decision to the Judge.

The decision in court below

[11] The Master in his analysis states (at page 19):

> *"(F) (1) Before turning to the substance of the application to set aside, I ought to mention one thing.*
>
> ***The Defendant filed its application to set aside the default judgment under Order 19, Rule 09 of the High Court Rules, 1988.***
>
> ***I desire to emphasise that the application should have been under Order 13, Rule 10 of the High Court Rules. 1988.***
>
> *It is, of course, an elementary principal of the law relating to setting aside default judgments that Order 19 is available only where after "notice of intention of Defend is filed, no "Statement of Defence" had followed.*
>
> *In situations where as in this case, the Defendant had failed to file in the first instance, "Notice of intention to Defend", then Order 13 procedure is the correct process.*
>
> ***It seems to me clear beyond question that Order 19, Rule 09 has no application even by any stretch of imagination to the instant case. The instant case stands on an entirely different footing.***
>
> ...
>
> *The Master then concludes:*
>
> *On the strength of the authority in the above judicial decisions, I wish to emphasise that the rules are there to be followed and non-compliance with those rules is fatal.*
>
> *Having said that, I venture to say beyond a per-adventure that the application is respect of setting aside the default judgment must fail for non-compliance with the High Court Rules.*
>
> *In the result, I am constrained to hold that the Defendant's Summons can go no further.*
>
> *Accordingly, there is no alternate but to dismiss the Summons.*
>
> ..."

The Grounds of Appeal

[12] The appeal is preferred on 2 grounds of appeal, as per amended notice of appeal and grounds of appeal:

1. *The Honourable Master erred in law and in fact in failing to consider and rule on the substance of the Appellant's application to set aside default judgment;*

2. *The Honourable Master erred in law and in finding that the Appellant's application to set aside must fail for non-compliance with the High Court Rules.*

The Law

[13] O 13, R 1, HCR permits to enter judgment in default of failing to give notice of intention in claim for liquidated demand. Rule 1 provides:

> *"1.-(1) Where a writ is indorsed with a claim against a defendant* ***for a liquidated demand only,*** *then,* ***if that defendant fails to give notice of intention to defend,*** *the plaintiff may, after the prescribed time* ***enter final judgment against that defendant*** *for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.*
>
> *(2) A claim shall not be prevented from being treated for the purposes of this Rule as a claim for a liquidated demand by reason only that part of the claim is for interest accruing after the date of the writ at an unspecified rate, but any such interest shall be computed from the date of the writ to the date of entering judgment at the rate of 5%" (Emphasis provided)*

[14] In terms of O 13, R 10, the court is invested with the discretion to set aside or vary any judgment entered in pursuance of O 13. Rule 10 says:

> *"10. Without prejudice to Rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

[15] O 19, R 6, HCR allows to enter judgment for failure to serve defence on the plaintiff. Rule 6 states:

> *6. Where the plaintiff makes against a defendant two or more of the claims mentioned in Rules 2 to 5, and no other claim, then, **if that defendant fails to serve a defence** on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, **enter against that defendant such judgment** in respect of any such claim as he would be entitled to enter under those Rules if that were the only claim made, and proceed with the action against the other defendants, if any.*

[16] A judgment entered in default defence may be set aside in pursuance of O 19, R 9, which provides:

> *"9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

The Governing Principles

[17] There are certain principles applicable in an application to set aside the judgment in default entered regularly. In *Thorn v Macdonald* [1999] CPLR 660 the Court of Appeal approved the following principles:

a) *while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;*
b) *any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;*
c) *the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and*
d) *prejudice (or the absence of it) to the claimant also has to be taken into account.*

[18] In *Lloyds Investment (Scandinavia) Ltd v Ager-Hansen* (2001) a default judgment was set aside on the ground that the defendant had a real prospect of success. Although, the claimant had raised serious questions about the defendant's credibility, no finding could be made without oral evidence and cross-examination.

Determination

Ground 2

[19] Firstly, I will deal with the second ground of appeal. The second ground of appeal is that the Master erred in law and in fact in failing to consider the substance of the appellant's application to set aside the default judgment.

[20] The defendant made, in pursuance of O 19, R 9 of the HCR, an application to set aside the judgment in default entered on the ground that there was no notice of intention to defend was given by the defendant.

[21] The entry of default judgment clearly discloses that the judgment is entered as the defendant had failed to give notice of intention to defend. Therefore, it is sufficiently clear that the judgment in default has been entered in pursuance of O 13, R 1 which allows the plaintiff to enter judgment in default of service of notice of intention to defend in the case of liquidated claim. The plaintiff's claim against the defendant is a liquidated claim. Thus, the plaintiff rightfully entered a default judgment against the defendant who had failed to serve a notice of intention to defend within the time laid down by the HCR. The defendant must have filed a notice of intention to defend within 14 days after the service of the writ on him.

[22] It will be noted that the defendant filed neither a notice of intention to defend nor statement of defence within the time limit.

[23] Without considering the merit of the defendant's application to set aside, the Master dismiss his application. The Master held that the defendant should have filed his application under O 13, R 10 and not under O 19, R 9.

[24] It appears that the Master has dismissed the setting aside application on a technical point which was never raised as a preliminary issue by the plaintiff. The plaintiff did not file any application to strike out the defendant's setting aside application on the ground that it has been filed under the wrong rule.

[25] It is submitted on behalf of the appellant that not allowing the appellant to make his case upon the merits of his case is prejudicial to the interest of the appellant.

[26] One thing we have to bear in mind is that in either case, whether the application to set aside, the regularly entered default judgment is filed under O 13, R 10 or under O 19, R 9, the applicable principles are the same.

[27] The plaintiff did not raise any issue that the application to set side had been filed under wrong Rule. The Master has determined an issue which was never raised before him. The plaintiff would have filed an application to strike out the defendant's setting aside application on the ground that it has been filed under the wrong Rule (O 19, R 9) if had intended to do so. Alternatively, the Master could have dealt with the application to set aside as an application filed in pursuance of O 13, R 10 instead of dismissing the application without considering the merits of the application, especially in the absence of any prejudice to the plaintiff. Technicality should not stand in the way of access to justice. In my opinion, the Master could have considered the application to set aside the default judgment on merits rather than dismissing it on a technical ground that it was filed under wrong Rule. Appeal ground 2 has merit and the appeal succeeds on that ground. I would, therefore, allow the appeal on ground 2. It follows that I should set aside the Master's decision of 21 April 2016. I do so.

Considering the merit of the application

[28] Grounds of appeal No 1 is that the Master erred in law and in fact in failing to consider the substance of the appellant's application to set aside default judgment.

[29] There has been considerable delay since the Master's decision dismissing the defendant's setting aside application. In order to avoid further delay, I would now proceed to consider the application to aside on merits treating it as an application filed in pursuance of O 13, R 10, instead of sending the case back to the Master for reconsidering the application on merits.

Regular Judgment

[30] Failure to file acknowledgement or a defence within the time limit laid down in the HCR may result under O 13, R 10 or under O 19, R 9 of the HCR in the plaintiff entering judgment in default, that is, judgment without a trial of the claim. In most cases entry of judgment in default is purely administrative act, not involving any judicial determination of the merits of the claim.

[31] The plaintiff entered the default judgment against the defendant for failing to serve a notice of intention to defend within 14 days after the service of the writ of summons on the defendant.

[32] The writ endorsed with the statement of claim was personally served on Sunil Prasad Mishra, the defendant at his registered office at 1.00 pm on 30 June 2014. An affidavit of service has been filed in proof thereof. According to the affidavit of service one Sheenal, Accounts Clerk accepted service of the documents and refuse to acknowledge receipt of the same.

[33] The writ of summons was deemed to have been served on the defendant on 30 June 2014. The 14 days permitted to file acknowledgement of service expired on 14 July 2014. The defendant did not file its notice of intention of defend until the plaintiff entered default judgment on 3 December 2014, which is some 4 months and 19 days after the service on the defendant.

[34] In pursuance of O 13, Rule 8 (1), judgment shall not be entered against the defendant under this Order unless-

a) the defendant has acknowledged service on him of the writ; or
b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or
c) the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf.

[35] UK CPR, r. 13.2 (a) to (c), defines the phrase 'entered wrongly', it is limited to the following cases:

a) time for acknowledging service, or for serving a defence (as the case may be) had not been expired by the time the default judgment was entered;
b) a summary judgment application or an application to strike out the claim made by the defendant was pending when the default judgment was entered; or
c) the defendant had satisfied the whole claim or, on a money claim, filed an admission and request for time to pay at the time the default judgment was entered.

[36] None of the above mentioned things, either in para 33 or 34, occurred in this case.

[37] The plaintiff had filed the affidavit of service. The defendant did not file a notice of intention to defend within the prescribed time. The defendant did not challenged the due service of the writ. The default judgment was entered well after the time allowed to file the acknowledgement of service. In the circumstances, I hold that the default judgment was entered regularly except for interest on the judgment sum (O 13, R (1) (2) allows the plaintiff to enter

judgment for liquidated sum including a claim for interest which is computed at a fix rate of 5% from the date of service of writ to the date of entering judgment, whereas the plaintiff had entered the default judgment with interest at the rate of 13.5%).

The delay

[38] The length of any delay by the defendant in making the application to set aside the default judgment must be taken into account.

[39] The defendant did not make his application to set aside promptly. He admits about 8 months delay between receiving the default judgment and making an application to set aside the default judgment. The default judgment was entered on 3 December 2014. However, it is not clear when the default judgment was served on the defendant.

[40] The explanation offered by the defendant for the delay in making the application to set aside is that: *"my office staff received this Writ of Summons and have never informed me and/or any other senior officers of my office of the same. I only came to know about this matter when Default Judgment was served onto my office than (sic) I made enquiries and instructed my Solicitors to defend this matter."* (See paras 7 and 8 of his affidavit in support).

[41] The defendant blames his staff for not informing of the receipt of the writ of summons to him. The explanation offered by the defendant for the delay in making the application to set aside is not satisfactory.

[42] In considering whether to set aside or vary a judgment in default, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly. In *Mullock v Price* [2009] EWCA Civ 1222, the Court of Appeal held that 'promptly' is an ordinary English word, with a plain and obvious meaning, and adopted the definition given in *Regency Rolls Ltd v Carnall* (2000) LTL 16/10/2000, that 'promptly' means to act 'with all reasonable celerity'.

[43] In *Hussain v Birmingham City Council* [2005] EWCA Civ 1570, the Court of Appeal held that the defendant had not acted promptly in making an application to set aside a default judgment. But it considered it appropriate for the judgment to be set aside on the grounds that the defendant had a real prospect of successfully defending the claim and full participation by the defendant at trial was necessary

in order to determine where liability lay between a number of defendants. Similarly, in *Berezovsky v Russian Television and Radio Broadcasting Co.* [2009] EWHC 1733 (QB), the Court accepted that the defendant had not acted promptly but still set judgment aside, holding that the delay was outweighed by the need to avoid any suggestion of a 'cover up' and to investigate the defence fully...

[44] The *Supreme Court Practice 1993* (Or 13 9 pg 137 – 138) states:

> *"The major consideration is where the Defendant has disclosed a defence on the merits, and this transcends any reason given by him in making the application even if the explanation given by him is false."(Vann v Awford (1986) 83 LS Gaz 1725, The Times, APRIL 23, 1986 C.A.). The fact that he has told lies in seeking to explain the delay, however, may affect his credibility of his defence and the way in which the Court should exercise its discretion."*

[45] In the matter at hand, the delay was far too long, about 8 months. The defendant did not act promptly in making his application to set aside. Explanation for the delay is not satisfactory. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside.

The proposed defence

[46] I now proceed to consider the proposed defence.

[47] I would like to cite the following well-known statement of principle by Lord Wright in *Evans v Bartlam* (1937) A.C. 473 at p.489:

> *"A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."*

[48] In the present case, the default judgment has been entered regularly. Therefore, the defendant must disclose a defence which has merits to which the court should pay heed and set aside the default judgment exercising its discretion.

[49] Sometime in July 2009, the defendant agreed to purchase 4 vehicles from the plaintiff on credit in the total sum of $89,000.00 and made a deposit of $19,200.00. The plaintiff was to transfer the vehicles to the defendant upon full payment after 2 years. The defendant defaulted in the payment of the balance sum of $69,800.00. The defendant has possession and use of all 4 vehicles. The plaintiff has entered default judgment for the sum of $69,800.00.

[50] There is nothing in the proposed statement of defence to show that the defendant had paid the balance sum as agreed. Instead, the defendant relies on breach of an agreement for the sale and purchase of land that belongs to the plaintiff. The sale and purchase agreement for sale of the plaintiff's property to the defendant has no relevance to the sale of the vehicles. Basically, the defendant intends to put forward breach of an agreement to sell the land which is not connected to the claim which relates to the sale of the vehicles on credit.

[51] In my opinion, the proposed statement of defence discloses no defence to the claim on merits.

Conclusion

[52] For the reasons set out above, I would dismiss the defendant's application to set aside and let the default judgment pass, however subject to **interest at a fixed rate of 5%** from the date of service of writ to the date of entering judgment, and **not at the rate of 13.5%.** The HCR, O 13, R 1 (2), allows interest on the judgment sum to be computed from the date of the writ to the date of entering judgment at the rate of 5 per cent. Accordingly, appeal allowed. The Master's decision dated 21 April 2016 is set aside. The defendant's application to set aside is dismissed. The default judgment is allowed to pass subject to interest on the judgment sum to be calculated from the date of the writ to the date of entering judgment at the rate of 5 per cent. There will be no order as to costs.

The outcome

1. Appeal allowed.
2. Master's order dated 21 April 2016 be set aside.

3. Defendant's application to set aside be dismissed.
4. The default judgment entered on 3 December 2014 be allowed to pass subject to interest on the judgment sum to be computed from the date of the writ to the date of entering judgment at the rate of 5 per cent.
5. There will be no order as to costs.

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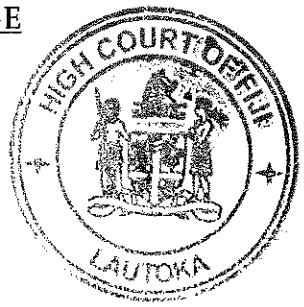
M. H. Mohamed Ajmeer

JUDGE



At Lautoka

5 November 2018

Solicitors:

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For the respondent: M/s Patel & Sharma, Barristers & Solicitors